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SC Court of Appeals

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

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2020-CP-42-03593
Appellate Case No. 2021-000707

Trina Dawkins,
as Personal Representative of the Estate of William Dawkins,

Respondent,

v.

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

Appellants.

RECORD ON APPEAL

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¹ Primarily, the “Facility” refers to Defendant/Appellant “THI of South Carolina at Spartanburg, LLC,” which is the correct legal name of the entity doing business as, and the sole licensee of, the skilled-nursing facility known as Magnolia Manor-Spartanburg; however, out of an abundance of caution, it is also intended to cover, to the extent necessary, the party improperly identified in this action as Defendant/Appellant “THI of South Carolina at Magnolia Manor-Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg.”

² “FAS” refers to Defendant/Appellant Fundamental Administrative Services, LLC.

³ “THISC” refers to Defendant/Appellant THI of South Carolina, LLC.

⁴ “FCOS” refers to Defendant/Appellant Fundamental Clinical and Operational Services, LLC.

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Trina Dawkins, as Personal Representative of
the Estate of William Dawkins,

CASE NO. 2020-CP-42-03593

Plaintiff,

**ORDER REGARDING DEFENDANTS' MOTIONS TO
STAY AND MOTION TO COMPEL ARBITRATION**

vs.

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

Defendant(s).

Hearing Date:
Hearing Judge:
Counsel for Plaintiff:
Counsel for Defendants:
Court Reporter:

March 16th, 2021, at 2:30 p.m.
Grace Gilchrist Knie
William A. Jordan, III
Russell G. Hines
Linda D. Moffitt

This matter was before the Court on March 16th, 2021, upon Defendants' Four Motions to Stay and Defendant THI of South Carolina at Spartanburg LLC's Motion to Compel Arbitration filed with the Court on February 12th, 2021. Attorney William A. Jordan, III, was present representing the Plaintiff, and Attorney Russell G. Hines was present representing all Defendants. The Court Reporter was Linda D. Moffitt. The hearing was conducted via Judge Knie's Virtual Courtroom. Plaintiff's counsel filed a Reply Memorandum on March 18th, 2021, and requested sanctions pursuant to Rule 11, SCRPC.

OVERVIEW AND PROCEDURAL BACKGROUND

This is a professional negligence case involving William Dawkins, who was admitted into the Defendants' facility on April 25th, 2017, for rehabilitation purposes following surgery and hospitalization. It is uncontested in the record that Mr. Dawkins signed no paperwork at the time of his admission and that he had never signed a Power of Attorney, nor had a guardian appointed for him. Present at the time of his admission was his daughter, Melissa Dawkins, who met with an admissions officer of the Defendant facility, Kris Milner. During the course of this meeting, Ms. Dawkins signed a 12 page Admission Agreement, a 5 page document titled "Authorizations, Consents, & Acknowledgements," and a one page Arbitration Agreement. Ms. Dawkins also signed 3 other single page consent forms. Defendants have asserted that the Arbitration Agreement is enforceable because Ms. Dawkins held herself out as her father's agent, represented that she had the authority to sign these documents on his behalf, and that the Dawkins' estate should be bound by the Arbitration Agreement, which has merged with the Admission Agreement. Plaintiff has argued that the Arbitration Agreement is not enforceable because there was no such agreement that Mr. Dawkins had with any of the Defendants, that Ms. Dawkins did not have the authority to sign the agreement on her father's behalf, and that the Dawkins' estate cannot be estopped from bringing this action in tort where no enforceable Arbitration Agreement exists.

The only evidence in the record concerning the circumstances of the meeting has been presented by the Plaintiff. Ms. Dawkins, in her affidavit, has stated that she repeatedly represented to Ms. Milner that she did not have legal authority to sign the documents on her father's behalf, and only signed when she was told that her father would not be admitted to the

facility without signatures on the paperwork. She further stated that she was not given an opportunity to review the documents in full and that the Arbitration Agreement was not explained to her. Defendants have presented no factual evidence that Melissa Dawkins had the authority to bind her father to an Arbitration Agreement, and Defendants agree that Melissa Dawkins was not her father's Power of Attorney and that Mr. Dawkins was competent at the time of his admission. Despite this, Defendants filed this motion.

To address a final procedural matter, the parties have been engaged in this case for over one year. The Plaintiff has presented evidence that copies of any agreements between the parties, including Arbitration Agreements or admission documents, were requested as early as February 18th, 2020, but that these documents were not provided in response to an initial record request. The Plaintiff filed the Notice of Intent on April 24th, 2020, and asked the Defendants to immediately disclose any Arbitration Agreements or move to compel arbitration if the Defendants believed an arbitration defense existed. The Defendants did not, and instead engaged in NOI-phase mediation on October 12th, 2020, again without raising an arbitration defense. After the Plaintiff filed suit, the Defendant refused to produce any of the aforementioned documents upon which it bases its motion, objecting and stating for the first time its intent to compel arbitration in January of 2021. The Plaintiff was granted access to the one page Arbitration Agreement for the first time on February 12th, 2021, when these motions were filed, but the remainder of the supporting documents were not produced until the day prior to the hearing, when the Defendants filed their memorandum in support of their motions.

LEGAL ANALYSIS

The parties agree the Arbitration Agreement is governed by the Federal Arbitration Act (hereinafter “FAA”). While there is a presumption in favor of Arbitration Agreements, this presumption only applies where there is a valid Arbitration Agreement. *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Toler’s Cove Homeowners Ass’n, Inc. v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612, 586 S.E. 2d 581 (2003). However, not all Arbitration Agreements are enforceable. Where the FAA does apply, the Arbitration Agreement is subject to the same defenses applicable to all other contracts as discussed below. *Rent-A-Center, West , Inc. v. Jackson*, 561 U.S. 63, (2010). Whether the parties agreed to arbitrate is a question of substantive state law. In *Chassereau v. Global Sun Pools, Inc.*, the Supreme Court stated:

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

373 S.C. 168 (2007).

While the FAA includes a presumption favoring arbitration, it only applies after the court finds there is a valid, enforceable Arbitration Agreement. 9 U.S.C. § 4 (“The court shall make an order directing the parties to proceed to arbitration” but only “upon being satisfied that the making of the agreement...is not in issue”). The FAA looks to state law to decide the threshold questions of contract formation. Therefore, Arbitration Agreements guided by the FAA are subject to the same defenses applicable to all other contracts. The judicial inquiry may include

an examination of authority, such as apparent or authority, whether a valid power of attorney exists, as well as other grounds existing at law or equity, including competency.

In determining whether a particular dispute can be compelled into arbitration, this Court must first determine whether a valid agreement to arbitrate exists between the parties. The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid Arbitration Agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). In determining whether an agreement to arbitrate exists, “the court should apply ‘ordinary state-law principles that govern the formation of contracts.’” *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App.1999). Arbitration is available only when the parties involved contractually agree to arbitrate. *Id.* South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 382 S.E. 2d 891(1989). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

In this case, there is no valid and enforceable contract. William Dawkins signed no Arbitration Agreement nor did he sign any other document giving Melissa the express authority to sign for him. The Defendants have made what is essentially an apparent agency argument, arguing that because Melissa Dawkins signed the agreement, she must have held herself out as her father’s agent. Defendants have no specific evidence to support this claim and have not presented an affidavit from any individual concerning the circumstances of the meeting in question. The evidence of the record does not support their argument. Ms. Dawkins has stated

that she repeatedly informed Defendants' employee that she did not have the legal authority to sign for her father, but only signed the paperwork upon being informed that her father would not be admitted to the facility without a signature. Out of concerns of her father's health and safety, she signed the paperwork, but not without the aforementioned caveats.

The facts of this case are very similar to several recent holdings in South Carolina. In the *Coleman* case, decedent's sister did not have power of attorney – she was authorized by the Adult Health Care Consent Act to make medical decisions only for the patient – and when placing decedent in health care facility, executed both an Admission Agreement and Arbitration Agreement on behalf of decedent. *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). The court held that the scope of the Act is to ensure that the patient's wishes concerning her medical treatment are honored whenever possible, and that it does not confer authority to execute a document which involves neither health care nor financial terms for payment of such care. *Id.* at 454. Further, the court noted the importance of the “separatedness” of the Arbitration Agreement and Admission Agreement; specifically, there was a “Residential Admission and Financial Agreement” and an “Agreement for Arbitration.” *Id.* at 454-55. “The scope of Sister's authority to consent to ‘decisions concerning Decedent's health care’ extended to the Admission Agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate Arbitration Agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future.” *Id.* at 454. Because admission to the facility for health-related needs was not contingent upon execution of the

Arbitration Agreement, it could not be said that the signatory had any authority to bind the patient as to the separate, voluntary Arbitration Agreement. *Id.*

Our Supreme Court has held that a surrogate without proper legal authority cannot bind a person to arbitration.

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

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

The Court of Appeals addressed these issues in the *Hodge* case, where the Resident was admitted to a nursing facility while competent and without any Power of Attorney. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 550, 813 S.E.2d 292, 295 (Ct. App. 2018). In *Hodge*, the decedent's husband signed all paperwork on her behalf, including an Arbitration Agreement. *Id.* at 550, 813 S.E.2d at 296. The Court of Appeals affirmed the Circuit Court's finding that "Husband's signing of the Arbitration Agreement, Admission Agreement, and other forms does not make him [wife]'s agent. [Wife] did not have a health care power of attorney. Additionally, the Facility knew she was competent at the time of admission as indicated by the doctor's examination and allowed her to sign other forms. The record contains no evidence from the Facility that [Wife], as the principal, represented Husband was her agent." *Hodge* at 573-74, 813 S.E.2d at 308.

The Court found that even if the Husband did have the authority to make some decisions on her behalf, this did not extend to waiving the Constitutional right to a jury trial: “Moreover, even if Husband had authority to handle finances or make health care decisions, as Appellants contend is evidenced by Husband signing past healthcare documents, this court has held ‘the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.’” *Id.* at 547, 813 S.E.2d at 308 (citing *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App.2016)).

This Court finds the authority from *Coleman* and *Hodge* are persuasive in this case. This precedent clearly stands for the proposition that when a healthcare facility attempts to bind a patient to an Arbitration Agreement signed by a family member, the facility must make a clear showing that the family member was a legal agent of the patient. Our Courts have indicated that without a Power of Attorney, or some other express delegation of authority by the principal, there is no actual legal authority for an alleged agent to bind the principal to any agreement, or to do anything beyond making healthcare decisions for an incompetent patient. In this case, the Defendants have presented no evidence to show that Ms. Dawkins held herself out as her father’s agent in any way, and the only evidence of record shows that she did the opposite.

As a final legal matter, the Defendants have asserted Ms. Dawkins signed the Admission Agreement based upon apparent authority, and that this agreement ultimately merged with the Arbitration Agreement. As a threshold matter, this argument fails for the aforementioned reasons: the Admission Agreement is not binding on Mr. Dawkins or his estate because Melissa Dawkins did not have the authority to sign it on his behalf. Even if this were true, the evidence

of the record does not support the Defendants' merger argument. As discussed at length in *Coleman*, merger does not occur where the documents recognize the "separatedness" of the Arbitration Agreement, which is indicative of an intent that the common law doctrine of merger not apply. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. In *Coleman*, 407 S.C. at 350, 755 S.E.2d at 452, Ann Coleman signed several documents, including Arbitration Agreements, when admitting her sister to a health care facility. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. *Id.* The circuit court denied the motion to compel. *Id.* On appeal, the Coleman court found the language in the section titled "Entirety of Agreement" "recognizes the 'separatedness' of the [Arbitration Agreement] and the Admission Agreement, not a merger of the two contracts." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. Furthermore, the court noted that the "Entirety of Agreement" clause creates an ambiguity as to merger, and "the law is clear that any ambiguity...is construed against the drafter...." *Id.* at 355-56, 755 S.E.2d at 455. The Coleman court ruled the circuit court properly denied [the health care facility's] equitable estoppel arguments because no merger occurred. *Id.* at 356, 755 S.E.2d at 455.

Additionally, merger does not occur where an Arbitration Agreement and Admission Agreement are governed by different law, reference each other separately, provide different mechanisms by which they can be revoked, are separately paginated, and have their own signature page. *See Hodge*, 422 S.C. at 562-563, 813 S.E.2d at 302. In *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295, Mable Hodge entered a rehabilitation facility. *Id.* Mable's husband executed various documents related to her admission, including an Arbitration Agreement and an Admission Agreement. *Id.* Mable was not present at the time her husband signed these documents on the day before her admission because she was still in the hospital. *Id.* However,

Mable was competent at the time of her admission. *Id.* 422 S.C. at 550, 813 S.E.2d at 296. The circuit court denied [the facility's] motion to dismiss or compel arbitration. *Id.* The facility appealed arguing the circuit court erred in finding the Arbitration Agreement was separate from the Admission Agreement because the two documents were merged. *Id.* 422 S.C. at 556, 813 S.E.2d at 299. The Court of Appeals upheld the circuit court, finding the Admission Agreement and Arbitration Agreement did not merge. *Id.* 422 S.C. at 563, 813 S.E.2d at 302.

The Court based its rulings on the fact that the "Admission Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law." *Id.* 422 S.C. at 562, 813 S.E.2d at 302. Additionally, similar to Coleman, the Arbitration Agreement recognized separatedness because it referenced the two documents separately, "stating '[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.'" *Id.* Furthermore, the Arbitration Agreement stated it could be revoked within thirty days, while the Admission Agreement did not contain such an indication; rather, it provided the Admission Agreement could only be amended by the patient with written agreement executed by the facility and the patient. The Court noted that each document was separately paginated and had its own signature page. Finally, signing the Arbitration Agreement was not a precondition to admission. *Id.* 422 S.C. at 562-63, 813 S.E.2d at 302. Based on this, the Court of Appeals found the Admission Agreement and Arbitration Agreement did not merge. *Id.* 422 S.C. at 563, 813 S.E.2d at 302. Therefore, because Mable received no benefit from the Arbitration Agreement, equitable estoppel did not bar Mable's claims. *Id.*

This case has many similarities to *Coleman* and *Hodge*: the Admission Agreement and the Arbitration Agreement are two separate documents; the Admission Agreement contemplates interpretation under state law while the Arbitration Agreement states that it is solely to be interpreted under federal law; the documents are separately paginated; the documents are titled separately; the documents have separate filenames; and, the documents have separate signature and date blocks.

Sanctions

During the March 16th, 2021, hearing Plaintiff's counsel requested leave of the Court to file a responsive Memorandum and to supplement the record, on the basis that the Defendants had withheld critical documents and had produced them upon the eve of the hearing. The Court granted this request. Plaintiff's counsel filed a Reply Memorandum on March 18th, 2021, and requested Sanctions pursuant to SCRPC Rule 11, on the basis that the Defendants had withheld documents, and also on the basis that the Defendants' motions were frivolous.

Rule 11 of the SCRPC allows a Court to impose an appropriate sanction upon motion or upon its own initiative, if no good ground exists to support a motion. Rule 11, SCRPC. Such sanctions may include reasonable expenses incurred by the defending party. Rule 11, SCRPC. Plaintiff contends, as outlined in the procedural history of this case, that Defendants gave no indication that they were pursuing an arbitration defense, despite repeated requests from the Plaintiff. Plaintiff further contends that the Defendants also refused to produce critical arbitration documents when requested and did not produce the documents or provide that this conduct continued for over a year and did not end until less than 24 hours prior to the hearing. At the time the Defendants filed their motion, their position was that a one page Arbitration Agreement

should be enforced pursuant to the FAA. Further that Defendants failed to disclose that they intended to pursue merger and estoppel arguments based on the Admission Agreement or apparent or inherent authority agreements based on the Admission Agreement and healthcare consents. Plaintiff contends that Defendants were in possession of the aforementioned documents for approximately four years, but had repeatedly refused to disclose them. Plaintiff further contends that Defendants waited until the evening before the hearing to file a lengthy Memorandum of Law that included the supporting documents. Plaintiff alleges that the Defendants' conduct has caused Plaintiff to incur additional expenses and that the Defendants have prejudiced Plaintiff by causing considerable delay, refusing to participate in discovery, and concealing the grounds for their motions.

CONCLUSION:

The Court acknowledges and appreciates the amount of research and preparation for the hearing by Counsel, as well as, the professionalism of Counsel in their presentations to the Court. After careful consideration of the record, memoranda, arguments presented, and the applicable law, the Court finds, and it is Ordered:

That Defendants' Four Motions to Stay and Defendant THI of South Carolina at Spartanburg LLC's Motion to Compel Arbitration filed with the Court on February 12th, 2021, are respectfully denied; is further ordered,

That Plaintiff's Motion for Sanctions made pursuant to Rule 11 of the SCRCP is respectfully denied at this time, however said motion may be renewed by Plaintiff and heard by the trial judge in this action.

IT IS SO ORDERED:

/s/Grace Gilchrist Knie

The Honorable Grace Gilchrist Knie
Seventh Judicial Circuit

April 8th, 2021



Spartanburg Common Pleas

Case Caption: Trina Dawkins, As Pr Of The Estate Of William Dawkins VS
Fundamental Clinical And Operational Services, Llc , defendant, et al
Case Number: 2020CP4203593
Type: Order/Stay

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

Electronically signed on 2021-04-08 16:41:49 page 14 of 14

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
	)	C.A. No. 2020-CP-42-03593
Trina Dawkins,	)	
as Personal Representative of the Estate	)	
Of William Dawkins,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	INITIAL
	)	ORDER REGARDING MOTION
	)	FOR RECONSIDERATION
White Oak Estates, Inc.; White Oak	)	
Management, Inc.; and White Oak	)	
Manor, Inc.,	)	
	)	
Defendants.	)	
	)	

Hearing Judge:	Grace Gilchrist Knie
Counsel for Plaintiff/s:	William A. Jordan, III
Counsel for Defendant/s:	D. Jay Davis, Jr.

A Rule 59(e) SCRCPP motion to reconsider and to alter or amend this Court's order issued on April 8th, 2021, has been received from the Defendants, filed with the Court on April 19th, 2021, and properly served on The Court per Rule 59(g) SCRCPP. Pursuant to Rule 59(f), SCRCPP, the Court, in its discretion, may decide the motion based on briefs without oral argument. The Court will decide the issue on written submissions. Written submissions are not required by the non-moving party, but will be considered. The moving party may rely upon what has been filed or may supplement.

The deadline to file written submissions regarding these motions is 5:00 P.M. on Friday, May 21st, 2021. Any submissions in reply must be filed by 5:00 p.m. on Wednesday, May 26th, 2021. A copy of any documents filed must be forwarded immediately to the undersigned judge

and to opposing counsel/self-represented party. The copies to the judge shall be sent by mail to 180 Magnolia Street, Spartanburg, South Carolina 29306, and/or by electronic mail to:

gknielc@sccourts.org; gkniej@sccourts.org; and gkniesc@sccourts.org.

AND IT IS SO ORDERED.

May 12th, 2021

/s/Grace Gilchrist Knie
Grace Gilchrist Knie, Judge
Seventh Judicial Circuit
Spartanburg, SC



Spartanburg Common Pleas

Case Caption: Trina Dawkins, As Pr Of The Estate Of William Dawkins VS
Fundamental Clinical And Operational Services, Llc , defendant, et al
Case Number: 2020CP4203593
Type: Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

Electronically signed on 2021-05-12 20:54:01 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
	)	C.A. No. 2020-CP-42-03593
Trina Dawkins, as Personal	)	
Representative of the Estate of William	)	
Dawkins,	)	
	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
	)	FINAL
	)	ORDER REGARDING MOTION
	)	FOR RECONSIDERATION
Fundamental Clinical and Operational	)	
Services, LLC; Fundamental Administrative	)	
Services, LLC; THI of South Carolina,	)	
LLC; THI of South Carolina at Spartanburg,	)	
LLC; THI of South Carolina at Magnolia	)	
Manor-Spartanburg, LLC d/b/a Magnolia	)	
Manor-Spartanburg,	)	
	)	
Defendants.	)	
	)	

Hearing Judge:	Grace Gilchrist Knie
Counsel for Plaintiff/s:	William A. Jordan, III
Counsel for Defendant/s:	Donald Jay Davis, Jr.

A Rule 59(e) SCRPC motion to reconsider and to alter or amend this Court's order issued on April 8th, 2021, has been received from the Defendants, filed with the Court on April 19th, 2021, and properly served on The Court per Rule 59(g) SCRPC. Pursuant to Rule 59(f), SCRPC, The Court indicated to the parties by prior order that it would decide the issue on written submissions. Further, the Court informed the parties that written submissions were not required by the non-moving party, and that the moving party could rely upon its filings or supplement. The deadlines to file written submissions regarding the motion have now passed.

After careful consideration of the able arguments and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Motion for Reconsideration made pursuant to Rule 59, SCRCP, ¹ is DENIED.

AND IT IS SO ORDERED.

May 28th, 2021
Spartanburg, SC

/s/Grace Gilchrist Knie
Grace Gilchrist Knie, Judge
Seventh Judicial Circuit

¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.



Spartanburg Common Pleas

Case Caption: Trina Dawkins, As Pr Of The Estate Of William Dawkins VS
Fundamental Clinical And Operational Services, Llc , defendant, et al
Case Number: 2020CP4203593
Type: Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

Electronically signed on 2021-05-28 17:08:59 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Trina Dawkins, as Personal Representative of
the Estate of William Dawkins,

Plaintiff(s),

vs.

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

Defendant(s).

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2020-CP-42-_____

SUMMONS**TO THE DEFENDANTS ABOVE NAMED:**

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscribers at their office, 622 Wade Hampton Blvd., Greenville, South Carolina 29609, within thirty (30) days, after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for relief demanded in said Complaint.

Respectfully submitted,

s/William A. Jordan, III

William A. Jordan, III, S.C. Bar #: 101271

Jordan Law Center, LLC

622 Wade Hampton Boulevard

Greenville, South Carolina 29609

William@jordanlawcenter.com

(864) 235-0147

Attorney for Plaintiff

Greenville, South Carolina
October 14, 2020

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Trina Dawkins, as Personal Representative of
the Estate of William Dawkins,

Plaintiff(s),

vs.

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

Defendant(s).

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2020-CP-42-_____

**COMPLAINT
(JURY TRIAL DEMANDED)**

Plaintiff, complaining of the Defendants, would respectfully show the Court as follows:

1. The Plaintiff is a citizen and resident of the County of Spartanburg, State of South Carolina.
2. Magnolia Manor of Spartanburg is a community residential care facility operating in Spartanburg County, South Carolina.
3. Upon information and belief, Defendant Fundamental Clinical and Operational Services, LLC, is a corporation organized and existing pursuant to the laws of Delaware but doing business in South Carolina.
4. Upon information and belief, Defendant Fundamental Administrative Services, LLC is a corporation organized and existing pursuant to the laws of Delaware but doing business in South Carolina.

5. Upon information and belief, Defendant THI of South Carolina, LLC is a corporation organized and existing pursuant to the laws of Delaware but doing business in South Carolina.

6. Upon information and belief, Defendant THI of South Carolina at Spartanburg, LLC is a corporation organized and existing pursuant to the laws of Delaware but doing business in South Carolina.

7. Upon information and belief, Defendant THI of South Carolina at Magnolia Manor-Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg is a corporation organized and existing pursuant to the laws of Delaware but doing business in South Carolina.

8. Upon information and belief, the Defendants own and operate a skilled nursing facility located at 375 Serpentine Drive, Spartanburg, South Carolina.

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

10. This is a survival action brought pursuant to S.C. Code § 15-5-90, et seq., for the benefit of William Dawkins, for conscious pain and suffering.

11. This is a wrongful death action brought pursuant to S.C. Code § 15-51-10, et seq., for the benefit of the beneficiaries of William Dawkins' Estate, by Trina Dawkins, as Personal Representative of the Estate.

12. On or around April 25, 2017, William Dawkins was admitted to the Defendants' facility for rehabilitation following his discharge from Spartanburg Hospital for Restorative Care.

13. Mr. Dawkins had multiple pressure ulcers and other wounds that required medical care and cleaning in order to facilitate proper healing and prevention of infection.

14. Defendants were fully aware that Mr. Dawkins' wounds required medical care,

and that he had been placed at their facility so that these wounds could be evaluated, monitored, and cleaned.

15. The Defendants failed to appropriately assess Mr. Dawkins' condition and based on that assessment, failed to provide a safe environment for Mr. Dawkins at Magnolia Manor Spartanburg.

16. The Defendants failed to monitor Mr. Dawkins adequately and failed to provide him assistance and other interventions to prevent him from developing an infection, developing gangrenous and necrotic tissue, and developing further pressure ulcers during his stay at the facility.

17. As a result of the Defendants' negligence, Mr. Dawkins was admitted to Spartanburg Medical Center on June 22, 2017.

18. As a result of the infection, Mr. Dawkins underwent an irrigation and debridement procedure for serious advancement of his leg wounds on June 30, 2017. On July 13, 2017, he was admitted to Spartanburg Restorative Care.

19. On August 16, 2017, Mr. Dawkins underwent an additional wound debridement at Spartanburg Medical Center.

20. Mr. Dawkins required significant additional treatment as a result of the negligence of the Defendants.

21. Defendants were fully aware that Mr. Dawkins suffered from pressure ulcers and had been placed at their facility so that his health conditions could be evaluated, monitored, and controlled.

22. The Defendants deviated from the standard of care and failed to assess, treat, and

monitor the condition of Mr. Dawkins' pressure ulcers. The staff failed to timely develop and implement a plan of care. The nursing staff did not follow the recommendations of the wound nurse nor the physician's orders regarding repositioning and other interventions.

23. As a result, Mr. Dawkins suffered grievous bodily injuries. Mr. Dawkins was placed in the rehabilitation center in an attempt to treat and heal his injuries, and lived out the remaining years of his life dealing with the complications of these injuries. He incurred substantial costs for medical treatment and did undergo tremendous physical and emotional pain, anguish, and suffering prior to his death.

24. The injuries caused and/or hastened Mr. Dawkins' death.

25. The injuries and damages as hereinafter set forth were caused by the grossly negligent and reckless conduct of Defendants in one or more of the following particulars:

- a) In failing to evaluate, monitor, and control Mr. Dawkins' health conditions;
- b) In failing to properly supervise Mr. Dawkins when they knew, or should have known, of the inherent dangers posed by his health conditions;
- c) In placing Mr. Dawkins in peril;
- d) In failing to protect Mr. Dawkins;
- e) In failing to notify its employees and/or agents of Mr. Dawkins' health conditions and medical requirements;
- f) In failing to notify its employees and/or agents that Mr. Dawkins' wounds required monitoring and evaluation to ensure infection did not develop;

- g) In failing to notify its employees and/or agents that Mr. Dawkins' wounds required proper cleaning to avoid infection;
- h) In failing to properly supervise Mr. Dawkins;
- i) In failing to provide Mr. Dawkins with the degree of care and supervision ordered by his physician and owed as a duty to Mr. Dawkins;
- j) In failing to meet the accepted standard of care required by and owed to Mr. Dawkins;
- k) In failing to take any precautions to prevent Mr. Dawkins from developing an infection;
- l) In exhibiting reckless disregard for the life and safety of Mr. Dawkins;
- m) In failing to properly attend to or care for Mr. Dawkins; and/or
- n) In failing to conduct meaningful routine care checks of its patients to ensure their safety.

26. As a proximate result of the Defendants' gross negligence set forth above, Plaintiff William Dawkins suffered damages. Plaintiff's damages include, but are not limited to:

- a) Mental and emotional distress;
- b) Medical expenses;
- c) Conscious pain and suffering;
- d) Loss of enjoyment of life;
- e) Wrongful death;
- f) Punitive damages; and

g) Actual damages.

27. As a proximate result of the Defendants' gross negligence and improper treatment, resulting in the death of Mr. Dawkins, his beneficiaries suffered damages including:

- a) Loss of companionship, society, services and the aid and comfort of William Dawkins; and
- b) Mental anguish and emotional trauma.

28. As a proximate result of these acts of gross negligence and improper treatment, William Dawkins suffered conscious pain and suffering recoverable pursuant to S.C. Code § 15-5-90, et seq., including actual and punitive damages.

29. As a proximate result of these acts of gross negligence and improper treatment which proximately caused Mr. Dawkins' death, his beneficiaries have suffered damages recoverable pursuant to S.C. Code § 15-51-10, et seq., including financial loss, loss of family services, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and punitive damages.

WHEREFORE, having fully set forth her complaint, Plaintiff prays for the relief set forth above, for actual and punitive damages to be determined by a jury and for any other relief that the Court deems just and proper.

Respectfully submitted,

s/William A. Jordan, III

William A. Jordan, III, S.C. Bar #: 101271

Jordan Law Center, LLC

622 Wade Hampton Boulevard

Greenville, South Carolina 29609

William@jordanlawcenter.com

(864) 235-0147

Attorneys for Plaintiff

Greenville, South Carolina
October 14, 2020

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

TRINA DAWKINS, AS PERSONAL) CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE)
OF WILLIAM DAWKINS,)

PLAINTIFF,)

vs.)

FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC;)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC; THI OF SOUTH)
CAROLINA, LLC; THI OF SOUTH)
CAROLINA AT SPARTANBURG, LLC;)
THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-)
SPARTANBURG, LLC D/B/A)
MAGNOLIA MANOR-SPARTANBURG)

**ANSWER ON BEHALF OF DEFENDANT
THI OF SOUTH CAROLINA AT
SPARTANBURG, LLC**

DEFENDANTS.)

TO: WILLIAM A. JORDAN, III, ATTORNEY FOR THE PLAINTIFF:

The Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg (misidentified separately as “THI of South Carolina at Spartanburg, LLC” and “THI of South Carolina at Magnolia Manor- Spartanburg, LLC d/b/a Magnolia Manor Spartanburg” and hereinafter referred to as “this Defendant” or the “Facility”), by and through its undersigned counsel and *subject to and specifically reserving its right to compel this matter to arbitration and without waiving any rights to have any and all claims dismissed*, hereby answers and responds to the allegations set forth in Plaintiff’s Complaint as follows:

1. All allegations of the Complaint not hereinafter admitted, qualified, or otherwise explained are hereby expressly denied and strict proof is demanded thereof.

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

3. This Defendant denies the allegations set forth in Paragraph 2 of Plaintiff's Complaint and demands strict proof thereof.

4. The allegations set forth in Paragraphs 3, 4 and 5 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

5. Responding to the allegations set forth in Paragraphs 6, 7 and 8 of Plaintiff's Complaint, this Defendant, *properly identified as Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor- Spartanburg*, admits those allegations insofar as they allege that this Defendant is a Delaware limited liability company which is the sole licensee of the skilled nursing facility at issue in Plaintiff's Complaint located at 375 Serpentine Drive in Spartanburg County, South Carolina. This Defendant denies any and all remaining allegations set forth in the above Paragraphs to the extent they are inconsistent with this response and demands strict proof thereof.

6. The allegations set forth in Paragraphs 9, 10 and 11 of Plaintiff's Complaint call for legal conclusions and therefore no response is required.

7. Responding to the allegations set forth in Paragraph 12 of Plaintiff's Complaint, this Defendant admits that Mr. Dawkins was a resident at the Facility, but would crave reference to his skilled nursing charts and medical records for his date of admission and the facility from

which he was discharged. Any allegations inconsistent with those contents or intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof.

8. Responding to the allegations set forth in Paragraph 13 of Plaintiff's Complaint, this Defendant would crave reference to Mr. Dawkins' skilled nursing charts and medical records for their contents related to the allegations in the above Paragraphs. Any allegations inconsistent with those contents or intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof.

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

10. This Defendant denies the allegations set forth in Paragraphs 15 and 16 of the Plaintiff's Complaint and demands strict proof thereof.

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

12. This Defendant is without sufficient knowledge and information to respond to the allegations set forth in Paragraph 18 and 19 of Plaintiff's Complaint and, therefore, denies these allegations and demands strict proof thereof. Any allegations intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof.

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

14. This Defendant denies the allegations set forth in Paragraph 21 of the Plaintiff's Complaint as stated and demands strict proof thereof.

15. This Defendant denies the allegations set forth in Paragraphs 22, 23, 24, 25, 26, 27, 28 and 29 of the Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

16. The Defendant denies the allegations set forth in the Plaintiff's Prayer for Relief in full.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

17. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered into between Mr. Dawkins' representative and this Defendant, and therefore this matter should be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

18. This action must be stayed until the validity of the Plaintiff's arbitration agreement is determined by the appropriate court.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

20. The Defendant asserts entitlement to all benefits, privileges, protections and limitations on any punitive damages award under the South Carolina Fairness in Civil Justice Act

of 2011, as codified in S.C. Code Ann. §§15-32-510, 15-32-520, 15-32-530 and 15-32-540 et seq.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

24. The Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or non-parties to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

28. The Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims she alleges.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

29. The care and treatment provided to Plaintiff's decedent provided by the Defendant was at all times in compliance with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

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

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

James D. Gandy, III

T. Ashton Phillips, III

P.O. Box 993, Charleston, SC 29402

(843) 577-4000; jdavis@ycrlaw.com

tgandy@ycrlaw.com; aphillips@ycrlaw.com

Attorneys for the Defendant THI of South Carolina

at Spartanburg, LLC d/b/a Magnolia Manor-

Spartanburg

Charleston, South Carolina

Dated: November 19, 2020

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

TRINA DAWKINS, AS PERSONAL) CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE)
OF WILLIAM DAWKINS,)

PLAINTIFF,)

vs.)

FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC;)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC; THI OF SOUTH)
CAROLINA, LLC; THI OF SOUTH)
CAROLINA AT SPARTANBURG, LLC;)
THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR)
SPARTANBURG, LLC D/B/A)
MAGNOLIA MANOR SPARTANBURG)

**ANSWER ON BEHALF OF
FUNDAMENTAL ADMINISTRATIVE
SERVICES, LLC**

DEFENDANTS.)

TO: WILLIAM A. JORDAN, III, ATTORNEY FOR THE PLAINTFF:

The Defendant Fundamental Administrative Services, LLC (hereinafter referred to as “this Defendant”), hereby responds to the allegations set forth in Plaintiff’s Complaint as follows:

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

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

3. The allegations set forth in Paragraphs 2 and 3 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

4. Responding to Paragraph 4 of Plaintiff's Complaint, this Defendant admits it is limited liability company organized under the laws of the State of Delaware but denies the remaining allegations set forth in the above Paragraph.

5. The allegations set forth in Paragraphs 5, 6 and 7 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

6. To the extent that the allegations set forth in Paragraph 8 of Plaintiff's Complaint are directed at this Defendant, they are denied and strict proof is demanded thereof.

7. The allegations set forth in Paragraphs 9, 10 and 11 of Plaintiff's Complaint call for legal conclusions and therefore no response is required.

8. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Dawkins or any person. This Defendant further denies any interaction or relationship with Mr. Dawkins of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

9. The Defendant denies the allegations set forth in the Plaintiff's Prayer for Relief in full.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

10. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered into between Mr. Dawkins' representative and the Facility Defendant, and therefore this matter should be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. This action must be stayed until the validity of the Plaintiff's arbitration agreement is determined by the appropriate court.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. This Court lacks jurisdiction over this Defendant and therefore this matter should be dismissed pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

14. The Defendant asserts entitlement to all benefits, privileges, protections and limitations on any punitive damages award under the South Carolina Fairness in Civil Justice Act

of 2011, as codified in S.C. Code Ann. §§15-32-510, 15-32-520, 15-32-530 and 15-32-540 et seq.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

18. The Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or non-parties to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

22. The Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims she alleges.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

23. The care and treatment provided to Plaintiff's decedent provided by the Defendant was at all times in compliance with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

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

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.
D. Jay Davis, Jr.
James D. Gandy, III
T. Ashton Phillips, III
P.O. Box 993, Charleston, SC 29402
(843) 577-4000; jdavis@ycrlaw.com
tgandy@ycrlaw.com; aphillips@ycrlaw.com
Attorneys for the Defendant Fundamental
Administrative Services, LLC

Charleston, South Carolina

Dated: November 19, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
TRINA DAWKINS, AS PERSONAL	)	CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE	)	
OF WILLIAM DAWKINS,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL ADMINISTRATIVE	)	ANSWER ON BEHALF OF THI OF
SERVICES, LLC; THI OF SOUTH	)	SOUTH CAROLINA, LLC
CAROLINA, LLC; THI OF SOUTH	)	
CAROLINA AT SPARTANBURG, LLC;	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR	)	
SPARTANBURG, LLC D/B/A	)	
MAGNOLIA MANOR SPARTANBURG	)	
,	)	
	)	
DEFENDANTS.	)	
	)	

TO: WILLIAM A. JORDAN, III, ATTORNEY FOR THE PLAINTFF:

The Defendant THI of South Carolina, LLC (hereinafter referred to as “this Defendant”), hereby responds to the allegations set forth in Plaintiff’s Complaint as follows:

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

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

3. The allegations set forth in Paragraphs 2, 3 and 4 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

4. Responding to Paragraph 5 of Plaintiff's Complaint, this Defendant admits it is limited liability company organized under the laws of the State of Delaware but denies the remaining allegations set forth in the above Paragraph.

5. The allegations set forth in Paragraphs 6 and 7 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

6. To the extent that the allegations set forth in Paragraph 8 of Plaintiff's Complaint are directed at this Defendant, they are denied and strict proof is demanded thereof.

7. The allegations set forth in Paragraphs 9, 10 and 11 of Plaintiff's Complaint call for legal conclusions and therefore no response is required.

8. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Dawkins or any person. This Defendant further denies any interaction or relationship with Mr. Dawkins of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

9. The Defendant denies the allegations set forth in the Plaintiff's Prayer for Relief in full.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

10. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered into between Mr. Dawkins' representative and the Facility Defendant, and therefore this matter should be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. This action must be stayed until the validity of the Plaintiff's arbitration agreement is determined by the appropriate court.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. This Court lacks jurisdiction over this Defendant and therefore this matter should be dismissed pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

14. The Defendant asserts entitlement to all benefits, privileges, protections and limitations on any punitive damages award under the South Carolina Fairness in Civil Justice Act

of 2011, as codified in S.C. Code Ann. §§15-32-510, 15-32-520, 15-32-530 and 15-32-540 et seq.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

18. The Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or non-parties to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

22. The Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims she alleges.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

23. The care and treatment provided to Plaintiff's decedent provided by the Defendant was at all times in compliance with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

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

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

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Attorneys for the Defendant THI of South Carolina,
LLC

Charleston, South Carolina

Dated: November 19, 2020

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

TRINA DAWKINS, AS PERSONAL) CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE)
OF WILLIAM DAWKINS,)

PLAINTIFF,)

vs.)

FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC;)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC; THI OF SOUTH)
CAROLINA, LLC; THI OF SOUTH)
CAROLINA AT SPARTANBURG, LLC;)
THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR)
SPARTANBURG, LLC D/B/A)
MAGNOLIA MANOR SPARTANBURG)

**ANSWER ON BEHALF OF
FUNDAMENTAL CLINICAL AND
OPERATIONAL SERVICES, LLC**

DEFENDANTS.)

TO: WILLIAM A. JORDAN, III, ATTORNEY FOR THE PLAINTFF:

The Defendant Fundamental Clinical and Operational Services, LLC (hereinafter referred to as “this Defendant”), hereby responds to the allegations set forth in Plaintiff’s Complaint as follows:

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

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

3. The allegations set forth in Paragraph 2 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

4. Responding to Paragraph 3 of Plaintiff's Complaint, this Defendant admits it is limited liability company organized under the laws of the State of Delaware but denies the remaining allegations set forth in the above Paragraph.

5. The allegations set forth in Paragraphs 4, 5, 6 and 7 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

6. To the extent that the allegations set forth in Paragraph 8 of Plaintiff's Complaint are directed at this Defendant, they are denied and strict proof is demanded thereof.

7. The allegations set forth in Paragraphs 9, 10 and 11 of Plaintiff's Complaint call for legal conclusions and therefore no response is required.

8. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Dawkins or any person. This Defendant further denies any interaction or relationship with Mr. Dawkins of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

9. The Defendant denies the allegations set forth in the Plaintiff's Prayer for Relief in full.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

10. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered into between Mr. Dawkins' representative and the Facility Defendant, and therefore this matter should be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. This action must be stayed until the validity of the Plaintiff's arbitration agreement is determined by the appropriate court.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. This Court lacks jurisdiction over this Defendant and therefore this matter should be dismissed pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

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14. The Defendant asserts entitlement to all benefits, privileges, protections and limitations on any punitive damages award under the South Carolina Fairness in Civil Justice Act

of 2011, as codified in S.C. Code Ann. §§15-32-510, 15-32-520, 15-32-530 and 15-32-540 et seq.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

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

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FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

22. The Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims she alleges.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

23. The care and treatment provided to Plaintiff's decedent provided by the Defendant was at all times in compliance with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

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

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By: s/ D. Jay Davis, Jr.

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Attorneys for the Defendant Fundamental Clinical
and Operational Services, LLC

Charleston, South Carolina

Dated: November 19, 2020

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT
3
4 Trina Dawkins, as Personal)
5 Representative of the)
6 Estate of William Dawkins,) TRANSCRIPT OF RECORD
7 Plaintiff,) 2020-CP-42-03593
8 -vs-)
9 Fundamental Clinical and)
10 Operational Services, LLC,)
11 et al,)
12 Defendants.) March 16, 2021
13 Spartanburg, South Carolina

14 B E F O R E:

15 HONORABLE GRACE GILCHRIST KNIE, JUDGE
16

17 A P P E A R A N C E S:

18 WILLIAM ASHLEY JORDAN, III, ESQUIRE
19 Attorney for the Plaintiff

20 RUSSELL G. HINES, ESQUIRE
21 Attorney for the Defendants
22
23

24 Linda D. Moffitt
25 Circuit Court Reporter

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Motions -- page 3.

No sworn testimony; no exhibits entered into evidence.

1 (The following takes place using WebEx.)

2 THE COURT: It is right at 2:30, and let me see if
3 everybody can hear me.

4 Linda.

5 THE COURT REPORTER: I'm good, Judge. Thanks.

6 THE COURT: Okay. Thank you.

7 Ms. Martinez.

8 THE CLERK: Yes, ma'am. I can hear you.

9 THE COURT: Okay. Thank you.

10 We are now commencing our afternoon session of court.

11 I am Judge Grace Knie, and I am in the Seventh
12 Judicial Circuit. This term of court is common pleas
13 nonjury.

14 With us today is our court reporter, Linda Moffitt;
15 the deputy clerk from our clerk's office, Mary Bell
16 Martinez, who handles common pleas. My administrative
17 assistant is Ashley Searcy. She is the host. And Brittany
18 Biggs is my law clerk.

19 I will -- just a couple of things before we get
20 started.

21 Normally, I allow my assistant to mute and unmute
22 folks. That just seems to make it a little simpler. And
23 I'll -- you'll know when to start talking to me. Okay.
24 It's much simpler than it sounds.

25 Let me first have Ms. Martinez to call the case.

1 THE CLERK: Yes, Your Honor.

2 The matter that we have for this afternoon is on case
3 2020-CP-42-3593, Trina Dawkins as P.R. of the estate of
4 William Dawkins vs. Fundamental Clinical and Operational
5 Service, LLC.

6 THE COURT: All right. Thank you.

7 And, Counsel, if you will, identify yourselves.
8 Counsel for Ms. Dawkins, please.

9 MR. JORDAN: William Jordan on behalf of the
10 plaintiff.

11 THE COURT: Okay. And, Counsel, I believe the
12 defendants are all represented by one firm, is that
13 correct?

14 MR. HINES: That's correct, Your Honor. All of the
15 defendants are represented by -- by Clement Rivers. And
16 I'm here on behalf of all of them. I'm Russ Hines.

17 THE COURT: Okay. Thank you.

18 And thank you all for agreeing to handle this matter
19 via a virtual courtroom today.

20 So the way that this will work, I will call upon the
21 moving party, who I believe would be Mr. Hines, and I will
22 give him an opportunity to argue, and then I will call upon
23 Mr. Jordan.

24 After that Mr. Hines will have an opportunity to reply
25 to anything that he deems is new. If you all will give me

1 just one minute, I also want to pull the case up again on
2 line. I have printed the motions.

3 Okay. And it looks like the last filings that I am
4 seeing a memorandum in opposition was filed on 3/12, and
5 then I see memorandum in support, filing on 3/15, and it
6 looks like maybe one on 3/16. Let me look at that. But
7 that was just the transmittal, so.

8 Okay. And so the reason I now really -- out of --
9 (Webex dropped.)

10 THE COURT: I try to make sure there's nothing else
11 that's been e-mailed since these filings -- emailed either
12 to my law clerk or my administrative assistant or to me or
13 anything that is in the cue or waiting to be filed by the
14 clerk.

15 It may have been submitted but not yet made its way
16 into the file, and it used to be we would just hand these
17 things up and across the aisle, and now things are a lot
18 different.

19 So, Mr. Jordan, sir, has there been other filing on
20 behalf of the plaintiff?

21 MR. JORDAN: Just the one you know, which I think is
22 the memo in opposition that you referenced from Friday.

23 THE COURT: Yes, sir, yes, sir. Thank you.

24 Okay. Mr. Hines, anything else?

25 MR. HINES: Your Honor, it sounds like you've got the

1 memo in opposition that was -- excuse me -- memo in support
2 rather. And let me clarify.

3 So we do have four motions. The primary one is a
4 motion to compel arbitration, and then we filed a memo in
5 support of that yesterday. And I believe, and I think I've
6 seen filed stamped copies of it.

7 Memos in support of these what I'll call tag-along
8 motions to stay. There were three of them and a memo
9 was -- each of the memos is short and identical in
10 substance on the motions to stay.

11 I don't know if you've see them in your file. If you
12 don't have them, I certainly could email to you what we've
13 submitted. I think they've showed up in the Court's file.
14 Let me take a look today.

15 THE COURT: Yes, sir. Let me -- let me just open each
16 one.

17 MR. HINES: Your Honor, if it helps you, you can open
18 just one of them and it'll save you the trouble. I
19 didn't -- substantively, those memos in support of the
20 motion to stay are all the same.

21 THE COURT: Okay. There was one that was a little
22 different.

23 MR. HINES: Yes.

24 THE COURT: Okay. And I see that there are three --
25 well, I pulled up two of the ones that you're saying tag

1 along in support, and then it looks like the one filed at
2 4:54 p.m. may be the longer ones.

3 MR. HINES: Yes, Your Honor. That's what I see as
4 well.

5 THE COURT: The motion to compel arbitration and stay.

6 MR. HINES: Your Honor, thank you, very much, and
7 thank you for patience in wading through all of that.

8 I'll say going forward, and I'm not trying to beg off
9 too much responsibility, but I didn't actually title these
10 various filings, and I'm going to suggest that we try to
11 come up with simpler titles for some of these things, which
12 I realize, as I looked at it, it might be a little bit of
13 an eye sore to read as much as we have there in the -- in
14 the caption as to what this is.

15 But the -- the long one of these is -- is just a memo
16 in support of the motion to compel arbitration, and, Your
17 Honor, that motion to compel arbitration -- well, I don't
18 want to start out of turn, but if you're ready to hear me
19 on it, I -- I'm happy to go forward with it and explain --
20 well, our argument on that.

21 THE COURT: Yes, sir. Well, and I think I need to
22 correct one thing.

23 I said that they were filed at 4:54, but somehow they
24 were all filed at 4:54. And so I believe it's even more
25 confusing.

1 Just bear with me just one moment, and let me see if I
2 can pull it up.

3 (Pause.)

4 THE COURT: Okay. Yes, sir. I have the longer
5 version. Thank you. And this one is T.H.I., is complete.
6 Okay.

7 MR. HINES: Thank you very much, Your Honor, and may
8 it please the Court.

9 Again, this is Russ Hines for all of the moving
10 parties.

11 The primary motions before you today, Your Honor, is a
12 motion to compel arbitration.

13 The name of the party who has made that motion is a
14 little bit cumbersome, but I'm going to shorten it for
15 convenience and just call them the facility.

16 This is a case that the context for this case is
17 nursing home negligence, and so the facility is a skilled
18 nursing facility in Spartanburg County.

19 The other moving parties who filed motions to stay are
20 the other defendants in the case, and really it's
21 sufficient to call them just the other movants or other
22 parties. That's really the posture of them.

23 Their motion, what they say, is because of the motion
24 to compel arbitration they're asking the Court to stay the
25 case as to them until the issue of arbitrability is

1 resolved and any arbitration that is ultimately compelled
2 has taken place. And the basis for that request to stay is
3 set forth in the memos that are -- that the Court has.

4 In short, there is -- the argument goes under Section
5 Three of the Federal Arbitration Act, which is 9 U.S.C.,
6 Section 3, and it's cited in there -- that a stay is
7 required if one of the parties moves to compel arbitration.

8 And then as a secondary argument to that the argument
9 is that the Court certainly has even -- even putting aside
10 a mandatory stay the Court has discretion to enter a stay
11 in furtherance of its or in accordance with its inherent
12 authority to -- to control its docket, which we believe
13 would be the thing to do in this case given the
14 relationship between the claims against the facility and
15 these other defendants.

16 But unless the Court has any -- any questions on the
17 motions to stay, I intend to put those aside and I think,
18 you know, they -- our position is set forth in the writing.
19 But really the -- the primary motion here, again, is the
20 facility's motion to compel arbitration.

21 And to try and get a little bit of shorthand here for
22 us, again, I've explained it. The facility is the moving
23 party here, and this is, again, a skilled nursing facility.
24 And the claim here is a wrongful death and survival action.

25 Mr. Dawkins, Williams Dawkins, is the decedent. The

1 case is brought by Trina Dawkins as personal representative
2 of his estate.

3 So Mr. Dawkins is the person who was the resident of
4 our facility. So when I mention Mr. Dawkins, I'll be
5 speaking about him.

6 And Trina Dawkins as the personal representative of
7 his estate is the plaintiff in this case. So that's who
8 the plaintiff is.

9 The only reason I go through this in a little bit more
10 detail is because there are three different Dawkins, and
11 the third one besides Trina and William is Melissa.

12 Melissa Dawkins is the person who signed the
13 documentation on behalf of Mr. Dawkins when he was admitted
14 to our facility in April of 2017. So Melissa, I will refer
15 to as the person who signed the paperwork. Plaintiff is
16 Trina as the personal representative for the estate. And
17 Mr. Dawkins is, again, the decedent and who was the man who
18 was the resident of our facility.

19 When -- in looking -- I'll start by saying in looking
20 over the plaintiff's memo in opposition, the plaintiff
21 makes the point that there was no power of attorney that
22 authorized Melissa to sign.

23 She signed an admission agreement and arbitration
24 agreement on behalf of her father. I think she's the
25 daughter. Doesn't matter though. She signed it on behalf

1 of Mr. Dawkins at the time of his admission.

2 The plaintiff's argument, as I understand, is that
3 Melissa did not have authority by virtue of a power of
4 attorney, nor did she have authority as an agent, nor did
5 she have authority under the South Carolina Adult
6 Healthcare Consent Act to sign the arbitration agreement
7 and to bind Mr. Dawkins, and now his estate, to
8 arbitration.

9 We do not deny the lack of power of attorney. We
10 don't know of any. But one point that I would make about
11 the lack of authorization by means of agency is that in the
12 plaintiff's memo there is this notion that there's
13 absolutely no evidence indicating that Melissa Dawkins had
14 a legal right, legal authority to waive Mr. Dawkins'
15 constitutional rights to a jury trial or even enter into
16 any kind of contract on her behalf.

17 I would point out that we take the position that the
18 evidence in support of that is indeed the arbitration
19 agreement itself, and the reason why I submit that that can
20 constitute evidence in this case is because that document
21 on its face contains Melissa's representation she has due
22 authority to execute it on behalf of her father. And it
23 has not been met, at least as yet, with any evidence --
24 exercising evidence in response, for instance, a contrary
25 affidavit.

1 I understand the plaintiff hasn't made an argument
2 that that is against that as far as the position on that
3 constituting evidence. It's just -- it on its face is the
4 evidence we've brought forth, and it has not been met with
5 evidence to undermine it.

6 Now, not to be too terribly petty about this, I
7 recognize -- and I'm not trying to catch plaintiff's
8 counsel shorthanded here.

9 I suspect that plaintiff's counsel could -- could get
10 an affidavit from Trina Dawkins in short order that says --
11 that provides evidence to support this argument. So I'm
12 not trying to play gotcha with that. I just am noting that
13 on the -- on its face that document --

14 (WebEx dropped.)

15 MR. HINES: So really the point that I wanted to also
16 make in going here is to say that plaintiff's memo would
17 seem to suggest that the only way there can be a binding
18 arbitration agreement would be through authorization by way
19 of agency or power of attorney. And I want to make sure
20 that -- to clarify that that's not correct.

21 I mean, you can do it in those ways, but,
22 specifically, there's a case, Wilson vs. Willis. It's
23 cited in our brief, and so I won't -- unless the Court
24 would like to have the citation provided -- but if the
25 Court will indulge me a brief quotation it reads, "South

1 Carolina has recognized several theories that could bind
2 nonsignatories to arbitration agreements. Under general
3 principle the contract and agency law, including the
4 corporation by reference, two, assumption, three, agency,
5 four, veil piercing/alter ego; and five estoppel.

6 The one I want to focus on today -- and I'll leave --
7 leave the -- ground in the brief and I'll leave most of
8 that ground covering to that on -- on paper -- but in the
9 interest of time what I'd like to focus on today is this
10 idea of estoppel and, again, the two documents that we have
11 here, admission agreement and arbitration agreement. And,
12 again, making the point that our law does recognize the
13 ability to bind a nonsignatory. He is -- Mr. Dawkins is
14 certainly a nonsignatory. We don't deny he did not sign
15 this. But he can be bound through estoppel.

16 The way that our argument works here, Your Honor, is
17 we start with a case called Coleman vs. Mariner Health
18 Care.

19 Now, Coleman vs. Mariner Health Care, the primary
20 thing -- and that was the case that also involved an
21 admission agreement and arbitration agreements. And the
22 question is whether or not the arbitration agreement is
23 binding.

24 The primary argument that was made in that case was
25 whether or not the -- it was a sister of the resident in

1 that case -- she had authority to sign the arbitration
2 agreement, bind her sister based upon South Carolina's
3 Adult Healthcare Consent, and there's no question that the
4 decision is that she did not. So the Adult Healthcare
5 Consent Act did not confer on the surrogate the right to
6 waive the right to a jury trial. It was confined to
7 healthcare decisions.

8 But within that decision -- and the Court addressed
9 another argument, actually addressed the argument about
10 merger and estoppel -- and although it ruled against the
11 arbitration in that case, it did nonetheless recognize the
12 validity of the legal theory of merger, which was what
13 underlied the -- the merger and estoppel argument that the
14 appellant was making there.

15 And, simply put, what the Court said -- and if the
16 Court, again, will -- will bear with me for just a little
17 bit of quotation -- this is from the Coleman decision.

18 "Appellant's equitable estoppel argument was premised
19 on their condition -- contention that, under state law, the
20 admission agreements and the arbitration agreements
21 merged."

22 In South Carolina -- and they quote, again, from
23 another decision called Kluttz Resort Realty vs. Down'Round
24 Development Corporation.

25 "The general rule is that, in the absence of anything

1 indicating a contrary intention, where instruments are
2 executed at the same time, by the same parties, for the
3 same purpose, and in the course of the same transaction,
4 the courts will consider and construe the documents
5 together. The theory is that the instruments are
6 effectively one instrument or contract."

7 And then concluding: "Here, the documents were
8 executed at the same time, by the same parties, for the
9 same purposes, and in the course of the same transaction.
10 Unless there is a contrary intention, appellants are
11 correct that there was a merger."

12 The point in going through all of that, Your Honor, is
13 to say that the legal principle upon which this argument
14 rests had been recognized as valid by the Coleman court.

15 What the Coleman court then did is it went on to say
16 there is evidence of a contrary intention to merger from
17 the facts of Coleman, not -- you know, not that there can
18 never be a merger, but it recognized the legal principle
19 when it looked at the Coleman case and said there -- there
20 has not been -- not a merger here because there's indicated
21 a contrary intention of the parties.

22 In this case, I submit to you, Your Honor, that the
23 facts that the Coleman court relied upon, and there are a
24 couple of particularly noteworthy called the Coleman
25 project, a couple of cases that followed Coleman, one

1 called Thompson vs. Pruitt, the Court of Appeals decision,
2 Thompson vs. Pruitt, and Hodge vs. UniHealth Post-Acute Care
3 of Bamberg, both of which are cited in our briefs that the
4 facts that control those cases, because those were also
5 cases about arbitration agreements in the context of
6 nursing homes, that -- that the merger was -- was found
7 against in those cases are different than what we have
8 here.

9 One thing, it was a consistent fact and a critical
10 fact in every one of those cases, is that the -- excuse
11 me -- the admission agreement in every one of those
12 cases -- Coleman and Thompson and Hodge -- it specifically
13 said or recognized the arbitration agreement as being a
14 separate contract, meaning separate than the -- separate
15 from the admission agreement.

16 The Courts indicated that that -- they found that
17 indicated what a separatedness -- a separatedness
18 meaning the -- the parties did not intend to merge.

19 In this case, Your Honor, the admission agreement does
20 not reference, not -- I should say not only does it not
21 reference the -- the arbitration agreement is a separate
22 contract. On the last page of the admission agreement,
23 which is page 12 of 12, and this is Exhibit 1 to the
24 facility's memo in support, it specifically says, "The
25 undersigned further acknowledges that he/she has received

1 and read the admission handbook and other admissions
2 materials and understands that these documents are made
3 part of this agreement by reference herein."

4 Our position, Your Honor, is that these other
5 admission materials certainly do include the arbitration
6 agreement, which was signed in conjunction with the -- with
7 the admission.

8 And just as in the Coleman case we were -- as Coleman
9 confirmed -- that the arbitration agreement and admission
10 agreement in that case were indeed signed at the same time
11 by the same parties, for the same purposes in accordance
12 with the same transaction that we have the merger. And
13 that's what makes this different, because there is -- there
14 is not a -- an intent contrary to merger in this case, but
15 there was one in those other cases -- Coleman, Thompson and
16 Hodge.

17 I'd also argue -- well, we also argue, Your Honor,
18 that in furtherance of this point that the admission
19 agreement really doesn't -- the arbitration agreement
20 rather really doesn't make any sense as a stand-alone
21 document.

22 The only reason why the arbitration agreement exists
23 is because of the admission. The whole point of the
24 arbitration agreement is to provide for this alternative
25 dispute resolution for disputes that arise out of the

1 admission.

2 There is a connectedness that respectfully cannot be
3 denied between the two documents.

4 In some cases I've had it argued against me that,
5 well, that they don't have -- there's a separatedness there
6 because the arbitration agreement was not a condition or
7 requirement for admission.

8 And my response, which I respectfully submit, is that
9 these persuasive, is that, quote, "The fact that it's not a
10 condition of admission doesn't mean that it's not something
11 that was executed in conjunction with the admission."

12 This was all a part of, again, the same time, parties,
13 purposes and transaction. So, again, the only reason why
14 the arbitration agreement was -- was entered into was
15 because of the admission agreement.

16 So, Your Honor, this is covered in a bit more detail
17 in written form, but what the basic point I'm trying to
18 wrap up here is on the do-we-have-a-merger, because we have
19 the requisite, same time, parties, purpose and transaction
20 with respect to the admission agreement and the arbitration
21 agreement where you can conclude both as arbitration, the
22 admission and arbitration agreements -- they're merged
23 together and properly construed as -- as a merged contract.

24 Then you apply to that the estoppel principle, and
25 this principle is also recognized in the case of Wilson vs.

1 willis I mentioned earlier, that you cannot benefit from
2 certain provisions of the contract and then deny others.

3 And in this case the decedent, Mr. Dawkins, benefited
4 from his admission to -- to the facility and he
5 benefited -- I should say he received benefits.

6 And I want to be clear. I understand that
7 Mr. Dawkins -- now his estate -- claims that there was
8 negligence that caused him damages over the course of his
9 admission, but they do not take issue, for instance, with
10 every single thing that he received, that he received room,
11 he received board, he received -- that he received a number
12 of things to his benefit over the course of his time there,
13 notwithstanding the claim of negligence which we, of
14 course, deny on the merits.

15 But so tie it all together, is you cannot receive
16 those benefits on the one hand and deny the requirement to
17 arbitrate, which is in the same contract by virtue of
18 merger.

19 Your Honor, thank you very much for your patience. I
20 think maybe at this juncture I would, again, reiterate
21 we -- we've set -- set this forth in our briefing.

22 I'll be happy to answer any questions the Court may
23 have, but I realize that this is sort of a -- well, it's --
24 it's an argument that takes a while to -- to get out there
25 even trying to get a little quickly, and I appreciate your

1 patience, and I'll await any questions you may have, or a
2 brief opportunity to reply to opposing counsel.

3 THE COURT: One thing that I do have a question about,
4 Mr. Hines.

5 The relationship between Mr. Dawkins and Melissa
6 Dawkins, at first you said that might be a daughter, and
7 then you said you weren't certain, is that correct?

8 MR. HINES: Yes, Your Honor, that's correct.

9 I had intended to call her a daughter. It was a bit
10 of a slip of the tongue. She may be a daughter. I just
11 don't know that and I don't want to misrepresent to the
12 Court that is indeed what she was, but my -- my argument
13 though does not rely upon her being a -- a daughter or of
14 any particular relation to him.

15 And, again, I would point to the language in the --
16 the arbitration agreement itself that says -- well,
17 actually, I don't know if I actually read this to Your
18 Honor, but by his signature on the executed party that
19 presents that she has the authority to sign on respondent's
20 behalf so as to bind the resident as well as the
21 representative.

22 And -- and the point of that, you know, that's --
23 that's what's represented to the facility, and it's
24 briefly -- and it gives me a thought to mention that it
25 must be remembered that this is an F.A.A. governed

1 arbitration agreement, which means it's governed by the
2 Federal Arbitration Act. And under the Federal Arbitration
3 Act the -- you know, state courts must treat arbitration
4 agreements, place them on equal footing with any other
5 contract.

6 Now, so while the state can invalidate a contract on
7 the basis of the generally applicable contract law the --
8 it cannot apply special rule for arbitration agreements.
9 And my point in mentioning that is to say under South
10 Carolina's general contract law when a person signs an
11 agreement they are -- by doing that they are being pursued
12 to -- to have read, understood and agreed to it.

13 They're also bound by the good faith and fair dealing.
14 And so regardless of who Ms. Dawkins is and, you know,
15 perhaps opposing counsel can let us know who she is -- a
16 relative -- but regardless of who she is, she has
17 represented affirmatively that she has requisite authority,
18 and she is no less bound by dealing in good faith and fair
19 dealing -- the facility is.

20 And so to the extent there's any suggestion that she
21 come up with a facility should be under some sort of
22 greater burden to determine her authority, I would argue
23 and submit respectfully that would be inconsistent with the
24 F.A.A.'s mandate to treat arbitration agreements on equal
25 footing because that would apply to this contract a burden

1 that would not be placed on another type contract.

2 THE COURT: Okay. Thank you. And I just wanted to
3 make sure that I understood what you had said. All right.
4 Okay. Thank you, sir.

5 Now, let me hear from opposing counsel, please,
6 Mr. Jordan.

7 MR. JORDAN: Thank you, Your Honor. William Jordan,
8 again, for the plaintiff. May it please the Court.

9 This -- we're here to talk about a -- an argument over
10 essentially the enforcement of a contract, and what is
11 absolutely not in dispute in this case is that there is no
12 contract between William Dawkins and any of these
13 defendants.

14 What we know is that allegedly there is this piece of
15 paper that has been signed by Melissa Dawkins and by a
16 representative of some of these defendants in this case.

17 And so the questions come down to whether or not
18 Melissa Dawkins had the authority to act as Mr. Dawkins'
19 agent essentially and to bind him to the terms of this
20 contract that the defendants are now attempting to enforce.

21 And that is the defendant -- I have cited case law
22 that -- that stands for the proposition that the defendants
23 have the obligation to show that a binding and valid
24 contract for arbitration actually exists in this case, and
25 that's something that they have to prove, and that's

1 something that goes beyond simply saying this document
2 stands on its own merit.

3 And -- and just by -- by virtue of the fact that it
4 says that it's a binding arbitration agreement, it is a
5 binding arbitration agreement, which is, you know, sort of
6 along the lines that they're going down, it sounds to me
7 like.

8 But, you know, essentially they're making the argument
9 that despite the fact that there's no healthcare power of
10 attorney and despite the fact that there -- there's no
11 guardianship, despite the fact that they can't meet any
12 threshold burden of showing that the Adult Healthcare
13 Consent Act had actually been invoked here, which is really
14 what a lot of case law around arbitration agreements in the
15 nursing home context in our state deals with, they still
16 think they should be able to enforce it. It's apparently
17 based on some type of apparent agency argument.

18 This -- this was dealt with a lot, and some of the
19 exhibits that I cited in the circuit court orders I -- you
20 know, and I -- I didn't know that this was the angle they
21 were coming from until yesterday at about 4:00, I guess
22 4:00 p.m. I didn't brief some of these issues.

23 If you look at the Wagnitz case, which is Exhibit J to
24 my brief, there is a discussion of establishing agency and
25 how that is done, and there -- there is this -- you know,

1 you have to go to this test where you have to show that
2 the -- the principal held themselves out as an agent and
3 that the -- the other party relied on that and then changed
4 their position to their own detriment based on that
5 reliance.

6 And in this situation you're -- you're talking about a
7 situation where you have a sophisticated party, who is this
8 defendant corroboration. They're dealing with an
9 admissions officer who deals with this kind of situation
10 all of the time.

11 And, you know, you're talking about a nursing home
12 that deals with healthcare power of attorney, advanced
13 healthcare directives, certificates of appointment in
14 probate court, documents like that all of the time.
15 They're well aware of the types of legal documents that
16 actually confer authority on to individuals to act and
17 serve as agents in situations like this.

18 This is not some helpless entity that's out there in
19 the world that doesn't know they're being taken advantage
20 of and -- and I'm not suggesting in any way that they were
21 being taken advantage of. They knew what the situation was
22 and they knew there was no power of attorney, and yet
23 they -- they asked for somebody to sign anyway, and that's
24 what happened in this situation. But it was somebody who
25 didn't have the authority, and the defendants knew that at

1 the time this happened.

2 what -- what bothers me a lot about this too is that,
3 you know, I -- I've been trying to get my hands on a lot of
4 these documents now for over a year.

5 The first time that I -- you know, I asked for this
6 admission agreement back in February of 2020. And, you
7 know, I -- I received the medical records.

8 I explicitly asked for the admission agreement and the
9 arbitration agreement back in -- the first time I ever saw
10 the arbitration agreement in this case was in February of
11 this year when this motion was filed -- motion to compel
12 arbitration.

13 The first time I ever saw this admission agreement was
14 last night. That's something that has never been produced
15 by these defendants and something that's never been turned
16 over until the eleventh hour when they're trying to enforce
17 this arbitration agreement through this merger argument
18 based on this apparent agency theory that they have, which
19 is absolutely not supported by any of the case law that --
20 that I've cited in my brief.

21 The Coleman and Thompson cases that were discussed
22 earlier are -- stand for the proposition that unless the
23 principal properly confers that agency authority on to the
24 agent in the correct way that you can't confer the
25 authority to waive the constitutional right to a jury trial

1 in the nursing home context. And that's been the position
2 of our court repeatedly and they -- they reiterated that
3 again last week. I think it's that Arredondo decision. I
4 didn't even have time to cite it in my memo. But they went
5 through that analysis again and essentially said -- and
6 that was a case where the agent had a general durable power
7 of attorney and a healthcare power of attorney. And the
8 analysis sort of turned on whether or not the powers that
9 were conferred in that power of attorney were actually
10 sufficient to allow that individual to sign an arbitration
11 agreement.

12 The Court ultimately determined they were not. And so
13 given that the person did not have those powers within the
14 power of attorney the Court determined they didn't have the
15 right to sign an arbitration agreement. And so that was a
16 reversal that came -- a reversal of the Court of Appeals'
17 earlier decision.

18 And so I just don't see any -- there's no factual
19 evidence in the record in this case outside of the
20 arbitration agreement itself that these defendants relied
21 in any way or defrauded in any way or acted in any way in
22 reliance on some argument that someone made or some agency
23 decision that was made or that they didn't understand the
24 full circumstances under which they were operating when
25 they admitted this patient, you know, agreed to bill the

1 health insurance that was presented to them and allow this
2 other individual to sign this document at the time that all
3 of this case law was out there. Everybody understood what
4 the obligations were and understood what had to be done in
5 order to actually go through with the arbitration
6 agreements.

7 And, you know, I just don't think that there is a
8 valid reason in this case to -- to enforce an arbitration
9 agreement, and I really don't understand what the
10 reasonable grounds for this motion are, and I think it's --
11 you know, this is one of those rare cases, and I don't
12 invoke this lightly, but I think this is a case where the
13 plaintiff should be entitled to costs in defending this
14 motion, because it's so clear based on the case law that in
15 this type of situation if you look at all of the precedent
16 that we have in this state under similar situations and
17 under identical situations the court, our Supreme Court,
18 has refused to compel arbitration in these types of
19 situations, and that's been the clear and well-established
20 case law, and we do have plenty in these cases where there
21 are -- you know, there are vigorous disputes and -- and
22 there are times when these arbitration agreements are
23 enforceable and the facts can be different, and I
24 completely understand that. But this is not one of those
25 situations in my mind, and I really don't think it's fair

1 in this type of situation where the defendant essentially
2 sits on all of the operative documents that they have in
3 this case and requires or allows the plaintiff to go
4 through with all of the N.O.I. phase in this case. And all
5 of this is a matter of record in this case. Plaintiff's
6 gone through the N.O.I. phase, hired an expert, filed
7 standard discovery, participated in mandatory mediation,
8 filed suit, done all of that.

9 Asked over and over again for arbitration agreement.
10 None of that was ever produced until this motion was filed.
11 And the admission agreement was not produced until
12 yesterday.

13 And so essentially what they've -- they've been asking
14 us to do this entire time is fight with one hand behind our
15 back as to the circumstances of the admission to this
16 facility.

17 And now they come up one day before the hearing and
18 dump all of these documents on us and ask the Court to make
19 this sort of weaving argument that has to do with this
20 merger clause which really does not have -- address the
21 core issue in this case, which is -- which is the lack of
22 authority to actually enter into any of these agreements on
23 behalf of Mr. Dawkins. And that's really all I have.
24 Thank you.

25 THE COURT: Thank you.

1 Anything else, Mr. Hines?

2 MR. HINES: Yes, Your Honor.

3 I suppose I have to start with the -- the idea of
4 sitting on -- on documents. I can't speak to all of that,
5 Your Honor, but because I guess candidly I wasn't involved
6 in the N.O.I. process, but, Your Honor, I -- I feel -- I do
7 feel like I can speak confidently when I say that
8 doesn't -- we're really talking about apples and oranges
9 there.

10 The N.O.I. process doesn't have anything to do with
11 what we're doing now. I mean, this -- this lawsuit was not
12 filed until October of last year.

13 We answered reserving our right to compel arbitration
14 or seek to compel arbitration. I think a month later in
15 November they ultimately sued thereafter. I filed this
16 motion, I think, on February 12th -- the other motions to
17 stay.

18 The motion was accompanied, of course, by the
19 arbitration agreement.

20 The only thing that counsel has mentioned aside from
21 that that was provided and filed yesterday was the
22 admission agreement, and the only thing, the admission
23 agreement that I mentioned, was the -- the merger clause
24 and the absence of any indication in the merger clause and
25 admission agreement, the arbitration agreement being a

1 separate contract and contrasting that Coleman, Thompson
2 and Hodge.

3 You know, it is interesting, I suppose, that
4 plaintiff's counsel would mention the idea of being able to
5 obtain costs orally, give oral argument, but not in the
6 written motion.

7 I can only take it as somewhat complementary that
8 however this oral argument has gone has -- has caused that
9 to be something that has come up in the argument as opposed
10 to before -- beforehand, but, I mean, plaintiff's counsel
11 is -- is certainly right that we have a lot of cases about
12 arbitration clause.

13 Respectfully, plaintiff's counsel is incorrect that
14 every one of these cases addresses the issues that we're
15 talking about. If you want to say that I -- that I am
16 arguing the court today, plaintiff's counsel, for instance,
17 mentioned apparent agency a number of times in describing
18 my argument. That's not it.

19 Your Honor, what I've offered to you today is -- is an
20 equitable estoppel argument that is premised on the merger
21 of the -- of the admission agreement and the arbitration
22 agreement.

23 That's a real argument, and that's nothing that is --
24 I mean, that's why I went and read -- and I appreciate the
25 Court's indulgence -- the quotation from Wilson vs. Willis

1 where the Court specifically talks about theories that can
2 bind nonsignators to arbitration agreements to include
3 estoppel.

4 That's why I also read the part that specifically
5 talked about the equitable estoppel argument being premised
6 upon merger and how the Court explained on the legal
7 principle that, yeah, the argument is right from its legal
8 premise and, nonetheless, there's a contrary contention
9 appellants are correct. There was a merger.

10 And what that does, Your Honor, is that gets us to a
11 point where we're talking about the facts of any particular
12 case and the facts that are the matter of facts of whether
13 or not there is a [sic] intention contrary to -- to merger.
14 Our argument is that there are -- that there are not. It's
15 not the facts in this case upon which that intention
16 contrary to merger can be found in a way that's not
17 speculative.

18 So I guess, Your Honor, I do have to push back quite
19 strongly on the idea that this motion and this argument is
20 one that is -- that has just been clearly addoomed by
21 existing precedent.

22 In fact, to the contrary, Your Honor. Your Honor, my
23 understanding of the existing precedent is that this
24 argument -- it reveals this argument, so to speak, I mean
25 just, as I just mentioned, a combination of cases between

1 Coleman and, you know, and again, the way the Coleman court
2 explains the background law if you read Coleman and
3 Thompson.

4 Hodge came down differently because they were decided
5 on different facts or they didn't specifically even
6 encounter the arguments that we've made about the -- about
7 the -- about the lack of separatedness or intention to
8 separate the two instruments.

9 And I guess one more thing I would mention, Your
10 Honor, for instance, maybe to explain that, you know, I'll
11 just go to this point.

12 Counsel mentioned that the Arredondo case that was
13 decided by our Supreme Court last week. Counsel correctly
14 stated that in that case there was both a general durable
15 power of attorney and also a healthcare power of attorney
16 and found -- the Court found that, nonetheless, there was
17 not authority under either of those powers for the holder
18 of power to -- to enter into an arbitration agreement. But
19 absolutely nothing in that holding undermines my argument.
20 This is just a completely different point. I'm not
21 arguing. Maybe this is another way to mention it or
22 explain it.

23 Plaintiff's counsel called this about me trying to
24 enforce a contract and -- and to the extent that we're
25 arguing for the application of agency, then it is that.

1 But we're allowed to make more than one argument to the
2 extent we're arguing equity, which is really the argument
3 that I -- I focused on today, merger and equity.

4 We're not arguing for enforcement of the contract.
5 We're arguing that plaintiff should be estopped to deny the
6 enforceability of this contract. It's a different
7 principle, Your Honor.

8 And then, lastly, on this part about the -- why we
9 would have an argument to enforce the contract, plaintiff
10 mentioned something about us not bringing forth evidence.

11 And I've already mentioned earlier, you know, I didn't
12 intend to be trying to play gotcha with plaintiff's
13 counsel. But as it stands today the fact is we have
14 presented the Court with the signed arbitration agreement.

15 Plaintiff's argument is that that arbitration
16 agreement was signed by somebody who didn't have authority
17 to do so.

18 I -- I would highlight the word argument. The only
19 thing that Your Honor has received in response to our
20 evidence is argument, and argument is not evidence, and so
21 that's my -- my point again.

22 If I go back -- and I'm not trying to set any -- I'm
23 not -- I am sure plaintiff's counsel can submit an
24 affidavit from -- from Trina Dawkins. I mean, I assume he
25 can get that. But -- but I do take issue with plaintiff

1 arguing that we've not presented evidence when, in fact, we
2 have, and there's -- there's no evidence that would call
3 into question that affidavit. Again, it's simply an
4 attorney's argument.

5 And I think we have a document that on its face says
6 Melissa Dawkins has -- she's represented her authority.
7 And in response to that all you have is legal argument.

8 To -- to properly upset what we've presented to the
9 Court, I believe there would need to be evidence, and-but,
10 in any event, Your Honor, the main focus of my argument
11 here is this merger and equitable estoppel claim, the
12 concept which the law supports this. And as far as there
13 being -- this being a proper path to -- to -- to compel
14 arbitration here, and the facts support us as to, you know
15 as to, the application of the governing law.

16 So, Your Honor, that's why -- with that I would,
17 again, request that Your Honor compel arbitration as the
18 facility has requested and -- and also to state a case
19 and -- and grant the case -- grant the motions to stay that
20 the other defendants have made.

21 Thank you, Your Honor.

22 THE COURT: Okay. Thank you.

23 Rather than -- than letting Mr. Jordan submit
24 additional documents -- I mean, Mr. Jordan, this -- let me
25 back up.

1 I will let you respond to the memorandums that were
2 submitted by counsel since they were filed just before
3 5:00 o'clock yesterday.

4 Am I correct on that, Mr. Hines?

5 MR. HINES: Your Honor, you're correct.

6 THE COURT: And you're the moving party.

7 MR. HINES: That's correct, Your Honor.

8 THE COURT: And -- and so I guess if Mr. Jordan had
9 objected at the beginning of the hearing we would have
10 continued this matter, but that really doesn't help y'all
11 either because y'all -- if I rule against the movant you
12 all need to get busy and conduct discovery. And jury
13 trials will be starting again soon. And if I move -- if I
14 rule in favor of the movant, then you all need to get busy
15 picking an arbitrator.

16 So what I will do -- Mr. Jordan, sir, I will allow you
17 to respond to anything that you feel that you need to.
18 Okay. I'll give you until Thursday to do that. And this
19 is only if you feel the need to, because in the end I'm
20 going to ask both of you to submit proposed orders
21 regarding your positions.

22 And, Mr. Jordan, you may be able to just make your
23 arguments by -- in -- in your proposed order.

24 Okay. And so if you want to think about that and
25 email me and Mr. Hines about it, let's say, by tomorrow at

1 noon, but I'll give you all ten days to submit your
2 proposed orders to me. Okay.

3 MR. HINES: Thank you very much, Your Honor.

4 THE COURT: Thank you, Mr. Hines. Thank you.

5 MR. JORDAN: That's ten days to submit a proposed
6 order and to file some type of responsive pleading or
7 responsive memorandum?

8 THE COURT: What I'd like for you to do, sir, is you
9 decide if you want to file a responsive memorandum to
10 Mr. Hines' memorandum that were filed on yesterday. And if
11 you do want to do that I'll give you until Thursday at
12 5:00 to do that.

13 Okay. And then you all will have ten days after that
14 to submit proposed orders.

15 If you decide not to do that, Mr. Jordan, and you just
16 want to go ahead and work on your proposed order, you let
17 us know. Either way, let us know by noon tomorrow. And
18 your ten days would start at noon or, you know, at
19 5:00 o'clock tomorrow. Okay.

20 MR. JORDAN: Thank you, Judge.

21 MR. HINES: Thank you very much, Your Honor.

22 THE COURT: Thank you all. Thank you for your
23 wonderful presentations and for the filings. It's very
24 helpful to me. All right. Nice to see you all.

25 END OF REQUESTED TRANSCRIPT OF RECORD

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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 16th day of March 2021.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

July 16, 2021

s/Linda D. Moffitt

Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Trina Dawkins, as Personal Representative of
the Estate of William Dawkins,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

CASE NO.: 2020-CP-42-03593

**PLAINTIFF'S FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION TO THE
DEFENDANT THI OF SOUTH CAROLINA AT
SPARTANBURG, LLC**

TO: Defendant, by and through its attorney of record, D. Jay Davis, Jr.:

Pursuant to Rules 33 and 34 of the South Carolina Rules of Civil Procedure, you are requested to answer the following Interrogatories and Requests for Production of Documents fully and in writing within thirty (30) days after service hereof. These Interrogatories and Requests for Production of Documents are continuing and call for answers to be supplemented by any information available to you up to the time of trial.

INSTRUCTIONS

A. Plaintiff requests Defendant to answer in writing and under oath in accordance with Rules 33 and 34 of the Rules of this Court, the interrogatories and requests for production below.

B. In answering these interrogatories and requests for production, furnish all information in the possession of the Parties, their officers, agents and employees, and their attorneys and investigators for their attorneys.

C. When used in these Interrogatories and Requests for Production of Documents, the term "defendant" or "you" and any synonym thereof, shall include, in addition to the named party upon whom these Interrogatories are served, all present and former subsidiaries, division, affiliates and predecessor entities of said defendant, as well as all of its present or past agents,

consultants, employees, representatives and others who are in possession of or may have created or obtained information for or on behalf of the defendant as defined herein.

D. If Defendant cannot answer the following interrogatories and requests for production in full after exercising due diligence to secure the information to do so, state the answer to the extent possible specifying your inability to answer the remainder and state whatever information or knowledge you have concerning the unanswered portion.

E. Each Interrogatory and Request for Production of Documents is considered continuing, and if Defendant obtains information which renders its answers, or one of them, incomplete or inaccurate, it is obligated to serve amended answers on Plaintiff.

F. Insofar as may be applicable, and except as otherwise indicated, the term "document" or "documents" shall refer to any and all writings and recorded materials, of any kind whatsoever, that is or has been in the possession, control or custody of the parties or of which the Parties have knowledge, whether originals or copies or in electronic form, including but not limited to contracts, documents, notes, rough drafts, interoffice memoranda, memoranda for the files, letters, research materials, correspondence, logs, diaries, forms, bank statements, card files, books of account, journals, ledgers, invoices, blueprints, diagrams, drawings, computer print-outs or tapes, reports, surveys, statistical computations, studies, pictures, maps, graphs, charts, minutes, manuals, pamphlets, or books of any nature or kind whatsoever; and all other materials handwritten, printed, typed, mimeographed, photocopied, or otherwise reproduced; and slides or motion pictures, television tapes; all mechanical tape recordings or other written or printed matter or tangible things on which words or phrases are affixed.

G. A request to "Describe" any oral statement or communication is a request to state:

1. The name and present address of each individual making such statement or communication.

2. The name and present address of each individual or individuals to whom the oral statement or communication was made.

3. The names and present addresses of any other individuals present when such oral statement or communication was made or who heard or acknowledged hearing the same.

4. The place where such oral statement or communication was made.

5. A brief description of the contents of such oral statement or communication.

H. A request to "cite" portions or provisions of any document is a request to state,

insofar as applicable with reference to such portion or provisions, the title, date, division, page, sheet, change order number, and such other information as may be necessary to accurately locate the portion or provision referenced.

I. The term "person" shall include a natural person, partnership, corporation, association, or other group however organized.

J. Whenever a request is made to "identify" a natural person, it shall mean to supply all of the following information:

1. His/her name.
2. His/her employer and the position at the time.
3. His/her last known address and telephone number.
4. His/her last known employer if current employer is unknown.

K. A request to "explain fully" any answer, denial, contention, or claim is a request, as applicable, to:

1. State fully and specifically each fact and/or contention in support of your answer, denial or claim; and
2. For each such fact or contention, to identify each person who has knowledge relative to that fact or contention, each document that tends to support that fact or contention; and each document that tends to dispute that fact or contention.

INTERROGATORIES

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not any written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.

3. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

4. For every written document, memorandum or other writing, which pertains to the facts, involved in this case, please state:

- a) The date on each document;
- b) The name, address and telephone number of the author of each document;
- c) The name of each addressee for each document;
- d) The name of each person who has received a copy of each document;
- e) The name, address and telephone number of each person who presently has custody, possession or control of the original and all copies of each document; and,
- f) A summary of the information contained in each document.

5. Please provide the name, title, and professional address of the person answering these interrogatories.

6. Please state fully the name of the defendant, including:

- a) Its d/b/a registered name;
- b) Its popular name;
- c) Any changes in the defendant's name within the past ten years; and,
- d) Its principal place of business.

7. Please state the name and address of any corporation of which the defendant is a subsidiary.

8. Please give the dates of, and briefly describe all mergers, consolidations, reorganizations, etc., in which the defendant has taken part since the date of its formation.

9. On the date that the plaintiff became a client or patient of the defendant, was the defendant accredited, licensed, or certified by any licensing entity? If so, please identify by name and address each such organization or entity, and in response to a Request to Produce, provide copies of any application for licensure or certification, with attachments.

10. State whether any reports have been filed by the defendant with any local, state, or Federal agency in connection with the events described in the plaintiff's complaint, and, if so, state:

- a) The date of each such report;
- b) The identity of the person or persons submitting each such report;
- c) The contents of each such report;
- d) The form of the report (oral, written, or otherwise); and,

- e) The identity of the custodian of each such report.

11. Have the facts and circumstances surrounding the events described in the plaintiff's complaint been investigated by any review committee, peer review committee, disciplinary committee, or any other committee associated with the defendant? If so, state:

- a) The name of each such committee making an investigation;
- b) The identity of the members comprising each such committee;
- c) The date or dates of each investigation; and,
- d) The persons interviewed by each committee.

12. Identify and provide the full names and current professional addresses of all physicians, nurses and medical personnel whose names, initials or abbreviated names appear in the medical records of William Dawkins (Note: a mere reference to the medical record in order to answer this interrogatory will be insufficient. The plaintiff requests the specific information regarding these people).

13. Within three years prior to the time of the events giving rise to the plaintiff's complaint, please set forth each date on which the defendant was inspected by any professional, national, state, or local authority or credentialing agency for the purpose of determining conformance with licensing regulations or any other regulations relating to the health and safety of patients who are at risk for falls and, as to each such inspection, please state:

- a) The name(s) of the inspector(s)
- b) The name and address of the organization conducting the inspection;
- c) All violations found by each inspection; and
- d) The name and address of the person who has custody of the report on each such inspection.

14. State whether the defendant was named or covered under any policy of liability insurance, primary, excess insurance or umbrella insurance at the time of care and treatment alleged in the complaint, and, if so, state the name of each such company, the policy number, the effective period and the maximum liability limits for each covered person or entity and each occurrence.

15. Identify each expert witness you intend to call as a witness at trial and for each such expert, provide the following:

- a) The subject matter to which he/she is expected to testify;
- b) The substance of the facts and opinions to which he/she is expected to testify;
- c) A summary of the grounds for each opinion; and
- d) An identification of any written report prepared by such expert.

16. If it is your contention that the defendant is immune from suit or damages because of any theory of immunity, please set forth all facts on which you base this contention.

17. If you contend that the defendant's liability for damages is limited by any statutory or other cap, please identify the applicable statute and set forth your contention for the maximum recovery allowed should the plaintiff prevail on the allegations of her complaint.

18. If you contend that any agent or employee of the defendant was acting outside the scope of his or her authority in caring for the plaintiff, please set forth all facts on which you base this contention.

19. In 2017, did the defendant have any mechanisms, policies or procedures by which the defendant, through its agents, employees or medical staff, monitored the quality of care provided by members of its medical staff regarding patients such as the plaintiff? If so, please identify and provide copies of each such policy and procedure in response to a Request to Produce.

20. In 2017, did the defendant have a written policy, procedure or protocol regarding any of the following:

- a) The evaluation, treatment and care of patients with pressure ulcers and/or other wounds;
- b) Scheduled management of patients with pressure ulcers and/or other wounds;
- c) reporting requirements for staff who observe evidence, signs or symptoms of pressure ulcers and/or other wounds, and;
- d) specific protocols for prevention of pressure ulcers and/or other wounds of patients if different from those identified in a) above;

To the extent that any such policies exist, please provide copies of those policies in response to a Request to Produce.

21. Please provide the following information for the defendant's physical plant and staff complement at the time of the plaintiff's care there:

- a) How many beds did the facility contain? Please identify beds by number, location and by level of care. For example, "On Wing A there were 27 beds for patients requiring skilled nursing."
- b) How many persons were employed by the defendant at its facility? Please provide numbers of employees and general educational or training levels, by shift and by level of care if different levels of care were offered at the time of the plaintiff's stay at the facility.
- c) What was the average patient census during the duration of the plaintiff's stay at the facility, by level of care?

- d) Did a physician maintain an office actually located on site during the plaintiff's stay at the facility? If so, who staffed that office and during what hours was staffing provided?
- e) If a physician did not maintain an office on site, what physicians or medical groups provided physician staffing? During what hours was physician staffing provided?

22. If you contend that any other entity is legally responsible for the injuries and damages alleged in the plaintiff's complaint identify that entity by name, address, and telephone number.

23. If you contend that any other entity is legally responsible for the injuries and damages alleged in the plaintiff's complaint, please provide the factual basis for your contention, and identify the documents or other prepared materials, if any, that support your contention.

REQUESTS FOR PRODUCTION

1. All writings and recordings in the possession, custody or control of this Defendant or this Defendant's attorney listed in, referred to, or used in the preparation of this Defendant's answers or responses to Plaintiff's First Set of Interrogatories.

2. All writings and recordings related in any manner to the medical care or medical treatment provided to William Dawkins.

3. In regard to medical care and medical treatments provided to William Dawkins, produce all Patient chart(s), Identification Sheets, History and Physical Examination Records, Consent Forms, Physician's Progress Records, Nurses Notes, Physician's Order Sheets, Consultation Notes, Laboratory Reports, Laboratory Test Notes, Consultation Reports, Discharge Summaries, Billing Records, Pathology Reports, Pathology Test Notes, notes or letters of any communications with any other physicians, and any other written or computer-generated files, photographs, plats, sketches, videotapes, audiotapes, pictures, drawings, animations, artist's renditions, x-rays, ultrasounds, diagrams, notes, memoranda, measurements, statements, correspondence, texts, records, reports, charts, laboratory slides, laboratory specimens, laboratory "cuts," electronic data files, e-mail communications, .jpg files, bitmap files, .tiff files, .gif files, or any other electronic images, data, webpages, brochures, information packets, manuals, or other writings or recordings, materials or physical evidence of any kind having any related to William Dawkins.

4. All medical articles, treaties, and/or any other medical literature you claim support your diagnosis, treatments, or care provided to William Dawkins.

5. All records of your charges for services and any related treatments provided to William Dawkins, together with any payments made thereon.

6. Copies of all writings or recordings related in any fashion to the events or claims in the Complaint obtained by this Defendant or anyone acting on his/her/its behalf via Subpoena *Duces Tecum*, signed authorization form, or other legal process.

7. All writings or recordings of any kind received from, provided to or generated by any expert witness whom this Defendant expects to call as a witness at the trial of this case. (In lieu of providing medical records and depositions transmitted to any expert, a listing of all of the medical records and depositions provided will be sufficient.

8. All writings or recordings of any kind relied upon by any expert witness in forming an opinion in this case whom this Defendant expects to call as a witness at trial.

9. Any writing or recording which this Defendant contends are relevant or which it may introduce at the trial of this action.

10. Written statements or transcripts of recorded statements taken from any witness or potential witness concerning the facts or issues of this action.

11. All writings or recordings relating in any way to the events set forth in the Complaint herein.

12. The *Curriculum Vitae* of any and all physicians, nurses, other healthcare providers, and any employees of this Defendant who filled out any portion of, signed, or initialed the medical records of William Dawkins.

13. The *Curriculum Vitae* of any and all witnesses whom you intend to call as an expert witness in the trial of this case.

14. A privilege log for all documents which you contend are entitled to some type of privilege or protection.

15. All correspondence concerning William Dawkins.

16. A copy of the declaration sheet and complete policy of liability insurance of Magnolia Manor Spartanburg. This would include any primary policy of insurance, any self-insured retention coverage and any excess or umbrella coverage and all endorsements or attachments thereto, including copies of any letters or assessment of additional premiums or monies for a period of five years prior to the date of this request. Additionally, this would include all insurance agreements and/or policies, in their entirety, which afford protection to any Defendant, for acts and omissions set forth by Plaintiff in the above entitled and numbered case including, but not limited to, primary, umbrella and excess policies which may obligate any respective insurance company to satisfy part or all of the judgment which may be rendered in an action against this Defendant arising out of the acts or omissions of any such member or

employee of any Defendant.

17. All writings or recordings related in any fashion to investigations undertaken regarding the matters alleged in the Complaint and the injuries of William Dawkins and/or damages sustained by William Dawkins.

18. All policies, procedures, manuals, protocols, written standards, standing orders, algorithms, guidelines, rules or regulations at Magnolia Manor Spartanburg governing the practice of medicine by any member or agent of the practice, which were in place during 2017, and all modifications or revisions thereto.

19. In particular, any policy or procedure referred to in response to the Plaintiff's First Set of Interrogatories to the Defendant, and in even more particularity any policy identified in response to Interrogatory 15.

20. All writings or recordings, including all correspondence contained in your files or charts to or from any liability insurance carrier that may provide coverage for the events outlined in Plaintiff's Complaint.

21. Copies of any and all Medicare and Medicaid forms which pertain to William Dawkins.

22. Any Arbitration Agreement which the Defendant claims is relevant to this case.

23. Contracts between the facility and any person or entity providing any service, to include *locum tenens* agreements with staffing companies, employment contracts with physician or non-physician staff, provision of care (independent contractor) agreements with any care provider, contracts for linen service, janitorial service or other cleaning or housekeeping services.

24. Any manual, whether electronic or paper, provided to staff that would purport to provide protocols, procedures, checklists, or other instruction related to patient care in any context.

25. Any documentation that William Dawkins is the subject of that would not be contained in his medical record, including but not limited to incident reports, family complaint logs, records from other facilities (such as hospital admission and discharge records, consultations, etc.).

26. Statistical reports related to numbers of patients, staffing complements, patient complaints, complications, infection rates, falls rates, IV infiltrations, or any other data collected by the defendant related to patient care or "problems" related to patient care (appropriately redacted).

27. Job descriptions by staff position—that is, if someone is categorized as a CNA,

what do CNA's do at the defendant's facility.

28. Job qualifications by staff position—that is, if someone wants to work as an RN, what are the minimum qualifications required to fill that position.

29. A wage and salary scale or range for all persons employed at the defendant's facility during the plaintiff's period of care.

If any document is withheld under a claim of privilege, please identify each such document and the privilege claimed. If any document requested is no longer in your possession or subject to your custody or control, please state whether it is missing or lost, destroyed, transferred to others or otherwise disposed of. For each document no longer in your custody or control, please describe it fully, and give the name and address of any individual currently possessing it or else any individual familiar with its contents.

You are required to produce the documents for inspection as they are kept in the usual course of business and you are required to organize and label them to correspond with the categories of the request.

Respectfully submitted,

s/William A. Jordan, III

William A. Jordan, III, S.C. Bar #: 101271
Jordan Law Center, LLC
622 Wade Hampton Boulevard
Greenville, South Carolina 29609
William@jordanlawcenter.com
(864) 235-0147
Attorneys for Plaintiff

Greenville, South Carolina
January 18, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
TRINA DAWKINS, AS PERSONAL	)	CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE	)	
OF WILLIAM DAWKINS,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	MOTION TO STAY STATE COURT
	)	PROCEEDINGS AND COMPEL
FUNDAMENTAL CLINICAL AND	)	ARBITRATION BY DEFENDANT THI OF
OPERATIONAL SERVICES, LLC;	)	SOUTH CAROLINA AT SPARTANBURG,
FUNDAMENTAL ADMINISTRATIVE	)	LLC D/B/A MAGNOLIA MANOR-
SERVICES, LLC; THI OF SOUTH	)	SPARTANBURG (MISIDENTIFIED
CAROLINA, LLC; THI OF SOUTH	)	SEPERATELY AS “THI OF SOUTH
CAROLINA AT SPARTANBURG, LLC;	)	CAROLINA AT SPARTANBURG, LLC”
THI OF SOUTH CAROLINA AT	)	AND “THI OF SOUTH CAROLINA AT
MAGNOLIA MANOR	)	MAGNOLIA MANOR-SPARTANBURG,
SPARTANBURG, LLC D/B/A	)	LLC D/B/A MAGNOLIA MANOR
MAGNOLIA MANOR SPARTANBURG	)	SPARTANBURG”)
	)	
	)	
DEFENDANTS.	)	
	)	

TO: WILLIAM A. JORDAN, III, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor- Spartanburg (misidentified separately as “THI of South Carolina at Spartanburg, LLC” and “THI of South Carolina at Magnolia Manor- Spartanburg, LLC d/b/a Magnolia Manor Spartanburg” and hereinafter referred to as “this Defendant” or the “Facility”), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action, and compelling arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq..

This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed at the time of Plaintiff's decedent's, William Dawkins' ("Mr. Dawkins"), admission to the Facility. See Arbitration Agreement attached as **Exhibit A**. The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, the arbitration would be governed by the FAA because the services and reimbursement thereof provided to Mr. Dawkins during his admission to the Facility involved interstate commerce. The Arbitration Agreement is expressly binding on Plaintiff, Plaintiff's decedent and this Defendant and, therefore, requires that Plaintiff's claims be submitted to arbitration according to the express terms of the Arbitration Agreement and the FAA and that this action be stayed until such arbitration has been had in accordance with the terms of the Arbitration Agreement. See 9 U.S.C §3.

This Defendant further requests that this Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions or discovery filed or served by Plaintiff while this Motion is pending.

This Motion is supported by the attached Arbitration Agreement, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits and any other evidence which may be submitted prior to the hearing on this motion, as well as by any oral argument to be presented by counsel at the hearing on this matter.

[Signature line on following page]

CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.

D. Jay Davis, Jr.

James D. Gandy, III

Alexandra J. Ginsburg

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

Attorneys for the THI of South Carolina at

Spartanburg, LLC d/b/a Magnolia Manor -

Spartanburg

Charleston, South Carolina

Dated: February 12, 2021

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

This Agreement is made between Magnolia Manor, Spartanburg ("Facility"), its agents, employees and servants, and William Dawkins ("Resident") or Melissa Dawkins ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident.

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

I understand and agree that I am giving up and waiving my right to a jury trial.

This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

Melissa Dawkins

Resident/Representative Signature

Date

Kris Milner

Authorized Agent of Facility

4/25/17

Date

Melissa Dawkins

Printed Name of Resident/Representative

Kris Milner/Admissions

Printed Name & Title

DEFENDANT'S
EXHIBIT

A

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
TRINA DAWKINS, AS PERSONAL	)	CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE	)	
OF WILLIAM DAWKINS,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL ADMINISTRATIVE	)	FUNDAMENTAL ADMINISTRATIVE
SERVICES, LLC; THI OF SOUTH	)	SERVICES, LLC'S MOTION TO STAY
CAROLINA, LLC; THI OF SOUTH	)	COURT PROCEEDINGS
CAROLINA AT SPARTANBURG, LLC;	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR	)	
SPARTANBURG, LLC D/B/A	)	
MAGNOLIA MANOR SPARTANBURG	)	
,	)	
	)	
DEFENDANTS.	)	

TO: WILLIAM A. JORDAN, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Fundamental Administrative Services, LLC ("this Defendant"), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor of Spartanburg (misidentified separately as "THI of South Carolina at Spartanburg, LLC" and "THI of South Carolina at Magnolia Manor- Spartanburg, LLC d/b/a Magnolia Manor Spartanburg") ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable Arbitration Agreement entered into between those parties.

This Defendant respectfully requests that this Honorable Court stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement, the appellate process, if any, on such determination has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits and any other evidence which may be submitted prior to hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.

D. Jay Davis, Jr.

James D. Gandy, III

Alxandra J. Ginsburg

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

Attorneys for the Defendant Fundamental

Administrative Services, LLC

Charleston, South Carolina

Dated: February 12, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
TRINA DAWKINS, AS PERSONAL	)	CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE	)	
OF WILLIAM DAWKINS,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL ADMINISTRATIVE	)	THI OF SOUTH CAROLINA, LLC'S
SERVICES, LLC; THI OF SOUTH	)	MOTION TO STAY COURT
CAROLINA, LLC; THI OF SOUTH	)	PROCEEDINGS
CAROLINA AT SPARTANBURG, LLC;	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR	)	
SPARTANBURG, LLC D/B/A	)	
MAGNOLIA MANOR SPARTANBURG	)	
,	)	
	)	
DEFENDANTS.	)	
	)	

TO: WILLIAM A. JORDAN, ATTORNEY FOR PLAINTIFF:

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This Defendant respectfully requests that this Honorable Court stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement, the appellate process, if any, on such determination has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits and any other evidence which may be submitted prior to hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.

D. Jay Davis, Jr.

James D. Gandy, III

Alexandra J. Ginsburg

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

Attorneys for the Defendant THI of South Carolina,
LLC

Charleston, South Carolina

Dated: February 12, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
TRINA DAWKINS, AS PERSONAL	)	CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE	)	
OF WILLIAM DAWKINS,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	FUNDAMENTAL CLINICAL AND
FUNDAMENTAL ADMINISTRATIVE	)	OPERATIONAL SERVICES, LLC'S
SERVICES, LLC; THI OF SOUTH	)	MOTION TO STAY COURT
CAROLINA, LLC; THI OF SOUTH	)	PROCEEDINGS
CAROLINA AT SPARTANBURG, LLC;	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR	)	
SPARTANBURG, LLC D/B/A	)	
MAGNOLIA MANOR SPARTANBURG	)	
,	)	
	)	
DEFENDANTS.	)	
	)	

TO: WILLIAM A. JORDAN, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Fundamental Clinical and Operational Services, LLC ("this Defendant"), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor of Spartanburg (misidentified separately as "THI of South Carolina at Spartanburg, LLC" and "THI of South Carolina at Magnolia Manor- Spartanburg, LLC d/b/a Magnolia Manor Spartanburg") ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable Arbitration Agreement entered into between those parties.

This Defendant respectfully requests that this Honorable Court stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement, the appellate process, if any, on such determination has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits and any other evidence which may be submitted prior to hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

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Charleston, South Carolina

Dated: February 12, 2021

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Trina Dawkins, as Personal Representative of
the Estate of William Dawkins,

CASE NO. 2020-CP-42-03593

Plaintiff,

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION STAY PROCEEDINGS
AND TO ENFORCE ARBITRATION**

vs.

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

Defendant(s).

OVERVIEW

This is a nursing negligence case. Mr. Dawkins was admitted to the Defendants' nursing facility, Magnolia Manor Spartanburg, on April 25, 2017. The Plaintiff, acting on behalf of Mr. Dawkins' estate, alleges that over approximately the next two months Mr. Dawkins did not receive proper wound care which led to severe injuries to his legs. The Plaintiff has brought both survival and wrongful death causes of action.

Mr. Dawkins was admitted to the facility on April 25, 2017. Defendants have produced an alleged arbitration agreement without Mr. Dawkins' signature. (Defendants' Exhibit A). The agreement appears to have the signature of Melissa Dawkins. *Id.* Defendants do not allege, nor is there any evidence to support, that Mr. Dawkins had ever executed a Power of Attorney, that a Guardian had ever been appointed for Mr. Dawkins, or that any physician had ever certified that Mr. Dawkins lacked the mental capacity to make his own healthcare decisions. To date, the Defendants have refused to participate in any discovery, citing the arbitration agreement. None

of these facts are in dispute. The Defendants do not allege that Melissa Dawkins was a Court-appointed Guardian for her father or that she was acting as his agent pursuant to a duly executed Power of Attorney. The Defendants do not allege that Mr. Dawkins had ever granted Power of Attorney to any particular agent.

The Plaintiff filed a Notice of Intent to File Suit, as required by statute, and after a failed mediation, filed this action. The Defendants have moved to stay this proceeding and compel arbitration. The clear and well-established case law means that the Defendants' motion should be denied.

PRIMARY LEGAL ISSUE – AUTHORITY TO BIND

In determining whether a particular dispute can be compelled into arbitration, this Court must first determine whether a valid agreement to arbitrate exists between the parties. The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App., 1999). Arbitration is available only when the parties involved contractually agree to arbitrate. *Id.* South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105, (1989). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

Defendants' motion to compel arbitration is effectively a motion to enforce a contract. In the ordinary course, a nursing home resident who alleges injury would bring his claims before the Court as Plaintiff has done here and the nursing home would mount its defense in the same forum. A valid contract to arbitrate their disputes is the only way for the parties to opt out of the litigation process. Defendants had no such contract with Mr. Dawkins. The "Arbitration Agreement" on which Defendants' motion relies is invalid because, under bedrock contract principles, there can be no contract without the mutual assent of its proposed parties. Mr. Dawkins never assented to the Arbitration Agreement and did not empower Melissa Dawkins to enter into such an agreement. The Defendants in this case have produced absolutely no evidence indicating that Melissa Dawkins had the legal authority to waive Mr. Dawkins' Constitutional right to a jury trial, or even to enter into any kind of contract on her behalf. Even assuming *arguendo* that Melissa Dawkins was a family member making decisions pursuant to the South Carolina Adult Health Care Consent Act (a presumption which should not be made because there is no evidence that Mr. Dawkins was not capable of making his own healthcare decisions), this motion should be denied.

This case is on all fours with several recent South Carolina cases. The seminal case in South Carolina is *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). *Coleman* clearly stands for the proposition that South Carolina's Adult Health Care Consent Act allows for certain individuals, under certain conditions, to make health care conditions for patients who are unable to consent, *but that this authority absolutely does not extend to the execution of an arbitration agreement.*

The South Carolina Adult Health Care Consent Act provides the order of priority of persons who have authority make health care decisions for patients who are unable to consent. S.C. Code Ann. § 44-66-30. An inability to consent is a specific situation defined by statute, where “two licensed physicians, each of whom has examined the patient” certify that the patient lacks the ability to consent. S.C. Code Ann. § 44-66-20. This authority extends to health care decisions, and secondarily to financial decisions necessitated by those decisions. *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). “An arbitration agreement is not considered to be a health-care decision when admission is not contingent upon its execution.” *Thompson*, at 686 (citing *Coleman*).

In *Coleman*, decedent’s sister did not have power of attorney – she was authorized by the Act to make medical decisions for patient – and when placing decedent in health care facility, executed both an admission agreement and arbitration agreement on behalf of decedent. *Coleman* at 451-52. The court held that the scope of the Act is to ensure that the patient’s wishes concerning her medical treatment are honored whenever possible, and that it does not confer authority to execute a document which involves neither health care nor financial terms for payment of such care. *Id.* at 454.

Further, the court noted the importance of the “separatedness” of the arbitration agreement and admission agreement; specifically, there was a “Residential Admission and Financial Agreement” and an “Agreement for Arbitration.” *Id.* at 454-55. “The scope of Sister’s authority to consent to ‘decisions concerning Decedent’s health care’ extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate arbitration agreement concerned neither health care nor

payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future.” *Id.* at 454. Because admission to the facility for health-related needs was not contingent upon execution of the arbitration agreement, it could not be said that the signatory had any authority to bind the patient as to the separate, voluntary arbitration agreement. *Id.*

Our Supreme Court has held that a surrogate without proper legal authority cannot bind a person to arbitration.

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

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014).

In the *Hodge* case, the Resident was admitted to a nursing facility while competent and without any Power of Attorney. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 550, 813 S.E.2d 292, 295 (Ct. App. 2018). Her husband signed all paperwork on her behalf, including an arbitration agreement. *Id.* at 550, 813 S.E.2d at 296. The Court of Appeals affirmed the Circuit Court’s finding that “Husband's signing of the Arbitration Agreement, Admissions Agreement, and other forms does not make him [wife]’s agent. [Wife] did not have a health care power of attorney. Additionally, the Facility knew she was competent at the time of admission as indicated by the doctor's examination and allowed her to sign other forms. The record contains no evidence from the Facility that [Wife], as the principal, represented Husband was her agent.”

Hodge at 573-74, 813 S.E.2d at 308. The Court found that even if the Husband did have the authority to make some decisions on her behalf, this did not extend to waiving the Constitutional right to a jury trial: “Moreover, even if Husband had authority to handle finances or make health care decisions, as Appellants contend is evidenced by Husband signing past healthcare documents, this court has held ‘the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.’” *Id.* at 547, 813 S.E.2d at 308 (citing *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686).

Circuit Courts around our state have denied motions to compel arbitration under the same or similar circumstances repeatedly, many of them against the same Defendants in this case. In *Hopkins* (Exhibit A), *McCraw* (Exhibit B), *Nanney* (Exhibit C), *Porter* (Exhibit D), *Owens* (Exhibit E), *Solesebee* (Exhibit F), *Murphy* (Exhibit G), *Boyd* (Exhibit H), *Daniels-Porter* (Exhibit I), and *Wagnitz* (Exhibit J), Nursing Home Defendants attempted to enforce arbitration agreements where the Resident had not signed the agreement and the alleged agent lacked any actual legal authority to bind the Resident to the agreement. 8 of these cases involve some of the same corporate Defendants named in this case; *Nanney* and *Owens* involve the same facility. In all of these cases the motions were denied at least in part on the grounds that the signatory to the arbitration agreement lacked any authority to enter into said agreement.

This Court should follow the precedent in *Coleman*, *Hodge*, and *Thompson* and the rationale from the various Circuit Court orders. In these cases, the Courts denied the nursing home defendants’ motion to stay the action and compel arbitration because the loved one of the resident who signed the arbitration and/or admission agreements lacked capacity to bind the

Resident to the arbitration agreement. In these cases, the person signing the agreement was not an authorized agent of the Resident of the facility and lacked the authority to bind that individual to an arbitration agreement, even if that individual did have the authority to make healthcare decisions for the Resident.

CONCLUSION

Mr. Dawkins did not sign the Arbitration Agreement at issue in this case, and Melissa Dawkins had no authority to sign it on his behalf, for numerous reasons. This Court should find the Defendants' arbitration clause unenforceable since no contract was formed between William Dawkins and any of the Defendants. There have been multiple similar cases in South Carolina and in all of them, where the signatory lacks the legal authority to bind the Resident to an arbitration agreement, the Courts have declined to enforce arbitration clauses. That should be the result here. An arbitration agreement is a legal document, and the signing of an arbitration agreement is not the making of a health care decision. An incapacitated person should not be bound to arbitration by someone who has no legal authority to do so, as it would be a grave injustice.

Respectfully submitted,

s/William A. Jordan, III

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March 12, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
TRINA DAWKINS, AS PERSONAL	)	CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE	)	
OF WILLIAM DAWKINS,	)	
	)	
PLAINTIFF,	)	DEFENDANT THI OF SOUTH
	)	CAROLINA AT SPARTANBURG, LLC’S
vs.	)	D/B/A MAGNOLIA MANOR-
	)	SPARTANBURG (MISIDENTIFIED
FUNDAMENTAL CLINICAL AND	)	SEPERATELY AS “THI OF SOUTH
OPERATIONAL SERVICES, LLC;	)	CAROLINA AT SPARTANBURG, LLC”
FUNDAMENTAL ADMINISTRATIVE	)	AND “THI OF SOUTH CAROLINA AT
SERVICES, LLC; THI OF SOUTH	)	MAGNOLIA MANOR-SPARTANBURG,
CAROLINA, LLC; THI OF SOUTH	)	LLC D/B/A MAGNOLIA MANOR
CAROLINA AT SPARTANBURG, LLC;	)	SPARTANBURG”) MEMORANDUM IN
THI OF SOUTH CAROLINA AT	)	SUPPORT OF ITS MOTION TO COMPEL
MAGNOLIA MANOR	)	ARBITRATION AND STAY STATE
SPARTANBURG, LLC D/B/A	)	COURT PROCEEDINGS
MAGNOLIA MANOR	)	
SPARTANBURG,	)	
	)	
DEFENDANTS.	)	

COMES NOW the Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg (misidentified separately as “THI of South Carolina at Spartanburg, LLC” and “THI of South Carolina at Magnolia Manor-Spartanburg, LLC d/b/a Magnolia Manor Spartanburg” and hereinafter referred to as “this Defendant,” “the Facility”, or “Magnolia Manor”), by and through its undersigned counsel, and submits the following Memorandum in Support of its Motion to Dismiss Plaintiff’s Complaint, Compel Arbitration, and stay court proceedings, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (“FAA”).

INTRODUCTION

Plaintiff has sued the Facility in tort based upon allegations, which arise solely out of and concern the residency of Plaintiff’s decedent, Mr. William Dawkins, at Defendant’s skilled

nursing facility. However, Ms. Melissa Dawkins (hereinafter referred to as “Ms. Dawkins”), as representative and agent for Mr. Dawkins and Mr. Dawkins’s daughter, executed and entered into a valid and binding Admission Agreement and Arbitration Agreement (“Arbitration Agreement”) with the Facility in connection with Mr. Dawkins’s residency there. **See Exhibit 1 – Admission Agreement; See Exhibit 2 – Arbitration Agreement.** The Arbitration Agreement covers all allegations raised in the Complaint and, according to its express terms, requires that the Plaintiff and the Facility submit this matter to arbitration. **See Ex. 2.** Further, the Arbitration Agreement explicitly binds not only the parties to the agreement, but “**also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.**” **See Id.** (emphasis added).

When the Admission Agreement and the Arbitration Agreement were signed by Ms. Dawkins on April 25, 2017, Ms. Dawkins was acting as William Dawkins’s agent and possessed apparent authority to enter into the Admission Agreement, including the various other consents and refusals, as well as the Arbitration Agreement, as discussed further below, *as conferred by Mr. Dawkins*¹. Ms. Dawkins and Mr. Dawkins presented Ms. Dawkins to the Facility as having authority to act on behalf of Mr. Dawkins and, as a matter of law, the Facility may rely on such apparent authority to enter into a valid, binding and enforceable contract. All indications are that Mr. Dawkins held Ms. Dawkins out – and Ms. Dawkins, who is Mr. Dawkins’s daughter, held herself out – as his agent with authority to enter into the Arbitration Agreement and the various other consents, refusals, and agreements related to his residency at the Facility on his behalf.

¹ Ms. Dawkins’s authority to admit Mr. Dawkins and to bind him to the contracts she entered into on his behalf on admission does not arise from the Adult Healthcare Consent Act, S.C. Code An.. §44-66-10 *et seq.*, as Mr. Dawkins was not rendered unable to make healthcare decisions as of the date of his admission (April 25, 2017).

Neither Ms. Dawkins or Plaintiff, Trina Dawkins, ever repudiated or canceled the Arbitration Agreement, at any point in time prior to her opposition to the Facility's efforts to enforce the Arbitration Agreement. Moreover, neither presently disputes and has never disputed that Ms. Dawkins had authority to admit Mr. Dawkins to the Facility on April 25, 2017.

The Arbitration Agreement represents (a) this Defendant's offer of alternative dispute resolution according to the terms of the Agreement to Mr. Dawkins, Ms. Dawkins, and his personal representatives, which includes Plaintiff, Trina Dawkins and (b) Mr. Dawkins's acceptance and Ms. Dawkins's acceptance of this offer. The Arbitration Agreement is clearly supported by valid, mutual consideration and therefore, the elements of a valid, binding and enforceable contract have been satisfied.

Plaintiff should be estopped from claiming that Ms. Dawkins had authority to enter into the Admissions Agreement and receive the benefits thereunder but refute the same authority to enter into the Arbitration agreement on the very same day. There is absolutely no evidence that the Arbitration Agreement was entered into under duress. Further, the Arbitration Agreement is not substantively or procedurally unconscionable by its terms. The Arbitration Agreement is valid on its face and should be enforced as such.

Moreover, Ms. Dawkins was, in fact, Mr. Dawkins's agent and possessed sufficient authority to enter into the Arbitration Agreement, which by its terms, further binds Plaintiff, the personal representatives of Mr. Dawkins. Accordingly, and for the reasons more fully discussed herein, this Defendant respectfully requests that the Court compel arbitration of Plaintiff's claims pursuant to the valid and binding contract between the Parties and, accordingly dismiss or stay Plaintiff's Complaint.

FACTUAL BACKGROUND

Plaintiff's father, Mr. William Dawkins, was admitted to the Facility for short-term care and rehabilitation on April 25, 2017. His daughter, Melissa Dawkins, entered into a number of contracts and consents with the Facility on behalf of Mr. Dawkins for the mutual benefit of both him and the Facility and their representatives and agents. Each of the contracts and written consents related to Mr. Dawkins's residency and care and treatment at the Facility and was signed by Ms. Dawkins on behalf of Mr. Dawkins. See **Exhibit 1** – Admission Agreement; **Exhibit 2** – Arbitration Agreement; **Exhibit 3** – Other Written Consents. As for the various consents, Ms. Dawkins consented to various directives and healthcare treatment on her father's behalf. **Ex. 3.**

At issue before this Court is the enforceability of the Arbitration Agreement entered into by Ms. Dawkins on behalf of Mr. Dawkins and on her behalf, which further extends and is binding to Plaintiff as personal representative in this case. Mr. Dawkins and Ms. Dawkins, expressly and implicitly through their actions, represented to the Facility that Ms. Dawkins was authorized to communicate with the Facility and otherwise act on Mr. Dawkins's behalf. This Defendant was under the reasonable belief based on the circumstances and representations made by Mr. Dawkins and Ms. Dawkins *and their family* to the Facility that Ms. Dawkins was authorized to enter in the Arbitration Agreement (and various other consents and agreements) as Mr. Dawkins's agent. Notably, Plaintiff does not assert that the Admission Agreement is invalid or that Mr. Dawkins entered the Facility unwillingly or without consent.

Following the execution of the Admission Agreement and pursuant to the Agreement set forth therein, Mr. Dawkins was admitted to the Facility and received skilled nursing care for the treatment of his health conditions and residential accommodations. Mr. Dawkins, Ms. Dawkins,

and the Facility each received the bargained-for benefits of the contracts they respectively entered into. Specifically, Ms. Dawkins and Mr. Dawkins received the benefit of the Facility's skilled nursing care and of other daily living necessities in return for their promises to pay for such care. Plaintiff has never challenged the validity of any of these agreements and consents.

On the date of admission, Ms. Dawkins explicitly represented that she was authorized to admit Mr. Dawkins to the Facility and execute necessary documents on his behalf, including the Arbitration Agreement. The very first provision of the Admission Agreement states that *all information submitted to Facility* is truthful and correct, including Ms. Dawkins's authority to bind her father, Mr. Dawkins, to certain agreements. See **Ex. 1**. Ms. Dawkins signed the Admission Agreement on behalf of Mr. Dawkins as his "Representative," as defined therein.

The Arbitration Agreement at issue defines "Magnolia Manor Spartanburg" as the "Facility" and William Dawkins as the "Resident," with Ms. Dawkins signing as Mr. Dawkins's "Representative." The relevant provisions of the Arbitration Agreement state the following:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules. See **Ex. 2, ¶ 3**.

The Arbitration Agreement further provides:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law. See **Ex. 2, ¶5**.

Additionally, the Arbitration Agreement has highlighted with pen:

I understand and agree that I am giving up and waiving my right to a jury trial.

See Ex.2, ¶ 6.

Regarding Ms. Dawkins's authority to sign on behalf of her father, the Arbitration Agreement states:

By his/her signature below, **the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.** (emphasis added) **See Ex. 2, ¶ 7.**

The Arbitration Agreement was executed by Ms. Dawkins as "Representative" of Mr. Dawkins, and the Admissions Director for the Facility signed on behalf of Magnolia Manor Spartanburg. The Arbitration Agreement explicitly states, "it is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident."

See Ex.2, ¶ 1. Thus, the Arbitration Agreement is also binding on Plaintiff.

ARGUMENT AND CITATION TO AUTHORITY

I. POLICY IN FAVOR OF ARBITRATION

As a general matter, there is a strong presumption in favor of the validity of arbitration agreements because of strong policy considerations favoring arbitration. O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997). Indeed, both federal and state policy favors arbitrating disputes. Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). "The federal policy favoring arbitration, as expressed in the [Federal Arbitration Act], is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements." Zabinski v. Bright Acres, 346 S.C. 580, 590, 553 S.E.2d 110 (S. Ct. 2001). Further, arbitration agreements are presumed valid, and "[t]he party resisting arbitration bears the burden of proving that the

claims at issue are unsuitable for arbitration.” Green Tree Fin. Corp.- Ala. v. Randolph, 531 U.S. 79, 91 (2000).

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND MANDATES THAT THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT BE COMPELLED TO ARBITRATION

A. The Arbitration Agreement is Governed by the FAA

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. The Arbitration Agreement, by its express terms and by law, is governed by the FAA. The Agreement states:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary to state law.

Ex. 2, ¶ 5.

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

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

9 U.S.C. § 4 (emphasis added).

The South Carolina Supreme Court ruled definitively in Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 382, 759 S.E. 2d 727, 733 (2014) that arbitration agreements executed between a skilled nursing facility and resident are governed by the FAA because they relate to the provision of healthcare and medical supplies, which in the aggregate are economic activities involving interstate commerce. Dean, 408 S.C. at 381, 759 S.E.2d at 732 (2014) (holding that skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA).

The Arbitration Agreement between the Facility, including its employees, and Mr. Dawkins as resident is precisely the type of arbitration agreement which the South Carolina Supreme Court determined in Dean involves interstate commerce. Moreover, South Carolina law supports that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E. 2d 839, 846 (Ct. App. 1999) (internal quotations and citations omitted); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)).

As further discussed herein, a binding and enforceable written agreement between Mr. Dawkins, by and through his personal representatives, and the Facility to arbitrate disputes that clearly involve and are related to interstate commerce exists in this case. Ms. Dawkins and Plaintiff are clearly a “Party” by the express terms of the Arbitration Agreement and in written representation upon signing it, and Plaintiff’s claims in her Complaint undoubtedly fall within the “Disputes” as contemplated in the Arbitration Agreement. Clearly, the Arbitration Agreement is governed by the FAA. Therefore, the binding precedent of this State mandates that Plaintiff’s

claims be resolved pursuant to the FAA and Plaintiff's claims should be compelled to arbitration and this case should be dismissed or stayed, as the case may be.

B. The Arbitration Agreement Must Be Placed on Equal Footing with All Other Contracts.

"[The] basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate", Allied-Bruce, 513 U.S. at 270, and to "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). "By its terms, the act leaves no place for the exercise of discretion by a . . . court, but instead mandates that . . . courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). Additionally, the FAA ". . . requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Zabinski, 346 S.C. at 582.

While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1423 (2017) (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)); see also 9 U.S.C. § 2 (providing that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.")). The FAA requires that the Court place the Arbitration Agreement "on *equal footing with other contracts* . . ." Concepcion, 563 U.S. at 339 (emphasis added).

III. THE ARBITRATION AGREEMENT IS A VALID AND ENFORCEABLE CONTRACT

When an arbitration agreement is governed by the FAA, the only question before the court is whether such arbitration agreement is a valid contract pursuant to South Carolina law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). Under South Carolina law, it is well-settled that the necessary elements of a contract are (i) offer, (ii) acceptance and (iii) valuable consideration. Carolina Amusement Co., Inc. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E. 2d 122 (Ct. App. 1993). Each of these elements are indisputably present with respect to the Arbitration Agreement made between Mr. Dawkins and the Facility.

A. The Arbitration Agreement is a Written Manifestation of the Defendant's Offer and Ms. Dawkins's, Plaintiff's and Mr. Dawkins's Acceptance thereof and is Supported by Mutual, Valid Consideration.

i. Offer and Acceptance

The Facility proposed the Arbitration Agreement to Mr. Dawkins and his representative, Ms. Dawkins, on or about April 25, 2017 and such proposal constitutes a valid offer by this Defendant. By the express terms of the Arbitration Agreement, Mr. Dawkins by and through Ms. Dawkins, acknowledged that Mr. Dawkins was not required to use Defendant's facility and such that such Agreement was binding on personal representatives and any person deriving their claims through or on behalf of Mr. Dawkins. See Ex.2, ¶ 1-2. By signing the Arbitration Agreement, Mr. Dawkins and his personal representatives accepted the offer. See Ex. 2, ¶ 7.

The Arbitration Agreement is clearly a written manifestation of an offer by this Defendant and acceptance of that offer by Mr. Dawkins, by and through Ms. Dawkins and

binding upon Plaintiff as personal representative as of April 25, 2017 and, therefore, the Court should find that these elements of a valid contract have been satisfied.

ii. Mutual, Valid Consideration

Also well-settled under South Carolina law is the principle that “mutual and concurrent promises afford sufficient legal consideration for the support of each other.” Furman University v. Waller, 124 S.C. 68, 117 S.E.2d 356 (1923); Johnson v. Spartanburg County Fair Ass’n, 201 S.C. 56, 41 S.E.2d 599 (1947) (citing to Furman University for the same proposition). This long-standing legal principle applies with equal force in the context of arbitration agreements, where both parties mutually assent to arbitration, as in any other type of contract. O’Neil, *supra* 115 F.3d at 272 (4th Cir. 1997) (holding a mutual promise to arbitrate constituted sufficient consideration to enforce an arbitration agreement); *see also*, Towles, 338 S.C. at 42 fn. 4 (citing O’Neil for the proposition that mutual promises to arbitrate support valid, sufficient legal consideration).

The promises to arbitrate by the Parties to the Arbitration Agreement – including Mr. Dawkins, Plaintiff and this Defendant - are undoubtedly mutual. Mr. Dawkins, Ms. Dawkins, Plaintiff and the Facility each mutually agreed to waive their respective rights to a judge or a jury trial, mutually agreed to have any Dispute resolved through alternative dispute resolution, including arbitration, and mutually agreed to an arbitration process and arbitration rules and procedures which would apply to and bind all Parties equally. **See Ex. 2**. Therefore, the Court should find that the Arbitration Agreement is supported by valid consideration through the mutual exchange of promises among each of Ms. Dawkins and Mr. Dawkins and the Facility. Accordingly, the Arbitration Agreement is a valid, enforceable contract, and the Court should compel the parties to arbitration in accordance with its express terms.

B. Ms. Dawkins's Attestation of Authority in the Arbitration Agreement Binds Plaintiff and Mr. Dawkins to the Arbitration Agreement as It is a Facially Valid Contract.

Ms. Dawkins represented herself to staff and admissions personnel at the Facility as her father's representative, with the authority to sign documents on his behalf, make decisions on his behalf and bind Mr. Dawkins, herself, and any personal representative pursuant to those documents. Indeed, immediately above her signature on the Arbitration Agreement, Ms. Dawkins attests in bold font:

By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative. See Ex.2, ¶7. (emphasis added).

Ms. Dawkins indisputably represented to the Facility that she had authority to act on behalf of her father in executing the Arbitration Agreement. It was clearly Ms. Dawkins's intention to bind her father, Mr. Dawkins, herself, and any personal representative on the face of the Arbitration Agreement according to its plain language.²

Notably, the Court faced facts similar to the ones at bar in Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. al, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (See Price Order Granting Defendant's Motion to Compel Arbitration, attached hereto as **Exhibit 4**) and in Josephine Spears v. Rehab Center of Cheraw, LLC et al, 2019-CP-13-00308 (January 10, 2020) (See Spears Order Granting Defendant's Motion to Compel Arbitration, attached hereto as **Exhibit 5**). In both of these cases, the plaintiff was the wife of a skilled nursing home resident at a skilled nursing facility in South Carolina. Further, the applicable

² As to Ms. Dawkins's intent to bind herself and Plaintiff, the personal representative, the Arbitration Agreement also provides: "It is **the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.**" Ex.2, ¶1. (emphasis added).

resident's wife executed a number of documents on her husband's behalf upon the latter's admission to the facility, including an admissions agreement and arbitration agreement similar to the ones in the case at bar. (See Ex. 4, p. 2-3; See Ex. 5, p. 1). In both Price and Spears, despite each wife's representation to the respective skilled nursing facility that she had authority to enter into the arbitration agreement on behalf of her husband, after the defendant skilled nursing facility moved to compel arbitration, each wife subsequently filed an affidavit refuting that she actually had authority in opposition to the defendant's motion to compel arbitration. However, in both Price and Spears this Court found that the signatory plaintiff's attestation of authority in the arbitration agreement bound plaintiff to its terms.

Specifically, this Court determined in Price that "the terms of the Arbitration Agreement clearly apply to the instant dispute[.]" because was it clearly the intent of the wife to bind her husband (and herself, as personal representative) according to the plain language terms of the arbitration agreement. (See Ex. 4, p. 5). Likewise, in Spears, the arbitration agreement at issue contained an express attestation of authority to enter into the agreement on behalf of the resident *identical* to Plaintiff's attestation in the Arbitration Agreement noted above.³ As such, this Court in Spears held, in part, that the wife's authority to sign the arbitration agreement at issue was "valid on its face" by its plain language (and indeed the arbitration agreement as a whole was found to be valid on its face) and that the skilled nursing facility had no obligation whatsoever to inquire as to the signatory plaintiff's authority beyond her own attestation. (See Ex. 5, p. 4).

As in Price and in Spears, Plaintiff in this matter expressly attested to her own authority to enter into the Arbitration Agreement on behalf of her father, Mr. Dawkins, and herself, as well

³ The arbitration agreement at issue in Spears contained the following attestation of authority: "By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative."

as bind Plaintiff, the personal representative. See Ex.2, ¶1. By signing the Arbitration Agreement, Ms. Dawkins is “presumed to have read, understood, and assented to [the] terms” of it. Gibson v. Epting, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019)(“[O]ne who has signed a contract is presumed to have read, understood and assented to its terms.”). Therefore, the Court should find that Plaintiff is bound by the plain language of the Arbitration Agreement. The authority Ms. Dawkins attested therein is sufficient to enforce the Arbitration Agreement, bind Plaintiff and Mr. Dawkins and compel this matter to arbitration.

C. Ms. Dawkins Possessed the Apparent and Inherent Authority to Bind Mr. Dawkins under the Arbitration Agreement, and should be Estopped from Denying the Validity of the Arbitration Agreement.

In further support of the Arbitration Agreement being a valid contract that should be enforced by this Court, the Facility also submits that Ms. Dawkins was, in fact, Mr. Dawkins’s agent with apparent and inherent authority to enter into the Arbitration Agreement.

i. Agency Relationship – Apparent Authority

A true agency relationship may be established by evidence of actual or apparent authority. R & G Const., Inc. v. Lowcountry Reg’l Transp. Auth., 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control.” Froneberger v. Smith, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). “An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.”

Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992).

The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. Eadie v. H.A. Sack Co., 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

The Facility points to Carraway v. Beverly Enters. Ala., Inc., 978 So. 2d 27 (Ala. 2007), as persuasive authority in this case. There, the plaintiff was the brother of a resident of a nursing home facility who executed a number of documents on his sister's behalf upon her admission to the facility, including an arbitration agreement. The brother signed the documents as his sister's authorized representative but did not have a power of attorney for his sister at the time. Nevertheless, as in this case, the admissions agreement in Carraway provided that plaintiff was his sister's legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. The arbitration agreement in Carraway was a separate document and was not a condition of admission to the facility. Id.

When signing the arbitration agreement, the brother in Carraway left the resident signature line blank and signed it as the "authorized representative" of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and

the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. Id. See also, Tenn. Health Mgmt. v. Johnson, 49 So. 3d 175 (Ala. 2010)(holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf). Notably, the Supreme Court of Alabama's holding in Carraway was applied as "persuasive authority" by this Court in Price, *supra*. **Ex. 4**, p. 8.

Clearly, Mr. Dawkins presented his daughter, Melissa Dawkins, as his agent and representative with authority to make decisions on his behalf with the Facility. Moreover, Ms. Dawkins expressly represented to the Facility that she was an agent for her father when executing various admission documents on behalf of her father, including the Arbitration Agreement at issue. (**See Ex. 1, Ex. 2 and Ex. 3**). She executed these documents in her capacity as Mr. Dawkins's "representative." Ms. Dawkins signed numerous consent documents and made various decisions regarding Mr. Dawkins's health. **See Ex. 3**. This continuity of decision-making by Ms. Dawkins further led the Facility staff to believe that she was acting as Mr. Dawkins's agent during this time.

Moreover, by allowing Ms. Dawkins to procure his admission to the Facility and thereafter by accepting the benefits of the contracts entered into in connection with that admission, Mr. Dawkins represented that his daughter was his authorized representative to act on his behalf in connection with admission. See R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000)(If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as his agent, "either **generally** or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances")(emphasis added).

A holding that Ms. Dawkins was *not* Mr. Dawkins's apparent agent would go against the fundamental concept of apparent agency: that an agency relationship is based on a third party's understanding of a principal's manifestations and a reasonable belief that the agent has been authorized to act. The Facility had reason to believe that (1) by allowing Ms. Dawkins to sign the admissions paperwork, including the documents providing for Mr. Dawkins's stay and the skilled nursing care provided at the Facility and (2) by relying on Ms. Dawkins to communicate with the Facility staff, Mr. Dawkins cloaked his daughter with the authority to execute the various documents related to his admission, including the Arbitration Agreement, which now binds Plaintiff. Further, neither Mr. Dawkins nor any member of his family repudiated or invalidated his Ms. Dawkins's action. Instead, Mr. Dawkins accepted the benefits of the contracts by remaining at the Facility and receiving skilled nursing care and services.

It is clear that an apparent agency relationship existed between Mr. Dawkins and Ms. Dawkins such that the Arbitration Agreement should be deemed enforceable.

ii. Inherent Agency Authority

Even if Ms. Dawkins lacked apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. Such inherent powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions "accompany or are incidental to transactions which the agent is authorized to conduct...." See, §§ 8A, 161 Restatement (Second) of Agency (1958); Smith v. Fitton & Pittman, Inc., 264 S.C. 129, 212 S.E.2d 925 (1975)(*abrogated on unrelated grounds*)(examining whether party had properly demonstrated the existence of inherent agency powers); Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r, 309 P.3d 372 (Wash. 2013); Daly v. Aspen Ctr. for Women's Health, Inc., 134 P.3d

450, 452 (Colo. App. 2005); Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210-11 (Ind. 2000); Cange v. Stotler & Co., 826 F.2d 581, 591 (7th Cir. 1987)(“[t]he powers of an agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.”)(citing to Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co., 177 F.2d 305, 309 (7th Cir. 1949)).

The basis for the doctrine of inherent agency is that, as between an equally innocent principal and third party with reference to an agent’s purportedly “unauthorized” actions, the third party should prevail. This well-established law follows from one of the cardinal principles of agency law: that third parties, such as the Facility, should not be disadvantaged because they dealt with an agent rather than a principal.

As set forth above, there is no dispute as to whether Ms. Dawkins was authorized to admit her father to the Facility. To the extent Plaintiff takes issue with her sister’s authority to bind their father to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to her sister’s authority to admit their father as a resident at Magnolia Manor Spartanburg. The Facility should not be disadvantaged for acting in accordance with the express representations of Ms. Dawkins regarding her authority to execute the various documents related to his admission, including the Arbitration Agreement, and her authority to act on behalf of Mr. Dawkins as his agent in communicating with the Facility.

iii. Agency by Estoppel

“When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.” R & G, supra, 343

S.C. at 433, 540 S.E.2d at 118. To properly show estoppel in South Carolina, this Defendant must show: “(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.” Boyd v. Bellsouth Tel.Co., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

In Price, *supra*, this Court ruled that the Plaintiff was equitably estopped from denying that she was her husband’s authorized agent during the latter’s admission to the skilled nursing facility:

In the case at the bar, [the facility] had not knowledge or reason to believe that Plaintiff was not [her husband’s] authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. [The facility] relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by [the facility] for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

(See **Ex. 4**, p. 9).

Similarly, in McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011), the facts are also substantially similar to the case at bar. (See McCutcheon – Order Granting Defendant’s Motion to Compel, attached hereto as **Exhibit 6**). There, the plaintiff was the husband of a resident of a nursing home facility in South Carolina who executed a number of documents on his wife’s behalf upon her admission to the facility, including an arbitration agreement. As is the case here, the husband signed the documents as his wife’s authorized representative but did not have a power of attorney for his wife at the time. Nevertheless, as in this case, the admissions agreement in McCutcheon provided that plaintiff

was his wife's legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. Also like here, the arbitration agreement in McCutcheon was a separate document and was not a condition of admission to the facility.

In McCutcheon, the United States District Court of South Carolina determined that the arbitration and admission agreements should be merged under general principles of contract law (See Sec. d. below - merger argument). Id. at *4. In addition, the McCutcheon court concluded the plaintiff was estopped from denying he had authority to bind his wife to arbitration, holding:

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. [Accordingly,] [i]t would be inequitable [] to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of [his wife], but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

Id. at *5.

As in Price and McCutcheon, it would be disingenuous and inequitable to allow Mr. Dawkins, by and through Ms. Dawkins, to effectively admit that his daughter was his authorized agent as to the Admission Agreement, but not the Arbitration Agreement.⁴ In the case at bar, the Facility had no knowledge or reason to believe that Ms. Dawkins was not Mr. Dawkins's authorized agent for purposes of executing the Arbitration Agreement and other admissions

⁴ To the extent Plaintiff argues that neither the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"), nor the Bill of Rights for Residents of Long-Term Care Facilities, S.C. Code Ann. §§ 44-81-10 to -70 (the "Resident's Bill of Rights"), gave Ms. Dawkins authority to sign the Arbitration Agreement on Mr. Dawkins's behalf, these arguments would be of no merit because the instant Motion does not rely on the AHCCA or the Resident's Bill of Rights as having granted Ms. Dawkins the authority to sign the Arbitration Agreement for Mr. Dawkins.

paperwork. The Facility relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties, which explicitly includes personal representatives, would be governed by its contents and such representations were relied upon by the Facility, only for the Plaintiff through the instant lawsuit to seemingly ignore the binding agreement. It is simply not equitable for Ms. Dawkins to hold herself out to the Facility as Mr. Dawkins's agent and representative, as further affirmed by Mr. Dawkins's holding out of Ms. Dawkins to the Facility, for the entirety of his 2-month residency and on the date of admission, but Plaintiff conveniently repudiate that her sister had any authority in response to this instant Motion. Accordingly, Plaintiff should be estopped from denying the validity of the Arbitration Agreement.

Relevant to the application of this equitable principle in the matter at bar is that there is an implied covenant of good faith and fair dealing in every contract, Adams v. G.J. Creel & Sons, Inc., and Plaintiff is no less bound by this covenant than the Facility. Ms. Dawkins, on behalf of *herself*, agreed to be bound by the terms of the Arbitration Agreement and also agreed to bind Plaintiff as personal representative. Indeed, the opening paragraph states that the Agreement is binding to the parties signing, but also personal representatives or "any persons deriving their claims through or on behalf of Resident." (See Ex. 2, ¶ 1). Furthermore, above Ms. Dawkins's signature on the Arbitration Agreement, she acknowledges and agrees: "**By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.**" (See Ex. 2, ¶ 7). There is no doubt, of course, that Ms. Dawkins could and did bind herself and Plaintiff to the Arbitration Agreement and there is no question here as to Ms. Dawkins's competency to have

done so. Thus, Mr. Dawkins owes Magnolia Manor covenants of good faith and fair dealing, and it would be *inequitable, unfair* and *not in good faith* to permit Ms. Dawkins to bind herself and Plaintiff to the Arbitration Agreement and hold herself out throughout Mr. Dawkins's residency as having authority to bind Mr. Dawkins to the Arbitration Agreement, yet allow Plaintiff to succeed in repudiating that position now just because Magnolia Manor seeks to enforce the terms of the Arbitration Agreement. To require good faith and fair dealing from Magnolia Manor as a contracting party, but not Ms. Dawkins, acting on her own behalf and on behalf of her father, and further binding Plaintiff as evidenced within the Arbitration Agreement, just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed "on *equal footing* with other contracts." Concepcion, 563 U.S. at 339.

D. The Arbitration Agreement and Admission Agreement Must Be Construed Together, and Plaintiff Should Be Estopped from Denying the Parties' Mutual Right to Arbitration.

The Admission Agreement and Arbitration Agreement are merged together, and Mr. Dawkins having effectively embraced/directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the Arbitration Agreement's enforceability.

i. Merger

The Arbitration Agreement and Admission Agreement were executed by Ms. Dawkins on behalf of Mr. Dawkins. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. Herron v. Century BMW, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement expressly contemplates that it relates to and concerns the very subject matter of the Admission Agreement—Mr. Dawkins's admission to Magnolia Manor.

Specifically, the Arbitration Agreement states that “in the event of any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at the Facility” and furthermore, such disputes “shall be resolved by arbitration...” (See Ex. 2, ¶ 3). Ms. Dawkins signed both the Admissions Agreement and the Arbitration Agreement on behalf of her father on the same day and at the same time—upon Mr. Dawkins’s admission to Magnolia Manor on April 25, 2017.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. Klutts Resort Realty, Inc. v. Down’Round Development Corp., 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. Id. See also Saro Investments v. Ocean Holiday Partnership, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will nevertheless still be construed together to determine the entire agreement between the parties. See Plaza Development Services v. Joe Hardin Builder, Inc., 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); accord Cafe Associates, Ltd v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991).

Indeed, in *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the *particular facts* before it, the Court nonetheless confirmed the validity of

the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument in the particular context of skilled nursing admission agreements and arbitration agreements:

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

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

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

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

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

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

As indicated previously, the court in McCutcheon, Price and Spears analyzed facts similar to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. (See McCutcheon - Ex. 6; Price – Ex. 4; Spear – Ex. 5). Indeed, this Court has cited to McCutcheon on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under similar circumstances. See Abrams v. Fundamental Long-Term Care

Holdings, LLC, et al, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); Campsen v. Fundamental Long-Term Care Holdings, LLC et al, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (See Abrams, Campsen attached hereto as **Exhibits 7 and 8**).

Accordingly, Mr. Dawkins, by and through the acts of his representative, Ms. Dawkins, on her own behalf and Plaintiff's, and Magnolia Manor, all contemplated that the terms of the agreement to admit Mr. Dawkins were contained in the Admissions Agreement and Arbitration Agreement. Ms. Dawkins executed the Arbitration Agreement in connection with the Admissions Agreement; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (Mr. Dawkins's residency at Magnolia Manor); the Arbitration Agreement and Admissions Agreement were agreed to by the same parties; and, therefore, the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

ii. Equitable Estoppel of Merged Agreement

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." Int'l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). "A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" Id. (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2nd Cir. 1999)).

Because of the doctrine of merger referenced above, this legal principle is properly applied in this case. The doctrine of equitable estoppel "exists to prevent a litigant from unfairly

receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision.” S. Ill. Bev., Inc. v. Hansen Bev. Co., 2007 U.S. Dist. LEXIS 76229 (S.D. Ill. 2007). Moreover, the Fourth Circuit has held that “no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001).

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates. S.A.S., 269 F.3d 187, 200 (3d Cir. 2001)(citing Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in Jackson v. Iris.com:

It is an axiomatic rule of contract law that a party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.

....

[W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007)(quoting in part Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp., 659 F.2d 836, 839 (7th Cir. 1981)(citing in part Int'l Paper Co.,

206 F.3d at 416)(internal quotations omitted); *accord Spears*, CA No. 2019-CP-13-00308 (Jan. 10, 2020)(See Ex. 5).⁵

In Wilson v. Willis, the Supreme Court of South Carolina favorably discussed the framework of the so-called direct benefits test—which test the Court of Appeals had applied in the decision then before the Wilson Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Dawkins received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement merged. 426 S.C. 326, 340–45, 827 S.E.2d 167, 175–77; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the Wilson Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added). Thus, Wilson—as well as logic itself—supports the use of the direct benefit test to answer the question of equitable estoppel in an arbitration case like this.

⁵ *See also THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11–888–CMC, 2011 WL 4089435, at *6 (D.S.C. Sept.13, 2011) (“Hall’s care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); *accord THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *4 (D.S.C. Oct. 31, 2014), *report and recommendation adopted*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

Here, Mr. Dawkins received extensive benefits associated with the Admission Agreement with Magnolia Manor. Indeed, Mr. Dawkins was admitted to Magnolia Manor by Ms. Dawkins for short-term residency and rehabilitation. Magnolia Manor provided skilled nursing care and residential services, as envisioned by the Admission Agreement, to Mr. Dawkins. Both Mr. Dawkins, Ms. Dawkins, and Plaintiff received the benefits of his residency at Magnolia Manor as provided by the Admission Agreement. It would be manifestly inequitable to permit a party to claim the other is liable in tort based upon a contractual relationship, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. In other words, Plaintiff cannot “have it both ways” by relying upon certain terms of the Admission Agreement when it works to her advantage and repudiating the Arbitration Agreement when it works to her disadvantage.

As previously noted, the Plaintiff’s allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against this Defendant based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement, and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Moreover, as is cited above, numerous courts hold that where a plaintiff receives the benefits of the contract, which both Mr. Dawkins, Ms. Dawkins and Plaintiff certainly did, the non-signatory (*i.e.* the Estate of William Dawkins) is estopped from denying an arbitration agreement merely because he did not sign the contract under which he received all of the benefits.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Dawkins received the benefit of his admission to the Facility, including, without limitation,

the room, board, care, and treatment he received therein. To deny his receipt of such benefits is illogical. It would require wholly discounting every single aspect of his residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility). Plaintiff herself does not even alleged this. (See Compl.) Therefore, as was held in McCutcheon, Price and Spears, this Court should find that Plaintiff is *equitably estopped* from refusing to comply with the Arbitration Agreement here, Mr. Dawkins having effectively embraced/directly benefitted from the Admission Agreement for the purpose of his admission only to later, via Plaintiff, attempt to repudiate the Arbitration Agreement with which the Admission Agreement was merged. (See **Ex. 6, Ex. 4 and Ex. 5**).⁶

iii. Coleman, Thompson, and Hodge are Distinguishable.

Plaintiff may argue that the Arbitration Agreement and Admission Agreement are not merged pursuant to Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), Coleman, 407 S.C. 346, 755 S.E.2d 450, and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 769 (Ct. App. 2016), and the Arbitration Agreement and Admissions Agreement are separate stand-alone agreements, and Ms. Dawkins did not possess the authority to enter into the Arbitration Agreement. Reliance on those cases is misplaced.

In Coleman, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the Supreme Court found, "On its face, this clause recognizes the 'separateness' of the [arbitration

⁶ Although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about the enforceability of the Admission Agreement, the Facility's equitable estoppel argument applies with equal for to the Admission Agreement.

agreement] and the admission agreement, not a merger of the two contracts . . . By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.” Id.

In the present case, the agreements “were executed by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (citing Klutts, *supra*, 268 S.C. at 88, 232 S.E.2d at 24). Specifically, the Admission and Arbitration Agreements were signed by Ms. Dawkins on her father’s behalf, and agreed to by Magnolia Manor on April 25, 2017. The documents were signed by the exact same person: Ms. Dawkins as representative for her father. The documents were agreed to for the same purpose and transaction of establishing Mr. Dawkins’s residency at the skilled nursing facility.

There is no language in either the Admission or Arbitration Agreement akin to the language in Coleman and its progeny to indicate the parties desired the documents be considered as separate contracts. Unlike the arbitration agreements at issue in Coleman, Hodge, and Thompson, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (See Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agmt. p. 12.) Indeed, directly contradicting the idea of any “separatedness” (in the parlance of the Coleman Court⁷), the “Entire Agreement” clause in the instant Admission

⁷ 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in Coleman—unlike the instant case—the “Entire Agreement” clause expressly referred to a separate arbitration

Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed “separatedness.” (Admission Agmt. p. 12.) And without question, the Arbitration Agreement is among these other materials.

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

Further still, it must be remembered that the merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”⁸ as indeed the Admission and Arbitration Agreements were here, there must be evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract.

agreement and, thus, “recognize[d] the ‘*separatedness*’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.”) (emphasis added).

⁸ Coleman, 407 S.C. at 355, 755 S.E.2d at 455.

As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties’ possessed a contrary intention. Cf. The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here. Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge.

Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. Even though the Arbitration Agreement was not a precondition to admission, this does not mean that the two instruments did not work hand-in-hand once the arbitration agreement came into existence (i.e., once it was in fact entered into). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement is indeed necessary to the Arbitration Agreement. In other words, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with, but that is not what happened.

The Arbitration Agreement was in fact executed, of course, and it was executed under circumstances giving rise to *the presumption of merger*—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the

Arbitration Agreement's) sole reason for being and the very subject matter of any "Disputes" that could arise under it.

It matters not whether the Arbitration Agreement was a condition of admission (though it was not here), only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon as it was by Ms. Dawkins, Mr. Dawkins and Magnolia Manor—was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Mr. Dawkins's relationship with Magnolia Manor: the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission. (Compare Admission Agreement (setting forth the terms of Mr. Dawkins's admission to the Facility) with Arbitration Agreement (providing for arbitration of disputes arising out of Mr. Dawkins's admission in the Facility).)

In fact, the Admission Agreement states, "[t]he undersigned further acknowledges that he/she received and read the Admission Handbook and other Admission materials and understands that these documents are made a part of this Agreement by reference herein." **See Ex. 1, p. 12.** By acknowledging and signing this Agreement, and immediately subsequently signing the Arbitration Agreement, it was clearly the intent of both parties that the Arbitration Agreement was a part and parcel of the Admission Agreement. To find otherwise would be an absurd interpretation of the actions and intentions of the Parties.

Superficial matters like the fact that Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and separately signed are immaterial. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and Arbitration Agreement are separate instruments, a fact which does not actually

suggest anything probative about the intent of the contracting parties as to whether they should be *construed* together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that merger is the default position, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all of these align—same time, same parties, same purpose, same transaction—our courts *will* consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” To allow the merger presumption to be upset, as, respectfully, the Court has done here, based on evidence that does not even go so far as to clearly indicate a contrary intention, but at most *might* (or might not) reflect a contrary intention, is to allow the exception to devour the rule.

Respectfully, the material facts of the instant case are different from those that controlled (and/or were simply not addressed in) Coleman, Thompson, and Hodge, and those cases do not control the outcome here. Under the particular facts of this case, an intent contrary to merger cannot reasonably be found. The Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and

in the course of the same transaction, the whole of which related to Mr. Dawkins's admission to the Facility and would not have been done at all but for his admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

E. The Arbitration Agreement is Not Unconscionable.

"In analyzing claims of unconscionability of arbitration agreements, . . . [courts should] focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 60, 791 S.E.2d 291 (Ct. App. 2016)(internal quotations omitted). Under the terms of the Arbitration Agreement, the parties are to select a third party arbitrator *jointly* "from a panel having experience and knowledge of the health care industry." **Ex. 2, ¶4.** If the parties are unable to agree upon such an arbitrator, the Court is vested with authority to make such a selection. The selected neutral arbitrator is vested with authority to hear the case and make a decision which is "binding on all parties." As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms. These provisions cannot be deemed oppressive or unjust, and accordingly do not support a finding of unconscionability.

Should Plaintiff contend in any supplemental briefing that this Arbitration Agreement is unenforceable because it is unconscionable, the law and facts surrounding Ms. Dawkins entering into this Arbitration Agreement and the clear language of the Agreement demonstrates this is clearly not the case. As an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration agreements identical to the one *sub judice* are not unconscionable. See McCutcheon v. THI of S.C. at Charleston, LLC, *supra*, at 6* - *8; Benson

v. THI of S.C. at Charleston, LLC, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011)(attached hereto as **Exhibit 9**); Abrams v. Fundamental Long-term Care Holdings, LLC, et al, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); Campsen v. Fundamental Long-Term Care Holdings, LLC et al, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

The Arbitration Agreement clearly articulates that the resident and representative are fully aware that there are various healthcare options and potential skilled nursing providers and admission to the Facility is not required. Indeed, the Arbitration Agreement states conspicuously:

It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident.

Ex. 2, ¶2.

Furthermore, highlighted in pen notation and in bold lettering, the Arbitration Agreement clearly states: **"I understand and agree that I am giving up and waiving my right to a jury trial."** See Ex. 2, ¶ 6 (emphasis in original).

Anyone who enters into a written contract has a duty to read the contract which she or he signs. Maw v. McAlister, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. Munoz v. Green Tree Financial Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." *Id.*

Ms. Dawkins, as the representative for her father, had a duty to read and understand the documents she was signing on his behalf under proper authority. Additionally, she also had a duty to communicate those terms to Mr. Dawkins as his agent. To the extent she did not, Plaintiff cannot now claim that Mr. Dawkins was unaware of the terms of the Arbitration Agreement that Ms. Dawkins voluntarily and with proper authority executed on her father's behalf, and which Mr. Dawkins later ratified.

Lastly, The United States District Court of South Carolina has repeatedly upheld the validity of arbitration agreements nearly identical to the one at issue in this matter. In evaluating these arbitration agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. McCutcheon, *supra*, at *3; THI of S.C. at Columbia, LLC v. Wiggins, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) (Currie, J.); *Benson*, *supra*. Along similar lines, any holding that the Arbitration Agreement at issue is unconscionable simply because it was executed in the context of an admission to the skilled nursing facility would be in violation of the clear precedent under Kindred and the FAA which instruct that arbitration agreements must be placed on equal footing with all other types of contracts. Accordingly, any argument by Plaintiff that the Arbitration Agreement is unconscionable is unfounded and therefore fails.

CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order either dismissing or staying the pending action and compelling arbitration.

CLEMENT RIVERS, LLP

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at Spartanburg, LLC's d/b/a/ Magnolia Manor-

Spartanburg

Charleston, South Carolina

Dated: March 15, 2021

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME:

William Dawkins

REDACTED

RESIDENT NUMBER:

DATE OF ADMISSION:

4/25/17

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among Magnolia Manor Spartanburg ("Facility"), William Dawkins ("Resident") and/or Melissa Dawkins ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

WHEREAS, the parties wish to admit Resident to Facility and hereto agree as follows:

I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.
2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.
3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.
4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.
5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

Original: Business File • Photocopy: Resident/Representative

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

1. Admit Resident upon receipt of a physician's order; assist in obtaining physician services if a personal physician becomes unavailable; obtain emergency physician services when required. *Resident is not deemed admitted until such time as all agreements required by law and Facility have been appropriately executed.* This provision may be waived in writing by Facility, at its sole discretion.
2. Maintain written records of financial transactions with Resident and/or Representative responsible for payment. Resident has the right to have personal funds held in trust in accordance with applicable state and federal law, as may be amended from time-to-time.
3. Furnish room, routine meals, nursing care, personal care, or custodial care to Resident in accordance with applicable State and Federal law. This provision expressly excludes extraordinary services, including but not limited to, physician care, private duty nursing, private sitters, specialty foods and therapies not required by law. Resident will be placed in a semi-private room, absent medical need for a private room as determined by Facility staff. Residents residing in private rooms will be billed accordingly.
4. Assist in applying for private insurance benefits, but not to accept assignment thereof unless otherwise noted as an exception herein.
5. Assist Resident and/or Representative in applying for Medicare or Medicaid benefits where applicable.
6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserves the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.
8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative has the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
9. Provide an activities program for Resident, components of which will be at the discretion of Facility.
10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

Original: Business File • Photocopy: Resident/Representative

B. RESIDENT AND/OR REPRESENTATIVE AGREE(S) TO:

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.
2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.
3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative has the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.
5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold*.
6. Provide and be responsible for personal items of clothing and property.
7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.
8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.
9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

Original: Business File • Photocopy: Resident/Representative

10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.

11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.

12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.

13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.

14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.

15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.

16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.

17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.

18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.

19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

Original: Business File • Photocopy: Resident/Representative

20. Resident and/or Representative will be responsible for paying all costs, expenses and reasonable attorneys' fees, whether or not suit is brought, in the event costs, expenses, and/or attorneys' fees are incurred by Facility in the collection of sums due from and owed by Resident or any other party on Resident's behalf to Facility.

III. FINANCIAL AGREEMENT

Resident and/or Representative will be responsible for immediate payment of all charges incurred as follows:

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☒-semi-private) accommodations, for a basic fee of \$ 111.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

- a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.
- b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.
- c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.

2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.

3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with

Original: Business File • Photocopy: Resident/Representative

state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance Section II-B-13 herein.

4. In the event Resident leaves Facility and has personal funds on account, Facility may deduct any outstanding monies due to Facility from said personal funds. The remainder will be distributed in accordance with applicable state and federal law.

5. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative shall pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

IV. TERMINATION

1. Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.

2. Except as otherwise provided herein, Facility may terminate this Agreement by providing at least fifteen (15) days advance notice to Resident and/or his/her legal representative.

3. This Agreement may be terminate immediately upon the occurrence of any of the following:

- a. Resident's condition has improved sufficiently so that he/she no longer requires the services provided by Facility.
- b. Resident's physical or mental condition changes and he/she requires a higher level of care which cannot be provided by Facility.
- c. Resident's death
- d. The safety or health of individuals in the Facility is endangered.
- e. Resident and/or his/her legal representative has failed to pay for his/her stay.
- f. Facility ceases to operate or is no longer able to provide services to Resident.
- g. Sanctions or remedies imposed by the Department.

4. In the event Facility terminates this Agreement through an involuntary transfer or Discharge, Facility shall provide appropriate notice and discharge planning as required by State and Federal law.

V. MEDICAID BENEFICIARIES

1. **Eligibility.** Eligibility for Medicaid-sponsored long-term care services is based on income and medical necessity. To qualify for assistance through the Medicaid program, a nursing home patient must need intermediate or skilled nursing care as determined through an assessment conducted by Medicaid program staff. The fact that a patient has already been admitted to a nursing home is not considered in this determination. It is possible that a patient could exhaust all other means of paying for nursing home care and meet Medicaid income criteria but still be denied assistance due to the lack of medical necessity.

It is recommended that all persons seeking admission to a nursing home be assessed by the Medicaid program prior to admission. This assessment will provide information about the level of care needed and the viability of community services as an alternative to admission. The Department may charge a fee, not to exceed the cost of the assessment, to persons not eligible for Medicaid-sponsored long-term care services.

Original: Business File • Photocopy: Resident/Representative

2. **Covered Services.** If Resident is a Medicaid recipient, the Medicaid Program will reimburse Facility for certain skilled services ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to: hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream, toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, and basic personal laundry.

3. **Non-Covered Services.**

- a. Medicaid is a cost-sharing program. Resident's monthly income must be contributed to the cost of his or her care. Medicaid determines how much of the Resident's monthly income must be paid to the Facility (also called "patient liability"). To the extent permitted by law, Resident's monthly Social Security and pension funds, minus the personal allowance retained by Resident (or other allowance as set by law), will be paid to Facility.
- b. Resident and/or Representative may purchase from Facility certain miscellaneous products and services that are not covered by Medicaid. An itemized list of fees for these additional products and services is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office.

4. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicaid for services rendered by Facility and authorizes Facility to receive payments from Medicaid pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicaid refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative will remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicaid.

5. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

6. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VI. MEDICARE BENEFICIARIES

1. **Covered Services.** If Resident is a Medicare recipient, the Medicare Program will reimburse Facility for certain skilled services such as nursing services and certain therapies ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to, hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream,

Original: Business File • Photocopy: Resident/Representative

toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, basic personal laundry and medically related social services.

2. **Non-Covered Services.** Resident and/or Representative will be required to pay certain other "Allowable Charges" which include, but are not limited to:

- a. Fees for certain products and services not covered under the Medicare program. Fees for such services will be identical those charged to private pay residents of Facility for the same products and services.
- b. Fees for certain products and services that are more expensive than the products and services covered under the Medicare program (e.g., a private room), as requested by a Resident and/or Representative. Fees charged for the more expensive products and services will be based on the difference between the fees charged to private pay residents of Facility and the customary charge for the same products and services under Medicare. Facility staff will inform Resident and/or Representative requesting additional or more expensive products or services that there will be a specified charge.
- c. Certain deductibles and co-insurance amounts under the Medicare Program.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicare for services rendered by Facility and authorizes Facility to receive direct payments from Medicare pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicare refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicare.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VII. PRIVATE PAY/INSURANCE

1. **Routine Services.** If Resident is paying for his/her stay privately OR if he/she is having his/her stay paid for through a third-party insurance carrier, Resident and/or Representative will reimburse Facility for routine services ("Routine Services") which include: routine nursing services; routine dietary services; routine activities programs; and routine room and bed maintenance services. Beauty shop fees are not included in the daily rate. Resident and/or Representative shall pay a deposit of two months' basic room and board prior to admission. Each subsequent monthly payment is due on or before the 10th day of the month.

Original: Business File • Photocopy: Resident/Representative

2. **Ancillary Services.** Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from any insurance company paying benefits to Resident for services rendered by Facility and authorizes Facility to receive payments from such insurance company pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent such insurance company refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment for these services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from such insurance company.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

magolia manor Spartanburg
375 Serpentine Dr
Spartanburg, SC 29303

All notices, consents, approvals and the like required to be given to Resident and/or Representative shall be given in writing to Resident and/or Representative to the address below or at such other address as he/she may designate:

William Dawkins
 REDACTED

Notice may be given via facsimile, e-mail or U.S. Mail, certified mail return receipt requested.

Original: Business File • Photocopy: Resident/Representative

IX. GOVERNING LAW

This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located. This Agreement will be binding and inure to the benefit of each of the undersigned parties and their respective heirs, personal representatives, successors and assigns.

X. SEVERABILITY

If any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement.

XI. CAPTIONS

Captions are for the purpose of reference only and do not govern, limit, modify, enlarge or in any manner affect the scope, meaning and intent of the provisions of this Agreement, nor will such captions be given any legal effect.

XII. MODIFICATIONS

Facility reserves the right to unilaterally modify this Agreement to conform to law and regulations as may be passed from time to time. Reasonable notice, considering all of the circumstances, will be given to Resident and/or Representative when any change is made in accordance with this paragraph. Any other modification, except as otherwise specifically reserved herein, will be made in writing and signed by all relevant parties.

XIII. WAIVER

Facility reserves the right to waive any obligation of Resident under the provisions of this Agreement in its sole and absolute discretion. No term, provision or obligation of this Agreement will be deemed to have been waived by Facility unless in writing, signed by Facility. Any waiver of any provision of this Agreement will not be deemed a waiver of any other term, provision or obligation of this Agreement, and the other obligations of Resident and/or Representative and this Agreement will remain in full force and effect.

XIV. RESIDENT

Use of the term "Resident" herein includes the Resident and any person with legal authority to handle Resident's funds or property and/or make medical decisions depending on the context in which the term is used.

XV. ASSIGNABILITY

This Agreement is fully assignable by Facility in the event that Facility is sold and/or the license is transferred such that a new licensee operates Facility. This Agreement, at Facility's option and without notice to Resident and/or Representative, may be automatically assigned to the new licensee and will be fully binding upon Resident and the new licensee.

XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.

2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.

3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.

4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.

2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.

3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.

4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

Original: Business File • Photocopy: Resident/Representative

5. In the event that an individual voluntarily agrees to become legally responsible for payment for the care and treatment of Resident, said Representative will be fully bound to the terms of this Agreement. Please note, Facility does not require a third-party guarantor.

6. Facility reserves the right to apply its indigent care policy, as appropriate, in its sole discretion.

XVIII. ENTIRE AGREEMENT

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

By signing below, I/we further acknowledge that I/we have made the above promises and representations in order to induce Facility to enter into this Agreement. The parties further understand that, by signing this Agreement, Facility is relying upon the truthfulness of the promises and representations I/we have made. The parties further agree that if any term or provision of the Agreement is found by a court or agency of competent jurisdiction to be legally unenforceable, the term and provision will be deemed severed from this Agreement and the remaining terms or provisions will be fully enforceable.

The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

Signature of Resident

Date

Printed Name of Resident

Resident Social Security Number

Witness Signature

Date

Printed Name of Witness

OR

Melissa Dawkins *4-25-17* *Melissa Dawkins*
Signature of Representative, if any Date Printed Name of Representative

Witness Signature

Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Kris Milner/Admissions *Kris Milner/Admissions*
Signature of Facility Official Printed Name of Facility Official & Title

Date

Original: Business File • Photocopy: Resident/Representative

General Information

Patient Name: DAWKINS, WILLIAM L

Patient DOB: REDACTED

Sex: Male

Date:

Time:

Status:

Location:

Room:

Service:

Patient Class:

Case Classification:

Preop DX:

Coded DX:

CPT Code:

Patient Demographics

Address: REDACTED

City: REDACTED

State: South Carolina

Phone Number: REDACTED

Zip Code: REDACTED

Case Management Forms by Wilson Pedrick Smith Jr., MD at 4/3/2017 5:04 PM

Author: Wilson Pedrick Smith Jr., MD

Service: Pulmonology

Author Type: Physician

Filed: 4/3/2017 10:51 PM

Date of Service: 4/3/2017 5:04 PM

Status: Signed

Editor: Wilson Pedrick Smith Jr., MD (Physician)

SPARTANBURG REGIONAL HEALTHCARE SYSTEM**PROGRESS NOTE ADDRESSING DECISIONAL CAPACITY**

Based upon my observation and involvement with this patient, it is my medical opinion that William L Dawkins DOES possess the decisional capacity to make healthcare decisions for self.

Progress Note:

Physician #2 of 2

Note: A Psychiatric consult is NOT required. This process requires a note with signatures of TWO Physicians! A progress note should be written regarding both the patient's medical condition and mental capacity. The completed progress notes will be forwarded at discharge to the extended care facility.

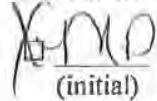
Electronically signed by Wilson Pedrick Smith Jr., MD on 4/3/2017 10:51 PM

Admission (Current) on 3/2/2017

AUTHORIZATIONS, CONSENTS & ACKNOWLEDGMENTS

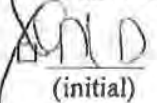
Please read, review and acknowledge each the following:

Treatment/Health Care Professionals:**Authorization for Treatment**


(initial)

I hereby authorize Facility's professional staff to administer nursing procedures, podiatric procedures, therapies, skin scrapings, nonsurgical dental procedures and laboratory and x-ray procedures on me/Resident. I understand that I may withdraw this consent at any time by notifying Facility in writing. I further understand that an additional consent will be required for any surgical treatment or for any treatment requiring the use of general anesthesia.

Medical Treatment


(initial)

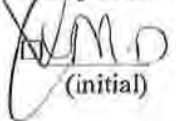
It is understood and agreed that Resident is under the control of his/her elected physician and/or his/her designee and that Facility is not liable for any act or omission as a result of following instructions of said physician(s)/designee(s). Resident consents to diagnostic imaging procedures, laboratory procedures, or medical treatment rendered to Resident under the general and special instructions of Resident's physician or physician's designee.

General Duty Nursing


(initial)

Facility provides general duty nursing care. Under this system, nurses are called to the resident's bedside by a signal system. If Resident is in such condition as to need continuous or special duty nursing care, it is agreed that Resident, Resident's legal representative or Resident's physician(s) will make the necessary arrangements for such care. It is understood and agreed that Facility shall not, in any way, be responsible for the failure to provide such care and is hereby released from any and all liability arising from the fact Resident is not provided with such care.

Independent Status of Health Care Providers and their Agents/Designees


(initial)

Resident and/or Resident's legal representative acknowledges that any and all health care providers and their agents/designees are not agents or employees of Facility. Resident and/or Resident's legal representative understands and agrees that each health care provider or their agent/designee who renders services to Resident will independently bill and collect fees for these services. Resident and/or Resident's legal representative agrees and understands that the health care provider's bills will be separate and apart from Facility's.

Selection of Medical Professionals:

You have the right to use your personal health care providers during your stay. In the event you do not have a current provider, the facility has a list of independent providers who are available to provide on-site care. If you have difficulty contacting any of these professionals, please notify our staff. Please indicate your choice of health care providers below, including the provider's phone number and address.

PHYSICIAN:

Name:

Address:

Phone:

Dr. Jonathan Liu
220 N. Main St. Ste 500 Greenville, SC 29601
864 412-0446

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

DENTAL☒ Yes☐ No

Examination Charge \$ _____

I would like to receive dental services at the above charge and have selected the following provider:

Name: _____

Address: _____

Phone: _____

VISION☒ Yes☐ No

Examination Charge \$ _____

I would like to receive vision services at the above charge and have selected the following provider:

Name: _____

Address: _____

Phone: _____

PODIATRY☒ Yes☐ No

Examination Charge \$ _____

I would like to receive podiatry services at the above charge and have selected the following provider:

Name: _____

Address: _____

Phone: _____

Self-Administration of Medications

Please indicate whether or not you wish to invoke your right to self-administer medications prescribed by your physician as outlined in the Admission Handbook.

☐ _____
(initial)

I wish to invoke my right to self-administer medications prescribed by my physician. I authorize and consent to an evaluation by the Interdisciplinary Team in order to determine my ability to carry out this responsibility.

☒ Y.M.D.
(initial)I wish to waive my right to self-administer medications. I request and authorize Facility's nursing staff to administer medications prescribed by my physician. **I understand that I am entitled to this right and that I may invoke this right any time in the future by written notification to the facility.**

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

Personal Property/Valuables/Money:


(initial)

I acknowledge that I have received, read or had read to me, and understand Facility's policy on personal property, valuables and money. I understand that all personal belongings should be labeled properly and entered on a personal inventory list. I understand that all items removed from or brought into the facility after admission should be documented on the inventory list and that missing items must be reported to appropriate staff as soon as possible.


(initial)

I acknowledge and understand that Facility is not responsible for damage to or theft/loss of any personal property/valuables/money not kept in compliance with Facility policies.

Deposit of Personal Funds:

Please indicate below whether or not you wish to deposit personal funds with Facility in accordance with the *Protection of Resident's Funds* policy outlined in the Admission Handbook. Please note that you are not required to deposit any funds with the facility.

☐

I do not wish to deposit personal funds with the facility at this time.

(initial)


(initial)

I authorize Facility to accept, hold and account for my personal funds in accordance with the policies outlined herein. I acknowledge that I have the right to revoke this authorization at any time upon written notice to Facility. I acknowledge that authorized State agencies may audit this account, regardless of my payer source.

Beneficiary Designation: (THIS PORTION TO BE FILLED IN BY RESIDENT ONLY)

In the event of my death, I authorize Facility to transfer all personal funds and property held by Facility to the following person(s): _____. If I have not named a beneficiary or the beneficiary cannot be located, I understand that Facility will hold and pay the funds in line with the State's regulations.

Advance Directive Acknowledgment:

☐

(initial)

I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy and State Requirements for Advance Directives* and have executed the following advance directive measures and a photocopy has been provided to the facility for inclusion with my Medical Records:

- ☐ Living Will
- ☐ Durable Power of Attorney for Health Care or similar agent designation
- ☐ "Do-Not-Resuscitate" Identification (CPR)
- ☐ Other: _____


(initial)

I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy and State Requirements for Advance Directives* and have elected **NOT** to execute any advance directive at this time, including DNR Identification. **I understand that facility staff will respond to medical emergencies with CPR measures and a full code will be instituted.**

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

Special Services:

Please indicate whether or not you authorize the following services to be provided. All associated fees will be charged to your account:

Telephone	☐ Yes	☐ No	☒ N/A	Charge \$ _____
Television	☐ Yes	☐ No	☒ N/A	Charge \$ _____
Newspaper	☐ Yes	☐ No	☒ N/A	Charge \$ _____
Laundry	☐ Yes	☐ No	☒ N/A	Charge \$ _____
Beauty Shop	☐ Yes	☐ No	☒ N/A	See charge list
Other(s) (Please Specify Below)				
_____	☐ Yes	☐ No		Charge \$ _____
_____	☐ Yes	☐ No		Charge \$ _____

Photographs by State/Federal Survey Agencies

I acknowledge and understand that, during my/Resident's stay, Federal and/or State surveyors (investigators) may take my/Resident's photograph as part of their independent survey/investigation process and in line with conditions of my/Resident's participation in the Medicare and/or Medicaid program. I understand that, in line with CMS guidelines, the surveyors must obtain written consent from Resident or his/her surrogate **before** any photographs are taken. I understand that the Federal/State Survey Agency is wholly responsible for acquiring and securing any photographs they may take.

SM
(initials)

I acknowledge and understand that neither Facility nor its parent, affiliates, officers, directors, employees, attorneys, assigns or any other person acting on its behalf, has any oversight or responsibility for the surveyors actions or inactions as it relates to taking photographs for their independent investigations.

Photograph/Audiotape/Videotape

☒ Yes SM ☐ No _____
(initial) (initial)

I hereby authorize Facility to photograph/audiotape/videotape me/Resident for its use in resident identification, infection control, surveillance and/or other medical purposes. I understand that, if the facility wishes to photograph/audiotape/video tape me for any other reason, (activities, marketing, media coverage, etc.), the facility will secure permission from me through a separate written authorization.

Posted Information

☒ Yes SM ☐ No _____
(initial) (initial)

To better serve you and meet your health care needs, permission is needed to post information regarding your/Resident's health care needs within your room and the facility as needed. The information to be disclosed will be the minimum amount necessary and shall serve as a means of communication, enabling staff to provide service while, at the same time, ensuring your/Resident's rights to privacy. Information to be disclosed may include, but not be limited to, therapy schedules, activities of daily living, ambulation/mobility parameters, swallowing and aspiration precautions, do-not-resuscitate orders.

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

Authorization to Release and Obtain Information

☒ Yes MP ☐ No _____
(initial) (initial)

I hereby authorize the facility to release and/or obtain medical information or other necessary data which may be necessary for my/Resident's continued treatment and care at the facility, including but not limited to the filing of insurance claims in my/Resident's/Facility's interest. I further authorize the release of information, medical or otherwise, to any government agency without my prior approval or that of my representative, if any.

Authorization to Receive/Open Mail

☒ Yes YMD ☐ No
(initial) (initial)

I hereby authorize Facility to open all mail received by me/Resident. Further, I would like this mail to be read to me/Resident upon receipt. You have the right to revoke this authorization at any time upon written notice to the facility.

Resident Signature

Date _____

Printed Name of Resident

Resident Signature _____ Date _____
Al Wilson Dawkins H-25
 Legal Representative Signature, if any _____ Date _____

Printed Name of Representative
Melissa Dawkins

Witness Signature _____

Date _____

Printed Name of Witness



 Facility Representative Signature Date

Kris Milner / Admission

INFORMED CONSENT FOR INFLUENZA VACCINE Inactivated or Recombinant

ELECTRONICALLY FILED - 2024 Mar 15 4:54 PM - SPARTANBURG - COMMUNITY HEALTH - CASE#2020CP4203593

Why you should get vaccinated?

Influenza (flu) is a contagious disease which spreads from person to person through coughing, sneezing and close contact. Symptoms come on suddenly and may last several days. Symptoms can include:

- Fever/Chills
- Sore throat
- Muscle aches
- Runny or stuffy nose
- Cough
- Headache
- Fatigue

Complications of influenza can include: • Pneumonia • Worsening of existing medical condition

The influenza vaccine is recommended for everyone 6 months and older. It's especially important that a person gets vaccinated if he/she is at risk for complications from influenza or he/she can spread influenza to those at risk. People at higher risk for complications from influenza include:

- People 65 and older
- People with a weakened immune system
- People with certain health conditions, such as heart, lung or kidney disease

For most people, the influenza vaccine prevents serious influenza-related illness. The vaccine will not prevent disease from other viruses, including influenza viruses not contained in the vaccine.

When should you get vaccinated?

Influenza viruses are always changing, so the influenza vaccine is updated every year. An annual vaccination is recommended.

Get the vaccine as soon as it is available. This should provide protection if the flu season comes early. It takes about 2 weeks for protection to develop after the vaccination, and protection can last up to a year.

Potential Adverse Effects/Negative Outcomes of Receiving the Vaccine

A vaccine could possibly cause serious problems, such as severe allergic reactions. The risk of a vaccine causing serious harm, or death, is extremely small. However, **if you have a severe egg allergy, severe allergy to any vaccine component (gelatin, antibiotics) or you've had a severe reaction after a previous dose of influenza vaccine, you should tell your doctor.** You should also talk with your doctor if you have ever had Guillain-Barre Syndrome (GBS) or you are presently ill.

The following **mild side effects** may occur soon after the shot and last 1 to 2 days:

- Hoarseness
- Cough
- Red or itchy eyes
- Fever
- Aches
- Fatigue
- Headaches
- Itching
- Soreness, redness, or swelling where the shot was given

If you have severe side effects including: a high fever, difficulty breathing, swelling of face and throat, hives, weakness, fast heart beat or dizziness, report these to your doctor immediately.

INFORMED CONSENT

I have read the above information or it has been explained to me and I understand the potential adverse effects and negative outcomes. Understanding the benefits, potential negative outcomes and side effects of receiving an **influenza vaccine**:

Initial appropriate response

☐ I hereby **GIVE** the facility permission to administer an **influenza vaccination**, unless medically contraindicated.

☒ I hereby **DO NOT GIVE** the facility permission to administer an **influenza vaccination**. *already had*

Resident Signature

Date

☒ Resident Representative and/or ☐ Durable Power of Attorney for Healthcare Signature/Relationship

Date

Facility Representative Signature/Title

Date

Resident Name

William Dawkins

REDACTED

Physician

W

See reverse for Pneumococcal Vaccine Consent

INFORMED CONSENT FOR PNEUMOCOCCAL VACCINE

Why you should get vaccinated?

Pneumococcal disease is an infection caused by a type of bacteria and can lead to serious infections including:

- Pneumococcal Pneumonia (lungs)
- Otitis media (middle ear infection)
- Pneumococcal Meningitis (covering of the brain)
- Pneumococcal Bacteremia (bloodstream infection)

Symptoms of pneumococcal pneumonia can include:

- Fever
- Shortness of breath
- Cough
- Chest pain

Symptoms of otitis media can include:

- Painful ear
- Red or swollen eardrum
- Sometimes sleeplessness, fever and irritability

Symptoms of pneumococcal meningitis can include:

- Stiff neck
- Fever
- Visual sensitivity to light
- Mental confusion and disorientation

Symptoms of pneumococcal bacteremia may be similar to some of the symptoms of pneumonia and meningitis, along with joint pain and chills.

The pneumococcal polysaccharide vaccine (PPSV) is recommended for the following:

- People 65 years and older
- People with a damaged spleen or no spleen
- People with chronic medical conditions, such as:
 - Alcoholism
 - Diabetes
 - Heart disease
 - Liver disease
 - Kidney disease
 - Lung disease
 - Sickle cell disease
- People whose immune systems have been weakened by cancer, HIV infection, AIDS or organ/bone marrow transplant or medications that lower immunity

Drugs such as penicillin were once effective in treating pneumococcal infections; but some strains of the disease have become resistant to these drugs, making treatment of pneumococcal infections more difficult. This makes prevention, through vaccination, even more important.

When should you get vaccinated?

Usually one dose of the PPSV is all that is needed. However, under some circumstances a second dose may be given.

A second dose is recommended for people 65 years of age and older who received their first dose when they were under 65, if five or more years have passed since that dose.

Potential Adverse Effects/Negative Outcomes of Receiving the Vaccine

A vaccine, like any medicine, could possibly cause serious problem, such as severe allergic reaction. The risk of a vaccine causing serious harm, or death, is extremely small. However, **if you have a severe allergy to any vaccine component or you've had a severe reaction after a previous dose of the pneumococcal vaccine, you should tell your doctor.** You should also talk with your doctor if you are presently ill. The vaccine may be less effective in some people, especially those with lower resistance to infection. These people should still be vaccinated, because they are more likely to have serious complications if they get pneumococcal disease.

The following mild side effects may occur after the vaccination:

- Fever
- Muscle aches
- Soreness/redness where the shot was given

If you experience more severe side effects including: a high fever, difficulty breathing, wheezing, hives, paleness, weakness, fast heart beat or dizziness report these to your doctor immediately.

INFORMED CONSENT

I have read the above information or it has been explained to me and I understand the adverse effects and potential negative outcomes. Understanding the benefits, adverse effects and potential negative outcomes and of receiving a **pneumococcal vaccine**:

Initial appropriate response

☐ I hereby **GIVE** the facility permission to administer a **pneumococcal vaccination**, unless medically contraindicated. To the best of my knowledge, I have not received a **pneumococcal vaccination** in the past five years.

☒ I hereby **DO NOT GIVE** the facility permission to administer a **pneumococcal vaccination** *already had*

Resident Signature

Date

☒ Resident Representative and/or ☐ Durable Power of Attorney for Healthcare Signature/Relationship

Date

Facility Representative Signature/Title

Date

Parts of this document were excerpted from the CDC's Vaccine Information Statement (8/19/2014) Inactivated Influenza Vaccine and the Pneumococcal Polysaccharide Vaccine, Vaccine Information Statement (10/6/09).

Resident Name

William Dawkins

REDACTED

Physician

LW

**PATIENT'S/RESIDENT'S CONSENT
TO PARTICIPATE IN FACILITY OUTINGS**

I, William Dawkins, state and declare that I am a current
Patient/Resident
patient/resident of Magnolia Manor Spartanburg AND that no agent or person has
Facility
been authorized by me or any Court to make health care decisions on my behalf.

By my signature below, I hereby notify Facility staff that I wish to be included in off-premises
community outings/trips sponsored by Facility during my stay.

I state and declare that my treating physician has issued an Order stating I may participate
in outings.

I understand that I will be advised of an outing in advance and that I will be provided with
the opportunity to decline participation in any outing.

I agree to adhere to Facility's policies and procedures while participating in any outings.

I understand that I may cancel this *Consent* in writing any any time by notifying Facility in
writing, except to the extent that action has been taken in reliance on this *Consent* prior to the
revocation.

I affirm that I have executed this declaration voluntarily and am fully aware of its content.

Release. By my signature below, I hereby hold Facility, its parent corporation, subsidiaries,
divisions, affiliates, officers, directors, employees, attorneys and assigns and any other person
harmless for any injuries or loss which I may sustain during this outing.

Melissa Dawkins 4-25-17
Patient/Resident Signature Date

Patient/Resident Signature

Date

Kris Milner
Witness Signature

Date

Kris Milner
Printed Name of Witness

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
TRINA DAWKINS, AS PERSONAL	)	CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE	)	
OF WILLIAM DAWKINS,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL ADMINISTRATIVE	)	
SERVICES, LLC; THI OF SOUTH	)	
CAROLINA, LLC; THI OF SOUTH	)	
CAROLINA AT SPARTANBURG, LLC;	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR	)	
SPARTANBURG, LLC D/B/A	)	
MAGNOLIA MANOR	)	
SPARTANBURG,	)	
	)	
DEFENDANTS.	)	
	)	

**DEFENDANT FUNDAMENTAL
CLINICAL AND OPERATIONAL
SERVICES, LLC’S MEMORANDUM IN
SUPPORT OF ITS MOTION TO STAY**

COMES NOW, Defendant Fundamental Clinical and Operational Services, LLC (hereinafter “this Defendant”), by and through its undersigned attorneys and submits this Memorandum in Support of its Motion to Stay.

BACKGROUND FACTS

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor- Spartanburg (misidentified separately as “THI of South Carolina at Spartanburg, LLC” and “THI of South Carolina at Magnolia Manor- Spartanburg, LLC d/b/a Magnolia Manor Spartanburg” and hereinafter referred to as “Facility Defendant”, or “Magnolia Manor”) entered into a valid Arbitration Agreement with Plaintiff’s decedent, William Dawkins (the “Arbitration Agreement”),

at the time of Mr. Dawkins's admission to Magnolia Manor. Per the Arbitration Agreement, Mr. Dawkins and Magnolia Manor agreed that the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA"), because the services and reimbursement thereof to be provided to Mr. Dawkins upon his admission to Magnolia Manor affected, related to, and involved the purchase of substantial quantities of goods and services that are produced outside of the state and shipped across state lines to the Facility Defendant, which is referred to as interstate commerce.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement and compel this matter to arbitration. See **Exhibit 1 - Motion to Stay State Court Proceedings and Compel Arbitration**. Per this Court's inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Magnolia Manor's pending Motion to Stay State Proceedings and Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled "Stay of proceedings where issue therein referable to arbitration," states the following:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,**

providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

Citing this statutory provision of the FAA, the South Carolina Court of Appeals held the “FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002)(citing 9 U.S.C. § 3).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it “may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id. See also Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)(“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added).

provision may impair an arbitrator's consideration of claims against a party that is compelled to arbitrate.”” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

In the instant matter, many of the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Magnolia Manor, a party to the Arbitration Agreement. To be sure, many of the claims against both this Defendant and Magnolia Manor are solely concerned with Mr. Dawkins’s residency at Magnolia Manor and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Magnolia. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Sumter East, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

As a general matter, Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and Magnolia Manor. Rather, Plaintiff repeatedly alleges that the “Defendants” are liable to Plaintiff under the various causes of action set forth in the Complaint. See Pltf.’s Complaint at ¶¶ 15-1, 21-29. Additionally, Plaintiff has asserted that this Defendant is vicariously liable as to any claims made against Magnolia Manor. See Pltf.’s Complaint. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Magnolia Manor could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Magnolia Manor. Should discovery and the trial of this matter continue against this Defendant in this Court, Magnolia Manor’s right to arbitration would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir.

2000)(Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would adversely affect signatory's right to arbitrate). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.
 D. Jay Davis, Jr
 Russell G. Hines
 James D. Gandy, III
 Alexandra J. Ginsburg
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 tgandy@ycrlaw.com; aginsburg@ycrlaw.com
*Attorneys for the Defendant Fundamental Clinical
 and Operational Services, LLC*

Charleston, South Carolina

Dated: March 15, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
TRINA DAWKINS, AS PERSONAL	)	CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE	)	
OF WILLIAM DAWKINS,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	DEFENDANT FUNDAMENTAL
FUNDAMENTAL ADMINISTRATIVE	)	ADMINISTRATIVE SERVICES, LLC'S
SERVICES, LLC; THI OF SOUTH	)	MEMORANDUM IN SUPPORT OF ITS
CAROLINA, LLC; THI OF SOUTH	)	MOTION TO STAY
CAROLINA AT SPARTANBURG, LLC;	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR	)	
SPARTANBURG, LLC D/B/A	)	
MAGNOLIA MANOR	)	
SPARTANBURG,	)	
	)	
DEFENDANTS.	)	

COMES NOW, Defendant Fundamental Administrative Services, LLC (hereinafter “this Defendant”), by and through its undersigned attorneys and submits this Memorandum in Support of its Motion to Stay.

BACKGROUND FACTS

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor- Spartanburg (misidentified separately as “THI of South Carolina at Spartanburg, LLC” and “THI of South Carolina at Magnolia Manor- Spartanburg, LLC d/b/a Magnolia Manor Spartanburg” and hereinafter referred to as “Facility Defendant”, or “Magnolia Manor”) entered into a valid Arbitration Agreement with Plaintiff’s decedent, William Dawkins (the “Arbitration Agreement”),

at the time of Mr. Dawkins's admission to Magnolia Manor. Per the Arbitration Agreement, Mr. Dawkins and Magnolia Manor agreed that the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA"), because the services and reimbursement thereof to be provided to Mr. Dawkins upon his admission to Magnolia Manor affected, related to, and involved the purchase of substantial quantities of goods and services that are produced outside of the state and shipped across state lines to the Facility Defendant, which is referred to as interstate commerce.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement and compel this matter to arbitration. See **Exhibit 1 - Motion to Stay State Court Proceedings and Compel Arbitration**. Per this Court's inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Magnolia Manor's pending Motion to Stay State Proceedings and Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled "Stay of proceedings where issue therein referable to arbitration," states the following:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,**

providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

Citing this statutory provision of the FAA, the South Carolina Court of Appeals held the “FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002)(citing 9 U.S.C. § 3).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it “may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id. See also Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)(“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added).

provision may impair an arbitrator's consideration of claims against a party that is compelled to arbitrate.”” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

In the instant matter, many of the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Magnolia Manor, a party to the Arbitration Agreement. To be sure, many of the claims against both this Defendant and Magnolia Manor are solely concerned with Mr. Dawkins’s residency at Magnolia Manor and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Magnolia. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Sumter East, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

As a general matter, Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and Magnolia Manor. Rather, Plaintiff repeatedly alleges that the “Defendants” are liable to Plaintiff under the various causes of action set forth in the Complaint. See Pltf.’s Complaint at ¶¶ 15-1, 21-29. Additionally, Plaintiff has asserted that this Defendant is vicariously liable as to any claims made against Magnolia Manor. See Pltf.’s Complaint. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Magnolia Manor could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Magnolia Manor. Should discovery and the trial of this matter continue against this Defendant in this Court, Magnolia Manor’s right to arbitration would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir.

2000)(Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would adversely affect signatory's right to arbitrate). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr

Russell G. Hines

James D. Gandy, III

Alexandra J. Ginsburg

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com;

tgandy@ycrlaw.com; aginsburg@ycrlaw.com

Attorneys for the Defendant Fundamental

Administrative Services, LLC

Charleston, South Carolina

Dated: March 15, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
TRINA DAWKINS, AS PERSONAL	)	CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE	)	
OF WILLIAM DAWKINS,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL ADMINISTRATIVE	)	DEFENDANT THI OF SOUTH
SERVICES, LLC; THI OF SOUTH	)	CAROLINA, LLC'S MEMORANDUM IN
CAROLINA, LLC; THI OF SOUTH	)	SUPPORT OF ITS MOTION TO STAY
CAROLINA AT SPARTANBURG, LLC;	)	
THI OF SOUTH CAROLINA AT	)	
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SPARTANBURG, LLC D/B/A	)	
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COMES NOW, Defendant THI of South Carolina, LLC (hereinafter “this Defendant”), by and through its undersigned attorneys and submits this Memorandum in Support of its Motion to Stay.

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The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added).

provision may impair an arbitrator's consideration of claims against a party that is compelled to arbitrate.” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

In the instant matter, many of the Plaintiff's claims against this Defendant arise out of the exact same factual underpinnings as his claims against Magnolia Manor, a party to the Arbitration Agreement. To be sure, many of the claims against both this Defendant and Magnolia Manor are solely concerned with Mr. Dawkins's residency at Magnolia Manor and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Magnolia. Without the issuance of a stay, disposition of the Plaintiff's claims against this Defendant may affect the disposition of the matter against Sumter East, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

As a general matter, Plaintiff's allegations of liability in the Complaint make very little distinction between this Defendant and Magnolia Manor. Rather, Plaintiff repeatedly alleges that the “Defendants” are liable to Plaintiff under the various causes of action set forth in the Complaint. See Pltf.'s Complaint at ¶¶ 15-1, 21-29. Additionally, Plaintiff has asserted that this Defendant is vicariously liable as to any claims made against Magnolia Manor. See Pltf.'s Complaint. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Magnolia Manor could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Magnolia Manor. Should discovery and the trial of this matter continue against this Defendant in this Court, Magnolia Manor's right to arbitration would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir.

2000)(Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would adversely affect signatory's right to arbitrate). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr

Russell G. Hines

James D. Gandy, III

Alexandra J. Ginsburg

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(843) 720-5406; jdavis@ycrlaw.com;

tgandy@ycrlaw.com; aginsburg@ycrlaw.com

*Attorneys for the Defendant THI of South Carolina,
LLC*

Charleston, South Carolina

Dated: March 15, 2021

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Trina Dawkins, as Personal Representative of
the Estate of William Dawkins,

CASE NO. 2020-CP-42-03593

Plaintiff,

**PLAINTIFF'S REPLY TO DEFENDANTS MEMO IN
SUPPORT OF MOTION TO COMPEL
ARBITRATION**

vs.

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

Defendant(s).

OVERVIEW

Defendants filed their Memorandum in support of their motion less than 24 hours prior to the hearing on their motion to stay the case and compel arbitration. Defendants rely primarily on an admission agreement, an arbitration agreement, and several healthcare consent forms as the basis for their motion. Plaintiff first asked for all of these documents in February of 2020, and has continued to ask for them since that time. Defendants did not produce any written arbitration agreement until February of 2021, when a short motion was filed. (Def. Mtn. to Stay and Compel Arbitration). The only supporting grounds for that motion were that the Federal Arbitration Act should be applied to the 1 page arbitration agreement. Nothing about any other documents or supporting grounds were mentioned. *Id.*

Defendants completely changed their argument on the eve of the hearing. (Def. Memo in Support of Mtn to Stay and Compel Arbitration). Defendants now argue that Melissa Dawkins was an apparent Agent of Mr. Dawkins', and that her signature on the various documents

referenced above is evidence of that agency. Moreover, Defendants argue that the admission agreement merged with the arbitration agreement to form a new agreement that the Plaintiff should be equitably estopped from enforcing because Ms. Dawkins fraudulently held herself out as someone who had authority to sign on behalf of her father.

In addition to such an argument flying in the face of well-established South Carolina case law, there is no factual basis in the record to support this argument. Plaintiff would show this Court that the exact opposite is true; namely that Ms. Dawkins never held herself out as her father's representative and that she was given assurances that despite her lack of legal authority to sign these documents, she should sign them or else her father's healthcare needs would not be met.

Beyond that, the Defendants' conduct up until February of 2021 was consistent with the position that there was no enforceable arbitration agreement and regardless of the merits of such an argument, the Defendants have now waived any arbitration argument that they may have once had. Finally, the Defendants should face Rule 11 Sanctions given their refusal to produce key documents and late attempt to ambush the Plaintiff with these documents.

PROCEDURAL BACKGROUND

Plaintiff first sought the arbitration agreement and other admission agreements on February 18, 2020. (Exhibit A, Request for Medical Records). Defendant facility responded with 200 pages of documents on March 10, 2020. (Exhibit B, Magnolia Manor records). These documents contained medical records only, and did not contain an admission agreement or an arbitration agreement. Plaintiff filed her NOI and standard discovery on April 24, 2020, which included the statement: "If [you] contend that an arbitration clause applies to this case, please

disclose immediately, and explain why it was not produced with the chart as requested by Plaintiff. . . . If Defendants do not immediately move to compel arbitration, Plaintiff will assume no arbitration clause exists or Defendants have abandoned any alleged claim to arbitration.” (Exhibit C, Plaintiff’s NOI). Defendants did not produce any arbitration agreement, did not raise an arbitration defense, did not move to compel arbitration, and instead participated in NOI-phase mediation without raising arbitration. (Exhibit D, Proof of ADR). Plaintiff then filed suit and later served discovery requests in January of 2021, and only then did the Defendants file a motion to stay and motion to compel arbitration (Exhibit E, Def. Mtn to Stay and Compel Arbitration). The one page alleged “Arbitration Agreement” was attached as an exhibit to this motion and produced to the Plaintiff for the first time at this point. Defendant also refused to participate in any written discovery, including refusing to produce any written documents relating to Decedent’s stay at the facility. (Exhibit F, Defendant Discovery Responses).

At the time the Plaintiff filed her Memorandum in Opposition to Defendants’ motion to compel arbitration (Friday, March 12, 2021), the Plaintiff was unaware of virtually all of the substantive grounds upon which these Defendants premise their motions and the factual bases behind those. Defendants have yet to present absolutely any factual basis for the contention that Melissa Dawkins held herself out to be a legal representative of her father who was capable of binding him to legal contracts.

For example, the Defendants argue that Melissa Dawkins “indisputably represented to the Facility that she had authority to act on behalf of her father in executing the Arbitration Agreement,” and that even though they recognized that she lacked any actual legal authority to

do so, that the Defendants were an innocent victim of her “unauthorized” actions. (Defendants’ Memorandum, p. 12, 18).

The Plaintiff vigorously disputes that this is the case. Melissa Dawkins repeatedly informed Defendants’ employees that she was not Mr. Dawkins’ Power of Attorney, that she was not his legal Representative, that she did not have authority to sign on his behalf, and that he had the capacity to make his own decisions and sign his own documents. (Exhibit G, Affidavit of Melissa Dawkins). She only signed the documents when Defendants’ staff insisted that he would not be admitted unless “someone” signed for him, and that she had grave fears about his health and safety were she not to sign the papers thrust in front of her. *Id.* She was not given time to review the documents, did not have them explained to her, and only signed because she was told that her signature was a condition of her father’s admission to the Defendants’ facility. *Id.* These are the sole facts in the record concerning the circumstances under which this arbitration agreement was signed, and clearly indicate that there was no agreement between William Dawkins and any Defendant in this case, simply because Melissa Dawkins gave absolutely no indication that she was her father’s representative. While there are other grounds on which to deny this motion, this should serve as the primary grounds to show that there was no enforceable agreement between Mr. Dawkins and the Defendants.

Estoppel

Defendants have now argued that Plaintiff should be equitably estopped from denying enforcement of the arbitration agreement. “Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.” *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). This defense requires proof that the

party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and, (3) had actual or constructive knowledge of the real facts. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance of the conduct of the party to be estopped. *Id.* Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. As person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. Of Fountain Inn*, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

There is absolutely no evidence in the record that Melissa Dawkins made any kind of false representation to these Defendants. Melissa Dawkins made it clear to the staff at Magnolia Manor that she was not her father's Power of Attorney and that she did not have the legal authority to sign on his behalf; she was told that someone had to sign the documents to have him admitted to the facility and was concerned about his health, so she signed the documents. *Id.* She has stated that she relied on the admissions staff's representations that it was acceptable for her to sign this paperwork. *Id.*

These are sophisticated corporate Defendants who are knowledgeable concerning Powers of Attorney and other agency issues, and they engaged in the drafting of an adhesion contract. They were also told that the signatory to these documents did not have the authority to sign them. They procured the signature anyway because "someone" had to sign them.

Defendants cannot point to a single case with similar facts, especially in the nursing home context, where estoppel has served as an equitable basis to enforce an arbitration contract.

Merger

In the present context, the Defendants' equitable estoppel argument is premised on the contention that the Admissions Agreement and Arbitration Agreement merged. However, merger does not occur where the documents recognize the "separateness" of the arbitration agreement, which is indicative of an intent that the common law doctrine of merger not apply. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. In *Coleman*, 407 S.C. at 350, 755 S.E.2d at 452, Ann Coleman signed several documents, including arbitration agreements, when admitting her sister to a health care facility. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. *Id.* The circuit court denied the motion to compel. *Id.* On appeal, the Coleman court found the language in the section titled "Entirety of Agreement" "recognizes the 'separateness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. Furthermore, the court noted that the "Entirety of Agreement" clause creates an ambiguity as to merger, and "the law is clear that any ambiguity...is construed against the drafter...." *Id.* at 355-56, 755 S.E.2d at 455. The Coleman court ruled the circuit court properly denied [the health care facility's] equitable estoppel arguments because no merger occurred. *Id.* at 356, 755 S.E.2d at 455.

Additionally, merger does not occur where an arbitration agreement and admission agreement are governed by different law, reference each other separately, provide different mechanisms by which they can be revoked, are separately paginated, and have their own signature page. *See Hodge*, 422 S.C. at 562-563, 813 S.E.2d at 302. In *Hodge*, 422 S.C. at 550, 813

S.E.2d at 295, Mable Hodge entered a rehabilitation facility. *Id.* Mable's husband executed various documents related to her admission, including an arbitration agreement and an admission agreement. *Id.* Mable was not present at the time her husband signed these documents on the day before her admission because she was still in the hospital. *Id.* However, Mable was competent at the time of her admission. *Id.* 422 S.C. at 550, 813 S.E.2d at 296. The circuit court denied [the facility's] motion to dismiss or compel arbitration. *Id.* The facility appealed arguing the circuit court erred in finding the arbitration agreement was separate from the admissions agreement because the two documents were merged. *Id.* 422 S.C. at 556, 813 S.E.2d at 299. The Court of Appeals upheld the circuit court, finding the admissions agreement and arbitration agreement did not merge. *Id.* 422 S.C. at 563, 813 S.E.2d at 302.

The Court based its rulings on the fact that the "Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law." *Id.* 422 S.C. at 562, 813 S.E.2d at 302. Additionally, similar to Coleman, the Arbitration Agreement recognized separateness because it referenced the two documents separately, "stating '[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.'" *Id.* Furthermore, the arbitration agreement stated it could be revoked within thirty days, while the admission agreement did not contain such an indication; rather, it provided the admissions agreement could only be amended by the patient with written agreement executed by the facility and the patient. The Court noted that each document was separately paginated and had its own signature page. Finally, signing the arbitration agreement was not a precondition to admission. *Id.* 422 S.C. at 562-63, 813 S.E.2d at 302. Based on this, the Court of Appeals found the admissions agreement

and arbitration agreement did not merge. *Id.* 422 S.C. at 563, 813 S.E.2d at 302. Therefore, because Mable received no benefit from the arbitration agreement, equitable estoppel did not bar Mable's claims. *Id.*

This case has many similarities to *Coleman* and *Hodge*: the admissions agreement and the arbitration agreement are two separate documents; the admissions agreements contemplates interpretation under state law while the arbitration agreement states that it is solely to be interpreted under federal law; the documents are separately paginated; the documents are titled separately; the documents have separate filenames; and, the documents have separate signature and date blocks.

The Admissions Agreement also contains an Integration Clause, which reads as follows:

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

By signing below, I/we further acknowledge that I/we have made the above promises and representations in order to induce Facility to enter into this Agreement. The parties further understand that, by signing this Agreement, Facility is relying upon the truthfulness of the promises and representations I/we have made. The parties further agree that if any term or provision of the Agreement is found by a court or agency of competent jurisdiction to be legally unenforceable, the term and provision will be deemed severed from this Agreement and the remaining terms or provisions will be fully enforceable.

The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

There is absolutely no evidence to indicate that the “other Admissions materials” referenced in the Admission Agreement includes the Arbitration Agreement. The words “arbitration” or “alternative dispute resolution” are not mentioned a single time in the Admissions Agreement. Contrary to the Defendants’ suggestion, it is not at all clear that these two documents are meant to be construed or interpreted as a single document. Given that the

Defendants drafted these documents, and that this is an adhesion contract, it would have been easy for them to make that fact obvious. That they did not do so should be held against them.

Sanctions and Waiver

Rule 11 of the South Carolina Rules of Civil Procedure allow a court to impose an appropriate sanction upon motion or upon its own initiative, if no good grounds exist to support a motion. Rule 11, SCRPC. Such sanctions may include reasonable expenses incurred by the defending party. Rule 11, SCRPC. As outlined in the procedural history above, other than a boilerplate answer, Defendants gave no indication that they were pursuing an arbitration Defense, nor did they produce critical arbitration documents when asked. This conduct continued for over a year and the Plaintiff was ambushed the evening prior to the hearing with voluminous new documents and legal grounds for the Defendants' motion. At the time the Defendants filed their motion, their position was that a one page arbitration agreement should be enforced pursuant to the FAA.

At that point in time, the Defendants had filed nothing indicating that they intended to pursue merger and estoppel arguments based on the admission agreement or apparent or inherent authority agreements based on the admission agreement and healthcare consents. They had been in possession of these documents for nearly four years at this point, but had repeatedly refused to provide them to the Plaintiff or the Court. They waited until the evening before the hearing to file a 143 page memorandum of law that included these, where the Plaintiff and her counsel were able to see these documents and grounds for the motion for the first time. As this memorandum indicates, there are numerous substantive and factual reasons why their motions should be denied. However, the manner in which the Defendants have conducted

themselves has caused the Plaintiff to incur additional expenses to further brief and address these issues, and has served as a continued delay tactic. It violates the fundamental fairness that should be expected in these proceedings to refuse to produce critical documents until just prior to the hearing. The Defendants have prejudiced the Plaintiff by causing considerable delay, refusing to participate in discovery, concealing the grounds for their motion, and allowing the Plaintiff to participate in the litigation process for over a year while never intending to do so themselves. Plaintiff seeks an order from this Court finding that the Plaintiff is entitled to reasonable costs incurring in again briefing this issue, a finding that the Defendants have waived any arbitration defense that they may have had (regardless of the substantive merits of such a claim), and any other sanctions that the Court may deem just and proper, including striking the Defendants' answer and/or holding them in Default. Given that the Defendants have unilaterally determined that they will not participate in discovery or otherwise engage in full disclosure of relevant materials, drastic sanctions are warranted.

Respectfully submitted,

s/William A. Jordan, III

William A. Jordan, III, S.C. Bar #: 101271

William@jordanlawcenter.com

622 Wade Hampton Boulevard
Greenville, South Carolina 29609
(864) 235-0147
Attorney for Plaintiffs

Greenville, South Carolina
March 18, 2021

EXHIBIT A



Jordan Law Center

Attorney William A. Jordan, III

February 18, 2020

Magnolia Manor Spartanburg
375 Serpentine Drive, #3026
Spartanburg, SC 29303

Re: Records Request
Our Client: William Lewis Dawkins
DOB: REDACTED
SSN: [REDACTED]

Dear Records Custodian/Administrator:

Please be advised that our office represents the Estate of William Lewis Dawkins regarding various legal matters. We are requesting that you provide us with a complete, unaltered, **color** copy of William Lewis Dawkins' medical records and any other documentation included in his chart **from the date of his admission through discharge**. Please also include all admissions documents and arbitration agreements.

This request includes, by is not limited to, the following documents:

- a. Physician's Orders and Progress Notes;
- b. Wound Care Assessments, treatments, and plan of care;
- c. Minimum Data Set (MDS);
- d. Interim Care Plan;
- e. Medication Administration Records;
- f. Treatment Administration Records;
- g. CNA care documentation;
- h. Dietary/Nutrition records;
- i. Incident/Accident Reports;
- j. Physician's History and Physicals;
- k. Physical Therapy Records;
- l. Speech Therapy Records;
- m. Occupational Therapy Records;
- n. Transfer Forms;
- o. DHEC reports/correspondence regarding Ms. Follett.

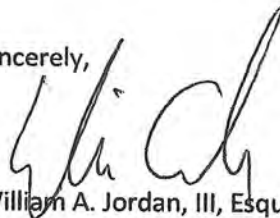
I am enclosing a signed, HIPAA-compliant release and a copy of the Certificate of Appointment authorizing you to release these documents to us.

622 Wade Hampton Boulevard Greenville, SC 29609
(Office) 864.235.0147 (Fax) 864.467.9349 www.JordanLawCenter.com
Email: William A. Jordan, III - William@JordanLawCenter.com

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Please be advised that 42 C.F.R. Section 483.10(b)(2) mandates that you must provide these records within 48 hours of the request. Please provide the requested records in digital format/copies pursuant to The Health Information Technology for Economic and Clinical Health (HITECH) Act. We will be happy to reimburse you a reasonable fee for copying pursuant to State statute. Feel free to contact us with any questions you may have. Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. A. Jordan, III', written in a cursive style.

William A. Jordan, III, Esquire

WAJ/tl
Enclosures

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

HIPAA COMPLIANT

"I understand that the release of Protected Health Information through this Authorization will not effect my treatment, payment, enrollment or eligibility for benefits."

I hereby authorize and request Magnolia Manor Spartanburg to furnish medical information and disclose patient identifiable health information to my attorneys:

William A. Jordan, Esquire
Jordan Law Center, LLC
622 Wade Hampton Blvd.
Greenville, South Carolina 29609

Phone: 864-235-0147 Fax: 864-467-9349

Patient Name: William Lewis Dawkins	Date of Birth: REDACTED
Patient Social Security Number: REDACTED	Dates of Treatment: Beginning 01/01/2017 through the present

Requested information will be used for any legal purposes regarding my: Potential Lawsuit

The scope of the health information to be provided or disclosed is as follows:

All medical records for all dates of service for all medical conditions and treatment from the above named health care provider, as well as all medical records for all dates of service for all medical conditions and treatment from other health care providers and facilities. All billing records regarding the referenced incident. All medical release authorization, notes, memoranda, correspondence, claim forms, reports and insurance documents regarding the referenced incident.

Initials
Initials

I acknowledge, and hereby consent to such, that the release information may contain alcohol, drug abuse, psychiatric, HIV testing results, or AIDS information.

I, the undersigned, have read the above and authorized the above Medical provider to disclose such information as herein contained. I understand that this consent may be withdrawn by me at any time except to the extent that action has been taken in reliance upon it or as otherwise specified by law. No individual has coerced me into signing this authorization and I am providing this authorization under my own free will. I understand that authorizing the disclosure of protected health information is voluntary. I can refuse to sign this authorization. I do not need to sign this form to receive treatment. I understand this information is received by the Jordan Law Center, LLC, and then this information may be subject to re-disclosure, and may no longer be protected by federal privacy laws. I acknowledge that this Authorization is subject to cancellation/revocation at any time, by the patient or legally qualified representative, provided that the cancellation is made in writing except to the extent that:

1. The facility has already acted on the request prior to receiving the request to cancel the authorization; or
2. If the authorization was given to release records to your insurance company in order to obtain insurance coverage.

PHOTOCOPIES OF THIS RELEASE ARE VALID AND MAY BE USED IN LIEU OF THE ORIGINAL

DATE: 02/17/20

BY:

Signature of the patient/client

W. A. Jordan
Other Responsible Person

Expiration: Unless earlier revoked, this authorization will expire upon the termination of the representation by the Jordan Law Center, LLC

for
William Dawkins

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

PROBATE COURT

IN THE MATTER OF WILLIAM L. DAWKINS

CASE NUMBER 2019ES4202072

CERTIFICATE OF APPOINTMENT

This is to certify that

MS TRINA DAWKINS

MS MELISSA DAWKINS

is/are the duly qualified

- ☒ PERSONAL REPRESENTATIVE
☐ GUARDIAN
☐ CONSERVATOR
☐ TRUSTEE
☐ _____

in the above matter and that this appointment, having been executed on the 23rd day of January, 2020, now in full force and effect, including authorization to receive all monies, income, principal, interest & dividends of and belonging to said estate.

RESTRICTIONS:

NONE.

Executed this 23rd day of January, 2020.

Ponda A. Caldwell

Do not accept a copy of this certificate without
the raised seal of the Probate Court.

Ponda A. Caldwell, Probate Court Judge

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Trina Dawkins, as Personal Representative of
the Estate of William Dawkins,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

CASE NO.: 2020-NI-42

NOTICE OF INTENT

TO: THE ABOVE NAMED DEFENDANT

You are hereby notified that, pursuant to S.C. Code § 15-79-125, the Plaintiff, by and through her undersigned attorney, intends to file suit against the Defendants named above.

If Defendants contend that an arbitration clause applies to this case, please disclose immediately, and explain why it was not produced with the chart as requested by Plaintiff. If Defendants do not raise arbitration immediately, Plaintiff will be prejudiced by producing the records referenced in the Responses to Standard Interrogatories and by scheduling and participating in the mandatory pre-suit mediation. If Defendants do not immediately move to compel arbitration, Plaintiff will assume no arbitration clause exists or Defendants have abandoned any alleged claim to arbitration.

Statement of Facts Entitling Plaintiff to Relief

Please take notice that the Plaintiff intends to file suit against the Defendants set forth above. This Notice of Intent to File Suit contains a short and plain statement of the facts showing that the Plaintiff is entitled to relief. Plaintiff alleges as follows:

1. Magnolia Manor Spartanburg is a community residential care facility operating in Spartanburg County, South Carolina, which is owned, operated and/or managed by the Defendants.

2. The employees of the Defendants failed to comply with the appropriate standard of care causing serious injury to William Dawkins.

3. Mr. Dawkins was a patient at Magnolia Manor Spartanburg, in Spartanburg, South Carolina. Mr. Dawkins was admitted to the facility on April 25, 2017 for long term care and rehabilitation. At numerous times during his stay at the Magnolia Manor Spartanburg, the staff failed to prevent, assess, treat, and monitor the condition of Mr. Dawkins' pressure ulcers and skin breakdown. The staff failed to timely develop and implement a plan of care. The nursing staff did not follow the recommendations of the wound nurse nor the physician's orders regarding wound care and prevention.

4. The Defendants deviated from the standard of care as set forth in paragraphs 5 - 8 below.

5. The Defendants failed to protect Plaintiff from pressure ulcers, causing him great pain and suffering.

6. The Defendants failed to meet the standard of care for the prevention and treatment of pressure ulcers which resulted in acute infection, gangrene, and surgery.

7. The Defendants failed to appropriately assess Mr. Dawkins' condition and based on that assessment, failed to provide a safe environment for Mr. Dawkins at Magnolia Manor Spartanburg.

8. The Defendants failed to monitor Mr. Dawkins adequately and failed to provide him assistance and other interventions to prevent him from developing pressure ulcers during his stay at the facility.

9. As a proximate result of the negligence of the Defendants set forth above, Plaintiff William Dawkins suffered damages. Plaintiff's damages include, but are not limited to:

- a) Mental and emotional distress;
- b) Medical expenses;
- c) Conscious pain and suffering;
- d) Loss of enjoyment of life;
- e) Wrongful Death;
- f) Punitive damages; and,
- g) Actual damages.

10. Pursuant to S.C. Code § 15-79-125(c), you are notified of the statutory requirement to participate in a mediation conference "within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit . . ." Plaintiff is ready and willing to schedule such mediation immediately. If mediation proves unsuccessful, Plaintiff will file the Summons and Complaint, as provided in S.C. Code § 15-79-125.

11. A copy of the affidavit of Paige Swatman, RN, LNC, supporting this claim is attached hereto.

12. By filing this Notice pursuant to S.C. Code § 15-79-125, Plaintiff does not waive Plaintiff's right to object to the constitutionality of the code section. Plaintiff contends that S.C. Code § 15-79-125 violates the equal protection clause of the United States and South Carolina Constitutions.

Respectfully submitted,

s/William A. Jordan, III

William A. Jordan, III, S.C. Bar #: 101271

Jordan Law Center, LLC

622 Wade Hampton Boulevard

Greenville, South Carolina 29609

William@jordanlawcenter.com

(864) 235-0147

Attorneys for Plaintiff

Greenville, South Carolina
April 24, 2020

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)

AFFADAVIT OF PAIGE SWATMAN, RN, LNC

RE: William Dawkins
 DOB: **/**/****

1. My name is Paige Swatman. I AM OVER THE AGE OF 18 AND COMPETENT TO MAKE THIS affidavit, which is based upon my education, training and experience.
2. I am a Registered Nurse with 35 years' experience in the long-term care field. My experience includes Director of Nursing Service, Regional Clinical Consultant, Vice President of Clinical Services, and Long-Term Care surveyor for the South Carolina Department of Health and Environmental Control.
3. I have reviewed the information provided and medical records of William Dawkins for the time period of Jan.19,2017 through November 20,2019. These records include Spartanburg Regional Hospital, Magnolia Manor Spartanburg, Spartanburg Hospital for restorative Care.
4. Based on the medical records review, it is my professional opinion that during the time period of April 25, 2017 and June 22, 2017, Magnolia Manor Spartanburg failed to meet the standard of care for the prevention and treatment of pressure ulcers. This resulted in multiple pressure ulcers with acute infection and gangrene.

These findings are based on review of the medical records as follows:

5. Mr. Dawkins was admitted to Spartanburg Regional Hospital on January 19, 2017 for weakness, lethargy, kidney failure and some skin redness on his buttocks. He was discharged to White Oak Manor skilled nursing for rehabilitation on January 26, 2017.
6. On January 29, 2017, Mr. Dawkins was re-admitted to Spartanburg Regional Hospital for diagnoses of kidney failure and low blood pressure. While there,

he had back surgery to repair T-8 through T-12 herniation. He also developed a foot ulcer and blisters to his right leg. This surgery resulted in decreased movement in the lower extremities.

7. Mr. Dawkins was discharged to Spartanburg Hospital for Restorative care on March 2, 2017, and was discharged to Magnolia Manor Spartanburg for long term care and rehabilitation on April 25, 2017.
8. On May 4, 2017, the Physician at Magnolia Manor Spartanburg documented the following, "Left extremity edema, moderately painful. Nursing said right lower extremity, but patient said both. Patient forgetful, but oriented X 3."
9. On May 15, 2017, the facility wound nurse documented, "RLE blister, 4th and 5th toe, 5th lateral metatarsal head, 4th toe left lateral, right heel non stageable, eschar, buttocks with shearing open wound. Instructions to nursing staff to prevent worsening. **Reposition in bed every 1-3 hours with wedge and pillows.**
10. On May 25, 2017, the dietitian wrote, "No pressure ulcers per nursing".
11. On June 1, 2017, the dietitian wrote, "continues to receive treatment for multiple pressure ulcers".
 - a. **This miscommunication from May 25, 2017 to June 1, 2017 indicates that interdepartmental care was not provided regarding Mr. Dawkin's wounds.**
12. The Interim care Plan developed on 6/4/17 did not address pressure ulcers.
 - a. **This indicates that a thorough and comprehensive assessment was not completed per standards of care.**
13. On 6/8/17, The VOHRA wound MD documented:
 - A. Wound of right calf for approximately 14 days. Black eschar 4.3 x 6 cm.
 - B. Necrosis right distal foot. Unstageable due to necrosis
 - C. Right proximal foot unstageable due to necrosis
 - D. Left heel unstageable due to necrosis
 - E. Left proximal foot unstageable due to necrosis

- F. Left distal foot unstageable due to necrosis
- G. Right calf unstageable due to necrosis
- H. Left calf unstageable due to necrosis
- I. Sacrum stage II pressure ulcer

14. The Magnolia Manor Spartanburg Certified Nursing Assistant Point of Care documentation dated 4/25/17 through 6/23/17 states the following:

A. How did the resident move in bed?

First shift –

- Did not occur x 7 days
- Independent x 5 days
- Supervision x 1 day
- family/non-facility staff provided care x 10 days.

Second shift-

- Did not occur x 4 days

B. Support provided for bed mobility:

First shift-

- No set up x 2 days
- Help only x 4 days

a. **This indicates that Mr. Dawkins did not receive appropriate assistance with turning and repositioning per Standards of care and as directed by the wound care nurse and Physician.**

C. Mr. Dawkins was admitted to Spartanburg Medical center on 6/22/17 for serious advancement of leg wounds. Irrigation and debridement were done on 6/30/17.

15. Mr. Dawkins condition continued to decline. On 7/13/17 he was taken to Spartanburg Restorative Care.

16. On 8/16/17, another wound debridement was done at Spartanburg Medical Center.

17. On 11/7/19, Mr. Dawkins was taken by ambulance to Cherokee Hospital and was transferred to Mary Black Hospital the same day.

18. Mr. Dawkins died on 11/20/19 of heart failure, respiratory distress and altered mental status.

References:

Federal Regulations for Long Term Care facilities states under 483.25 (b) (1)

F 686:

"Based on the comprehensive assessment of the resident, the facility must ensure that

(i) a resident receive care, consistent with professional standards of practice, to prevent pressure ulcers and does not develop pressure ulcers unless the individual clinical condition demonstrates that they were unavoidable; and

(ii) A resident with pressure ulcers receives necessary care and services, consistent with professional standards of practice, to promote healing, prevent infection and prevent new ulcers from developing.

Summary:

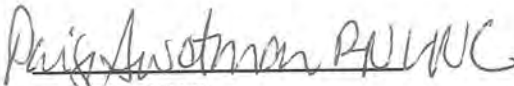
The staff at Magnolia Manor Spartanburg failed to prevent, assess, treat, and monitor the condition of Mr. Dawkins' pressure ulcers. The staff failed to timely develop and implement a plan of care. The nursing staff did not follow the recommendations of the wound nurse nor the physician's orders regarding repositioning.

Conclusion:

It is my professional opinion that the staff at Magnolia Manor Spartanburg contributed in a direct and proximate way to the pain, suffering and ultimate physical decline of William Dawkins.

Sworn and subscribed before me,

This 24th day of April


Paige Swatman, RN, LNC


Notary Public for South Carolina



STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Trina Dawkins, as Personal Representative of
the Estate of William Dawkins,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

CASE NO.: 2020-NI-42-00016

**PLAINTIFF'S ANSWERS TO STANDARD
INTERROGATORIES**

TO: THE ABOVE NAMED DEFENDANTS

Pursuant to S.C. Code § 15-79-125, Plaintiff answers Standard Interrogatories as follows:

INTERROGATORIES

1. Give the names and addresses of persons known to the parties to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

Trina Dawkins
c/o Jordan Law Center, LLC

Ms. Dawkins is the daughter of William Dawkins, as well as the Personal Representative of the Estate of William Dawkins. She is expected to testify as to the injuries Plaintiff suffered and the care he required. No statements have been taken from this witness.

Melissa Dawkins

Ms. Dawkins is the daughter of William Dawkins, as well as the Personal Representative of the Estate of William Dawkins. She is expected to testify as to the injuries Plaintiff suffered and the care he required. No statements have been taken from this witness.

All medical providers who provided treatment or services to the Plaintiff.

All employees, agents, or contractors of the Defendant.

All witnesses identified by the Defendant.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relates to the claim or defense in the case.

ANSWER:

Plaintiff is in possession of several photographs and will produce upon request.

Medical records and bills of William Dawkins.

Affidavit of Paige Swatman.

3. In cases involving personal injury, set forth the names and addresses of all physicians who have treated the party and all hospitals to which the party has been committed in connection with said injuries and also set forth a statement of all medical costs involved.

ANSWER:

Ambustar	TBD
Magnolia Manor Spartanburg	TBD
Mary Black Hospital	TBD
Medical Group of the Carolinas Wound Healing Serv. SMC	TBD
Spartanburg Medical Center	TBD
Blue Ridge in Brookview Healthcare Center	TBD

Plaintiff reserves the right to supplement this answer as discovery continues in this matter.

4. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER:

The Plaintiff is unaware of the existence of any such policies, their coverage amounts, or the policy numbers.

5. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

ANSWER:

Plaintiff working to ascertain and will supplement upon receipt.

6. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.

ANSWER:

Paige Swatman, RN, LNC

REDACTED

7. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER:

Triana Dawkins and Melissa Dawkins will testify about William Dawkins' damages. Medical providers will testify about the treatment they provided to William Dawkins.

Respectfully submitted,
s/William A. Jordan, III

William A. Jordan, III, S.C. Bar #: 101271
Jordan Law Center, LLC
622 Wade Hampton Boulevard
Greenville, South Carolina 29609

William@jordanlawcenter.com
(864) 235-0147

Attorneys for Plaintiff

Greenville, South Carolina
April 24, 2020

EXHIBIT D

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Trina Dawkins, as Personal Representative of
the Estate of William Dawkins,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2020NI4200016**MEDIATION RESULTS REPORT****(THIS FORM TO BE COMPLETED BY THE MEDIATOR WITHIN 10 DAYS OF
CONCLUSION OF THE CONFERENCE, WHETHER OR NOT AGREEMENT WAS
REACHED BY THE PARTIES.)**1. Mediated settlement conference commenced before me on Monday, October 12, 2020, at
which an impasse was reached.2. As a result of this conference, this case should be considered *(please check one)*:☐ Fully Settled *(please check one)*:☐ by Consent Judgment, to be filed by _____ or,
(Name of Designee)☐ by Voluntary Dismissal, to be filed by counsel of record for the parties.
(Name of Designee)☐ Partially Settled, with agreement of the parties on the following issues:*(attach separate sheet, if necessary):*☒ At an impasse. The mediation session was productive. There remains a
possibility that further reflection by the parties and settlement discussions could
lead to an agreement.

- ☐ In need of further mediation. (I ☐ **am**/ ☐ **am not** willing to mediate this case further.)
- ☐ Continued (Date) _____
3. Plaintiff ☐ **was**/ ☒ **was not** present.
Defendants ☐ **were**/ ☒ **were not** present.
4. Other participants were:
- ☒ attorney for plaintiff
 - ☒ attorney for defendants
 - ☐ representative for insurance carrier
 - ☐ guardian ad litem _____
 - ☐ experts _____
 - ☐ others
5. This case was co-mediated with: N/A.
6. Choice of the mediator was by:
- ☒ Stipulation and Agreement
 - ☐ Court Order.
7. The total number of hours spent in mediation was: .30 hours.
8. Further comments of the mediator:
Item # 7 above does not request and consequently does not reflect the preparation and work performed by the mediator before and after the actual mediation of this case. The mediator worked a total of 1.50 hours.

Date: October 12, 2020

Signature of Mediator: _____

Print Name of Mediator: Benjamin D. McCoy, Esquire

EXHIBIT F

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
TRINA DAWKINS, AS PERSONAL	)	CASE NO. 2020-CP-42-03593
REPRESENTATIVE OF THE ESTATE	)	
OF WILLIAM DAWKINS,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	DEFENDANT THI OF SOUTH
OPERATIONAL SERVICES, LLC;	)	CAROLINA AT SPARTANBURG LLC,
FUNDAMENTAL ADMINISTRATIVE	)	D/B/A MAGNOLIA MANOR-
SERVICES, LLC; THI OF SOUTH	)	SPARTANBURG'S ANSWERS TO
CAROLINA, LLC; THI OF SOUTH	)	PLAINTIFF'S FIRST SET OF
CAROLINA AT SPARTANBURG, LLC;	)	INTERROGATORIES
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR	)	
SPARTANBURG, LLC D/B/A	)	
MAGNOLIA MANOR SPARTANBURG	)	
,	)	
	)	
DEFENDANTS.	)	

TO: WILLIAM A. JORDAN, ATTORNEY FOR PLAINTIFF:

Pursuant to Rule 26 and 33 of the South Carolina Rules of Civil Procedure, the Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor- Spartanburg (misidentified separately as "THI of South Carolina at Spartanburg, LLC" and "THI of South Carolina at Magnolia Manor- Spartanburg, LLC d/b/a Magnolia Manor Spartanburg" and hereinafter referred to as "this Defendant" or the "Facility"), responds to Plaintiff's First Set of Interrogatories as follows:

I. RESERVATION OF RIGHTS

1. This Defendant specifically reserves and does not waive any rights to pursue and be heard on any and all defenses set forth in its Answer to the Complaint.

2. This Defendant specifically reserves and does not waive any objections which may be appropriate to the Request for Production.

3. This Defendant specifically reserves and does not waive any objections which may otherwise be available to it and further states that no response should be deemed as an admission of relevancy, materiality or admissibility of any response or document produced. It further reserves the right to amend or supplement its response, if appropriate.

II. GENERAL OBJECTIONS

1. This Defendant objects to responding to any Interrogatory or Request for Production that seeks information which constitutes confidential attorney-client communication or which constitutes protected work product materials.

2. This Defendant objects to any production of materials that falls outside the scope of Rule 26(b)(1) or which exceeds the scope of discovery otherwise provided by the Federal Rules of Civil Procedure or by statute or common law.

3. This Defendant objects to Plaintiff's discovery requests which are vague, overly broad, unreasonably burdensome, or duplicative.

4. This Defendant objects to the Plaintiff's discovery requests to the extent they seek information which is not in the possession of this Defendant as defined by the Federal Rules of Civil Procedure.

5. This Defendant objects to the production of documents protected by the self-critical analysis privilege.

6. This Defendant objects to the production of materials protected by S.C. Code Ann. § 43-38-20.

7. This Defendant objects to the production of materials protected by the provisions of 42 C.F.R. § 483, et. seq.

8. This Defendant objects to the production of documents which are protected by federal privacy laws including, but not limited to, the provisions of the Health Insurance Portability and Accountability Act.

9. Each of the below answers are provided and made reserving each of these objections.

III. INTERROGATORIES

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not any written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

Defendant reserves the right to supplement this response as discovery continues.

3. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

4. For any written document, memorandum or other writing, which pertains to the facts, involved in this case, please state:

- a) The date on each document;
- b) The name, address and telephone number of the author of each document;
- c) The name of each addressee for each document;
- d) The name of each person who has received a copy of each document;
- e) The name, address and telephone number of each person who presently has custody, possession or control of the original and all copies of each document; and
- f) A summary of the information contained in each document.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

5. Please provide the name, title, and professional address of the person answering these interrogatories.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

6. Please state fully the name of the defendant, including:
- a) Its d/b/a registered name;
 - b) Its popular name;
 - c) Any changes in the defendant's name within the past ten years; and.
 - d) Its principal place of business.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

7. Please state the name and address of any corporation of which the defendant is a subsidiary.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

8. Please give the dates of, and briefly describe all mergers, consolidations, reorganizations, etc., in which the defendant has taken part since the date of its formation.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

9. On the date that the plaintiff became a client or patient of the defendant, was the defendant accredited, licensed, or certified by any licensing entity? If so, please identify by name and address each such organization or entity, and in response to a Request to Produce, provide copies of any application for licensure or certification, with attachments.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

10. State whether any reports have been filed by the defendant with any local, state, or Federal agency in connection with the events described in the plaintiff's complaint, and if so, state:

- a) The date of each such report;
- b) The identity of the person or persons submitting each such report;
- c) The contents of each such report;
- d) The form of the report (oral, written, or otherwise); and.

- e) The identity of the custodian of each such report.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

11. Have the facts and circumstances surrounding the events described in the plaintiff's complaint been investigated by any review committee, peer review committee, disciplinary committee, or any other committee associated with the defendant? If so, state:

- a) The name of each such committee making an investigation;
- b) The identity of the members comprising each such committee;
- c) The date or dates of each investigation; and,
- d) The persons interviewed by each committee.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

12. Identify and provide the full names and current professional addresses of all physicians, nurses and medical personnel whose names, initials or abbreviated names appear in the medical records of William Dawkins (Note: a mere reference to the medical record in order to answer this interrogatory will be insufficient. The plaintiff requests the specific information regarding these people).

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

13. Within three years prior to the time of the events giving rise to the plaintiff's complaint, please set forth each date on which the defendant was inspected by any professional, national, state, or local authority or credentialing agency for the purpose of determining

conformance with licensing regulations or any other regulations relating to the health and safety of patients who are at risk for falls and, as to each such inspection, please state:

- a) The name(s) of the inspector(s)
- b) The name and address of the organization conducting the inspection;
- c) All violations found by each inspection; and
- d) The name and address of the person who has custody of the report on each such inspection.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

14. State whether the defendant was named or covered under any policy of liability insurance, primary, excess insurance or umbrella insurance at the time of care and treatment alleged in the complaint, and, if so, state the name of each such company, the policy number, the effective period and the maximum liability limits for each covered person or entity and each occurrence.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

15. Identify each expert witness you intend to call as a witness at trial and for each such expert, provide the following:

- a) The subject matter to which he/she is expected to testify;
- b) The substance of the facts and opinions to which he/she is expected to testify;
- c) A summary of the grounds for each opinion; and
- d) An identification of any written report prepared by such expert.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

16. If it is your contention that the defendant is immune from suit or damages because of any theory of immunity, please set forth all facts on which you base this contention.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

17. If you contend that the defendant's liability for damages is limited by any statutory or other cap, please identify the applicable statute and set forth your contention for the maximum recovery allowed should the plaintiff prevail on the allegations of her complaint.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

18. If you contend that any agent or employee of the defendant was acting outside the scope of his or her authority in caring for the plaintiff, please set forth all facts on which you base this contention.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

19. In 2017, did the defendant have any mechanisms, policies or procedures by which the defendant, through its agents, employees or medical staff, monitored the quality of care provided by members of its medical staff regarding patients such as the plaintiff? If so, please identify and provide copies of each such policy and procedure in response to a Request to Produce.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

20. In 2017, did the defendant have a written policy, procedure or protocol regarding any of the following:

- a) The evaluation, treatment and care of patients with pressure ulcers and/or other wounds;
- b) Scheduled management of patients with pressure ulcers and/or other wounds;
- c) Reporting requirements for staff who observe evidence, signs or symptoms of pressure ulcers and/ or other wounds, and;
- d) Specific protocols for prevention of pressure ulcers and/or other wounds of patients if different from those identified in a) above;

To the extent that nay such policies exist, please provide copies of those policies in response to a Request to Produce.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

21. Please provide the following information for the defendant's physical plant and staff complement at the time of the plaintiff's care there:

- a) How many beds did the facility contain? Please identify beds by number, location and by level of care. For example, "On Wing A there were 27 beds for patients requiring skilled nursing."
- b) How many persons were employed by the defendant at its facility? Please provide numbers of employees and general educational or training levels, by shift and by level of care if different levels of care were offered at the time of the plaintiff's stay at the facility.

- c) What was the average patient census during the duration of plaintiff's stay at the facility, by level of care?
- d) Did a physician maintain an office actually located on site during the plaintiff's stay at the facility? If so, who staffed that office and during what hours was staffing provided?
- e) If a physician did not maintain an office on site, what physicians or medical groups provided physician staffing? During what hours was physician staffing provided?

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

22. If you contend that any other entity is legally responsible for the injuries and damages alleged in the plaintiff's complaint identify that entity by name, address, and telephone number.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

23. If you contend that any other entity is legally responsible for the injuries and damages alleged in the plaintiff's complaint, please provide the factual basis for your contention, and identify the documents or other prepared materials, if any, that support your contention.

ANSWER: Objection. Please see this Defendant's Motion to Stay or Dismiss Action and Compel Arbitration filed with the Court on February 12, 2021.

CLEMENT RIVERS, LLP

By: J. D. Davis, Jr.

D. Jay Davis, Jr.

James D. Gandy, III

Alexandra J. Ginsburg

P.O. Box 993, Charleston, SC 29402

(843) 577-4000; jdavis@ycrlaw.com

tgandy@ycrlaw.com; aginsburg@ycrlaw.com

Attorneys for the Defendant THI of South Carolina
at Spartanburg d/b/a Magnolia Manor- Spartanburg

Charleston, South Carolina

Dated: 2/14/21

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to
all counsel of record in this proceeding this 14th day of

February, 2021
James D. Gandy, III

EXHIBIT G

STATE OF NORTH CAROLINA
COUNTY OF RUTHERFORDTON

)
)
)

AFFIDAVIT OF MELISSA DAWKINS

Personally, appeared before me, Melissa Dawkins, who, being first duly sworn, deposes and says as follows:

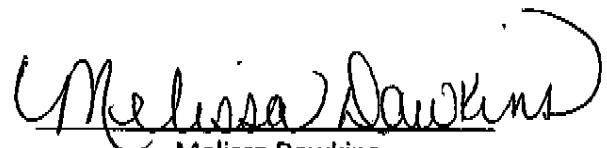
I am over the age of eighteen (18) years. I am competent to make this statement. This statement is based on my own personal knowledge, information and/or belief.

1. I am William Dawkins' daughter. I assisted him in checking in at Magnolia Manor on April 25, 2017.
2. At the time he was admitted to Magnolia Manor, my father had been in the hospital for several months following major surgery and my primary concern was his health. I knew that my father needed rehabilitative care in order to get better and that he was not capable of taking care of all of his healthcare needs at that point in time.
3. Despite his health problems, at the time he was admitted to Magnolia Manor my father had not been diagnosed with dementia or any other similar condition, he was of sound mind, and was capable of making his own decisions regarding legal matters and healthcare decisions. I and my sister Irina had discussed this with his doctors and my father and we were all in agreement as to this issue.
4. During the check-in process at Magnolia Manor, I was asked by an admissions staff member named Kris to come to the office without my father. I told Kris that my father was capable of making his own decisions, signing his own paperwork, that he did not have a legal guardian, and that he had not signed a power of attorney.

5. I also told Kris that my father's doctors had determined he was capable of making his own decisions, and gave her paperwork from the hospital confirming this fact. This document is attached as Exhibit A to this affidavit.
6. Kris insisted that "someone" other than my father had to sign paperwork in order for him to be admitted to the facility. I explained that I was not his Power of Attorney, that my father was capable of signing his own paperwork, and that I did not have the legal authority to sign for him in any way whatsoever.
7. Kris very clearly told me that my father could not be admitted to the facility unless all of the papers that were presented to me were signed. I felt uncomfortable doing this given that I knew that I did not have the legal authority to sign for my father. I told Kris again that my father had not given me the authority to sign any paperwork for him, whether it was related to his healthcare or legal matters. Kris insisted that without my signature, my father would not be admitted to the facility.
8. At this point, I had been told multiple times that my father would not be admitted without me signing the paperwork. While I had significant reservations about signing, and I had expressed those more than once to Kris, my father's health was of greater concern to me. I did not want him to be turned away from this facility and sent home, where I knew that he would be unable to care for himself, so I agreed to sign the papers.
9. A number of documents were then presented to me in quick fashion. I was not given an opportunity to review these papers in detail or ask many questions about them. They had been pre-marked in the places where I was supposed to sign or initial and Kris quickly flipped through them and pointed to where I should sign or initial.

10. Arbitration or alternative dispute resolution was never mentioned during the conversation, nor was giving up my father's right to a jury trial.
11. I never held myself out to be my father's legal representative and in fact did the opposite with the admissions staff at Magnolia Manor.
12. I am appalled that Magnolia Manor has now suggested that I held myself as my father's legal representative when I repeatedly told their employees that this was not the case, and the suggestion that I acted in an "unauthorized" or fraudulent manner is completely untrue. I told Magnolia Manor staff exactly what my legal relationship was with my father prior to signing the paperwork, and was told by Kris that it was fine for me to sign the papers anyway. I trusted her when she told me this.

Further affiant saith not.

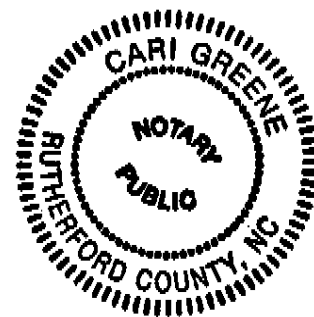

Melissa Dawkins

Sworn to and subscribed before me
this 18 day of March, 2021.



Notary Public for North Carolina

My Commission Expires: November 24, 2025



Hines, Russell

From: William Jordan <william@jordanlawcenter.com>
Sent: Thursday, March 25, 2021 5:08 PM
To: gkniej@sccourts.org
Cc: Knie, Grace Law Clerk (Elizabeth Von Keller); Teri Lackey; Davis, Jay; Hines, Russell
Subject: Dawkins v. FCOS, et al.
Attachments: Dawkins v. FCOS et al. - Proposed Order on Arbitration.docx

Dear Judge Knie,

Attached please find Plaintiff's proposed Order as requested at the hearing last week.

Thank You,

--

William A. Jordan, III
Jordan Law Center
622 Wade Hampton Boulevard
Greenville, S.C. 29609
william@jordanlawcenter.com
Phone: [864-235-0147](tel:864-235-0147)
Fax: [864-467-9349](tel:864-467-9349)

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Trina Dawkins, as Personal Representative of
the Estate of William Dawkins,

CASE NO. 2020-CP-42-03593

Plaintiff,

**PROPOSED ORDER DENYING DEFENDANTS'
MOTION TO STAY AND MOTION TO COMPEL
ARBITRATION**

vs.

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

Defendant(s).

OVERVIEW

The parties argued Defendants' Motion to Stay and Motion to Compel Arbitration on March 16, 2021. Attorney William A. Jordan, III of the Jordan Law Center, LLC represented the Plaintiff, and Attorney Russell G. Hines represented the Defendants. After oral arguments the Court requested that the parties supplement their respective memorandums and forward proposed orders. Having considered oral arguments, memorandums, and proposed orders, and the evidence in the record, the Court makes the following findings:

OVERVIEW AND PROCEDURAL BACKGROUND

This is a professional negligence case involving William Dawkins, who was admitted into the Defendants' facility on April 25, 2017, for rehabilitation purposes following surgery and hospitalization. It is the uncontested evidence of the record that Mr. Dawkins signed no paperwork at the time of his admission and that he had never signed a Power of Attorney, nor had a guardian ever been appointed for him. Present at the time of his admission was his

daughter, Melissa Dawkins, who met with an admissions officer of the Defendant facility, Kris Milner. During the course of this meeting, Ms. Dawkins signed a 12 page admissions agreement, a 5 page document titled “Authorizations, Consents, & Acknowledgements,” and a one page arbitration agreement. Ms. Dawkins also signed 3 other single page consent forms. Defendants have asserted that the arbitration agreement is enforceable because Ms. Dawkins held herself out as her father’s agent, represented that she had the authority to sign these documents on his behalf, and that the Dawkins estate should be bound by the arbitration agreement, which has merged with the arbitration agreement. Plaintiff has argued that the arbitration agreement is not enforceable because there was no such agreement that Mr. Dawkins had with any of the Defendants, that Ms. Dawkins did not have the authority to sign the agreement on her father’s behalf, and that the Dawkins estate cannot be estopped from bringing this action in tort where no enforceable arbitration agreement exists.

The only evidence in the record concerning the circumstances of the meeting has been presented by the Plaintiff. Ms. Dawkins, in her affidavit, has stated that she repeatedly represented to Ms. Milner that she did not have legal authority to sign the documents on her father’s behalf, and only signed when she was told that her father would not be admitted to the facility without signatures on the paperwork. She further stated that she was not given an opportunity to review the documents in full and that the arbitration agreement was not explained to her. Defendants have presented no factual evidence that Melissa Dawkins had the authority to bind her father to an arbitration agreement, and Defendants agree that Melissa Dawkins was not her father’s Power of Attorney and that Mr. Dawkins was competent at the time of his admission. Despite this, Defendants filed this motion.

To address a final procedural matter, the parties have been engaged in this case for over one year. The Plaintiff has presented evidence that copies of any agreements between the parties, including arbitration agreements or admission documents, were requested as early as February 18, 2020, but that these documents were not provided in response to an initial record request. The Plaintiff filed the Notice of Intent on April 24, 2020, and asked the Defendants to immediately disclose any arbitration agreements or move to compel arbitration if the Defendants believed an arbitration defense existed. The Defendants did not, and instead engaged in NOI-phase mediation on October 12, 2020, again without raising an arbitration defense. After the Plaintiff filed suit, the Defendant refused to produce any of the aforementioned documents upon which it bases its motion, objecting and stating for the first time its intent to compel arbitration in January of 2021. The Plaintiff was granted access to the one page arbitration agreement for the first time on February 12, 2021, when these motions were filed, but the remainder of the supporting documents were not produced until the day prior to the hearing, when the Defendants filed their memorandum in support of their motions. All of this is uncontested evidence in the record.

LEGAL ANALYSIS

First, it is important to note that the parties agree the Arbitration Agreement is governed by the Federal Arbitration Act (hereinafter “FAA”). While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid arbitration agreement. *EEOC v. Waffle House*, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); *Toler’s Cove Homeowners Ass’n v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration agreements are enforceable. Where the FAA

does apply, the Arbitration Agreement is subject to the same defenses applicable to all other contracts as discussed below. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) (i.e. consideration). Whether the parties agreed to arbitrate is a question of substantive state law. In *Chassereau v. Global Sun Pools, Inc.*, the Supreme Court stated:

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

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

While the FAA includes a presumption favoring arbitration, it only applies after the court finds there is a valid, enforceable arbitration agreement. 9 U.S.C. § 4 (“The court shall make an order directing the parties to proceed to arbitration” but only “upon being satisfied that the making of the agreement...is not in issue”). The FAA looks to state law to decide the threshold questions of contract formation. Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. The judicial inquiry may include an examination of authority, such as apparent or authority, whether a valid power of attorney exists, as well as other grounds existing at law or equity, including competency.

In determining whether a particular dispute can be compelled into arbitration, this Court must first determine whether a valid agreement to arbitrate exists between the parties. The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644

S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). In determining whether an agreement to arbitrate exists, “the court should apply ‘ordinary state-law principles that govern the formation of contracts.’” *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App., 1999). Arbitration is available only when the parties involved contractually agree to arbitrate. *Id.* South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105, (1989). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

In this case, there is no valid and enforceable contract. William Dawkins signed no arbitration agreement nor did he sign any other document giving Melissa the express authority to sign for him. The Defendants have made what is essentially an apparent agency argument, arguing that because Melissa Dawkins signed the agreement, she must have held herself out as her father’s agent. Defendants have no specific evidence to support this claim and have not presented an affidavit from any individual concerning the circumstances of the meeting in question. The evidence of the record does not support their argument. Ms. Dawkins has stated that she repeatedly informed Defendants’ employee that she did not have the legal authority to sign for her father, but only signed the paperwork upon being informed that her father would not be admitted to the facility without a signature. Out of concerns of her father’s health and safety, she signed the paperwork, but not without the aforementioned caveats.

The facts of this case are very similar to several recent holdings in South Carolina. In the *Coleman* case, decedent’s sister did not have power of attorney – she was authorized by the

Adult Health Care Consent Act to make medical decisions only for the patient – and when placing decedent in health care facility, executed both an admission agreement and arbitration agreement on behalf of decedent. *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). The court held that the scope of the Act is to ensure that the patient’s wishes concerning her medical treatment are honored whenever possible, and that it does not confer authority to execute a document which involves neither health care nor financial terms for payment of such care. *Id.* at 454. Further, the court noted the importance of the “separatedness” of the arbitration agreement and admission agreement; specifically, there was a “Residential Admission and Financial Agreement” and an “Agreement for Arbitration.” *Id.* at 454-55. “The scope of Sister's authority to consent to ‘decisions concerning Decedent's health care’ extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future.” *Id.* at 454. Because admission to the facility for health-related needs was not contingent upon execution of the arbitration agreement, it could not be said that the signatory had any authority to bind the patient as to the separate, voluntary arbitration agreement. *Id.*

Our Supreme Court has held that a surrogate without proper legal authority cannot bind a person to arbitration.

The scope of Sister's authority to consent to "decisions concerning Decedent's health care" extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. **The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future. Under the Act, Sister did not**

have the capacity to bind Decedent to this voluntary arbitration agreement. We therefore affirm the circuit court's holding that the Act did not confer authority on Sister to execute a document which involved neither health care nor financial terms for payment of such care.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014).

The Court of Appeals addressed these issues in the *Hodge* case, where the Resident was admitted to a nursing facility while competent and without any Power of Attorney – just as Mr. Dawkins was in the instant case. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 550, 813 S.E.2d 292, 295 (Ct. App. 2018). In *Hodge*, the decedent's husband signed all paperwork on her behalf, including an arbitration agreement. *Id.* at 550, 813 S.E.2d at 296. The Court of Appeals affirmed the Circuit Court's finding that "Husband's signing of the Arbitration Agreement, Admissions Agreement, and other forms does not make him [wife]'s agent. [Wife] did not have a health care power of attorney. Additionally, the Facility knew she was competent at the time of admission as indicated by the doctor's examination and allowed her to sign other forms. The record contains no evidence from the Facility that [Wife], as the principal, represented Husband was her agent." *Hodge* at 573-74, 813 S.E.2d at 308.

The Court found that even if the Husband did have the authority to make some decisions on her behalf, this did not extend to waiving the Constitutional right to a jury trial: "Moreover, even if Husband had authority to handle finances or make health care decisions, as Appellants contend is evidenced by Husband signing past healthcare documents, this court has held 'the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.'" *Id.* at 547, 813 S.E.2d at 308 (citing *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686).

This Court finds the authority from *Coleman* and *Hodge* are persuasive in this case. This precedent clearly stands for the proposition that when a healthcare facility attempts to bind a patient to an arbitration agreement signed by a family member, the facility must make a clear showing that the family member was a legal agent of the patient. Our Courts have time and again indicated that without a Power of Attorney, or some other express delegation of authority by the principal, there is no actual legal authority for an alleged agent to bind the principal to any agreement, or to do anything beyond making healthcare decisions for an incompetent patient. In this case, the Defendants have presented no evidence to show that Ms. Dawkins held herself out as her father's agent in any way, and the only evidence of record shows that she did the opposite.

The Defendants have argued that even if this Court finds that no contract exists between the parties, the Plaintiff should be equitably estopped from denying enforcement of the agreement. "Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). This defense requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and, (3) had actual or constructive knowledge of the real facts. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance of the conduct of the party to be estopped. *Id.* Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. As person cannot claim to have been misled

and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. Of Fountain Inn*, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

There is absolutely no evidence in the record that Melissa Dawkins made any kind of false representation to these Defendants. Melissa Dawkins made it clear to the staff at Magnolia Manor that she was not her father's Power of Attorney and that she did not have the legal authority to sign on his behalf; she was told that someone had to sign the documents to have him admitted to the facility and was concerned about his health, so she signed the documents. She has stated that she relied on the admissions staff's representations that it was acceptable for her to sign this paperwork. This Court would note that these Defendants are sophisticated corporate entities who drafted an adhesion contract and had the ability and resources to assess the legal authority under which Ms. Dawkins was operating. Given the evidence of the record, they cannot be said to have been taken advantage of or defrauded in any way, nor can they meet the requirement that they acted diligently given their knowledge that Ms. Dawkins was not an actual legal agent. After receiving the information that Ms. Dawkins was not a Power of Attorney and lacked any legal authority, Defendants' employees could easily have returned to Mr. Dawkins and proposed the arbitration agreement to him. They chose not to. Equitable Estoppel is not applicable in this case.

As a final legal matter, the Defendants have asserted Ms. Dawkins signed the Admissions Agreement based upon apparent authority, and that this agreement ultimately merged with the Arbitration agreement. As a threshold matter, this argument fails for the aforementioned

reasons: the Admission Agreement is not binding on Mr. Dawkins or his estate because Melissa Dawkins did not have the authority to sign it on his behalf. Even if this were true, the evidence of the record does not support the Defendants' merger argument. As discussed at length in *Coleman*, merger does not occur where the documents recognize the "separatedness" of the arbitration agreement, which is indicative of an intent that the common law doctrine of merger not apply. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. In *Coleman*, 407 S.C. at 350, 755 S.E.2d at 452, Ann Coleman signed several documents, including arbitration agreements, when admitting her sister to a health care facility. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. *Id.* The circuit court denied the motion to compel. *Id.* On appeal, the Coleman court found the language in the section titled "Entirety of Agreement" "recognizes the 'separateness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. Furthermore, the court noted that the "Entirety of Agreement" clause creates an ambiguity as to merger, and "the law is clear that any ambiguity...is construed against the drafter...." *Id.* at 355-56, 755 S.E.2d at 455. The Coleman court ruled the circuit court properly denied [the health care facility's] equitable estoppel arguments because no merger occurred. *Id.* at 356, 755 S.E.2d at 455.

Additionally, merger does not occur where an arbitration agreement and admission agreement are governed by different law, reference each other separately, provide different mechanisms by which they can be revoked, are separately paginated, and have their own signature page. *See Hodge*, 422 S.C. at 562-563, 813 S.E.2d at 302. In *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295, Mable Hodge entered a rehabilitation facility. *Id.* Mable's husband executed various documents related to her admission, including an arbitration agreement and an

admission agreement. *Id.* Mable was not present at the time her husband signed these documents on the day before her admission because she was still in the hospital. *Id.* However, Mable was competent at the time of her admission. *Id.* 422 S.C. at 550, 813 S.E.2d at 296. The circuit court denied [the facility's] motion to dismiss or compel arbitration. *Id.* The facility appealed arguing the circuit court erred in finding the arbitration agreement was separate from the admissions agreement because the two documents were merged. *Id.* 422 S.C. at 556, 813 S.E.2d at 299. The Court of Appeals upheld the circuit court, finding the admissions agreement and arbitration agreement did not merge. *Id.* 422 S.C. at 563, 813 S.E.2d at 302.

The Court based its rulings on the fact that the "Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law." *Id.* 422 S.C. at 562, 813 S.E.2d at 302. Additionally, similar to Coleman, the Arbitration Agreement recognized separateness because it referenced the two documents separately, "stating '[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.'" *Id.* Furthermore, the arbitration agreement stated it could be revoked within thirty days, while the admission agreement did not contain such an indication; rather, it provided the admissions agreement could only be amended by the patient with written agreement executed by the facility and the patient. The Court noted that each document was separately paginated and had its own signature page. Finally, signing the arbitration agreement was not a precondition to admission. *Id.* 422 S.C. at 562-63, 813 S.E.2d at 302. Based on this, the Court of Appeals found the admissions agreement and arbitration agreement did not merge. *Id.* 422 S.C. at 563, 813 S.E.2d at 302. Therefore,

because Mable received no benefit from the arbitration agreement, equitable estoppel did not bar Mable's claims. *Id.*

This case has many similarities to *Coleman* and *Hodge*: the admissions agreement and the arbitration agreement are two separate documents; the admissions agreements contemplates interpretation under state law while the arbitration agreement states that it is solely to be interpreted under federal law; the documents are separately paginated; the documents are titled separately; the documents have separate filenames; and, the documents have separate signature and date blocks. Contrary to the Defendants' suggestion, it is not at all clear that these two documents are meant to be construed or interpreted as a single document. Given that the Defendants drafted these documents, and that this is an adhesion contract, it would have been easy for them to make that fact obvious. That they did not do so should be held against them.

Sanctions and Waiver

During the March 16, 2021 hearing, Plaintiff's counsel requested leave of the Court to file a responsive Memorandum and to supplement the record, on the basis that the Defendants had withheld critical documents for over a year and had only produced them upon the eve of the hearing, and the Court granted this request. Plaintiff's counsel filed a Reply Memorandum on March 18, 2021, and requested Sanctions pursuant to Rule 11, on the basis that the Defendants had withheld these documents, and also on the basis that the Defendants had no good grounds to support their motions.

Rule 11 of the South Carolina Rules of Civil Procedure allow a court to impose an appropriate sanction upon motion or upon its own initiative, if no good grounds exist to support a motion. Rule 11, SCRPC. Such sanctions may include reasonable expenses incurred by the

defending party. Rule 11, SCRPC. As outlined in the procedural history of this case, Defendants gave no indication that they were pursuing an arbitration Defense, despite repeated requests from the Plaintiff. The Defendants also refused to produce critical arbitration documents when asked. This conduct continued for over a year and did not end until less than 24 hours prior to the hearing. At the time the Defendants filed their motion, their position was that a one page arbitration agreement should be enforced pursuant to the FAA.

At that point in time, the Defendants had filed nothing indicating that they intended to pursue merger and estoppel arguments based on the admission agreement or apparent or inherent authority agreements based on the admission agreement and healthcare consents. They had been in possession of these documents for nearly four years at this point, but had repeatedly refused to provide them to the Plaintiff or the Court. They waited until the evening before the hearing to file a 143 page memorandum of law that included the supporting documents; neither the Plaintiff nor the Court had been provided with these documents or been informed about the grounds for these motions until that time. Beyond that, there is clear and longstanding case law indicating that without a Power of Attorney (or some similar document granting an agent actual authority to make contractual decisions for a patient), a Defendant facility must introduce factual evidence into the record showing the specific grounds on which it claims the signatory had agency power (*See Hodge* at 573-74, 813 S.E.2d at 308: “The record contains no evidence from the Facility that [Wife], as the principal, represented Husband was her agent.”). The Defendants have failed to make such a showing, presumably because they are unable to do so.

The Defendants' conduct has caused the Plaintiff to incur additional expenses to further brief and address these issues, and has served as a continued delay tactic. It violates the fundamental fairness that should be expected in these proceedings to refuse to produce critical documents until just prior to the hearing. The Defendants have prejudiced the Plaintiff by causing considerable delay, refusing to participate in discovery, concealing the grounds for their motion, and allowing the Plaintiff to participate in the litigation process for over a year while never intending to do so themselves.

This Court finds that the Defendants should have known of the existence of these critical underlying documents much earlier in the process, should have responded to the Plaintiff's requests for these documents, and should not have filed these motions given the complete lack of evidence to support an enforceable arbitration agreement. This Court further finds that by engaging in the litigation process for over a year, including NOI-phase mediation, without raising the arbitration defense, the Defendants have waived these arbitration defenses. This Court finds that the attorneys' fees and costs requested by the Plaintiff are related and reasonable.

CONCLUSION

After careful consideration of the record evidence, arguments of counsel, memorandum and proposed Order of respective counsel, and the applicable law, and for the reasons set forth above, is it Ordered that Defendants' Motion to Stay and Motion to Compel Arbitration is **denied**; and,

It is further ordered that Plaintiff's motion pursuant to Rule 11 of the South Carolina Rules of Civil Procedure is **granted**. Defendant is ordered to pay Plaintiff reasonable expenses

associated with briefing and responding to its motions and memoranda. Plaintiff's counsel is to submit an Attorney's Fee Affidavit to the Court within 10 days of the date of this Order for review.

AND IT IS SO ORDERED!

Judge Grace G. Knie
Seventh Judicial Circuit

March _____, 2021

From: [Hines, Russell](#)
To: ["Knie, Grace Law Clerk \(Brittany Biggs\)"; William Jordan; Knie, Grace G.](#)
Cc: [Teri Lackey; Davis, Jay](#)
Subject: RE: Dawkins v. FCOS, et al.
Date: Monday, March 29, 2021 9:59:56 AM
Attachments: [image001.png](#)
[Defendants' Proposed Order.docx](#)

Thank you!

Defendants' proposed order is attached.

Russell G. Hines
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From: Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>
Sent: Monday, March 29, 2021 9:41 AM
To: Hines, Russell <RHines@ycrlaw.com>; William Jordan <william@jordanlawcenter.com>; Knie, Grace G. <gkniej@sccourts.org>
Cc: Teri Lackey <teri@jordanlawcenter.com>; Davis, Jay <jdavis@ycrlaw.com>
Subject: RE: Dawkins v. FCOS, et al.

Mr. Hines,

That will be fine to submit the proposed order this morning, Monday, March 29, 2021 at 10:00 am.

Sincerely,

Brittany L. Biggs
Law Clerk to the Honorable Grace Gilchrist Knie
Seventh Judicial Circuit
180 Magnolia Street
Spartanburg, South Carolina 29306
Ph: (864) 596-4235
Fax: (864) 562-4234

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	CASE NO. 2020-CP-42-03593
TRINA DAWKINS,	)	
as Personal Representative	)	
of the Estate of William Dawkins,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER GRANTING MOTION TO
	)	COMPEL ARBITRATION AND RELATED
FUNDAMENTAL CLINICAL AND	)	MOTIONS TO STAY LITIGATION
OPERATIONAL SERVICES, LLC;	)	PENDING ARBITRATION
FUNDAMENTAL ADMINISTRATIVE	)	
SERVICES, LLC; THI OF SOUTH	)	
CAROLINA, LLC; THI OF SOUTH	)	
CAROLINA AT SPARTANBURG, LLC;	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR-SPARTANBURG,	)	
LLC d/b/a Magnolia Manor-Spartanburg,	)	
	)	
Defendants.	)	

This matter is before the Court on four motions filed February 12, 2021 (collectively, the “Subject Motions”). Chief among them is the motion of Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg (the “Facility”)¹ to compel the claims asserted against it in this action by Plaintiff, Trina Dawkins, as Personal Representative of the Estate of William Dawkins (“Mr. Dawkins”), to arbitration (the “Motion to Compel Arbitration”). Secondary to that motion are three motions, one by each of Defendants Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and THI of South

¹ In this order, the reference to the Facility covers both the defendant identified as “THI of South Carolina at Spartanburg, LLC” and the defendant identified as “THI of South Carolina at Magnolia Manor-Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg.” The correct legal name for the entity doing business as Magnolia Manor-Spartanburg, i.e., the Facility, is “THI of South Carolina at Spartanburg, LLC.” An online search of the South Carolina Secretary of State’s business filings returns no record of any entity named “THI of South Carolina at Magnolia Manor-Spartanburg, LLC.”

Carolina, LLC (collectively, the “Other Defendants”),² each identical in substance, asking for this action to be stayed pending the outcome of the Motion to Compel Arbitration and any resulting arbitration between Plaintiff and the Facility (collectively, the “Motions to Stay”).

Plaintiff filed a memo in opposition to the Motion to Compel Arbitration on March 12, 2021. The Facility filed a memo in support of the Motion to Compel Arbitration on March 15, 2021. The Court heard the Subject Motions on March 16, 2021, via Webex. During the hearing, the Court granted Plaintiff permission to file a reply to the Facility’s memo in support. Plaintiff thereafter filed such a reply on March 18, 2021. Plaintiff did not only file a reply, however, but also, along with her reply, filed the affidavit of Melissa Dawkins (“Melissa”), which the Court rejects for the following reasons:

- (a) Pursuant to Rule 6(d), SCRCP, “opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time.” Melissa’s affidavit is untimely under Rule 6(d), and the permission granted Plaintiff during the hearing was to file a *reply* (or other supplemental briefing), not to file an affidavit(s);
- (b) Much of the substance of the affidavit is inadmissible hearsay, wherein Melissa states what she allegedly said to Facility staff and what Facility staff allegedly said to her. *See* Rules 801–806, SCRE; and
- (c) As further explained below, the portions of Melissa’s affidavit wherein she now states—for the first time, some four years after Mr. Dawkins’s admission to the Facility—what she allegedly said to Facility staff and what Facility staff allegedly

² Where this order simply refers to “Defendants” it refers to the Facility and the Other Defendants, collectively.

said to her, contradict Melissa's own contemporaneous representations in the Admission Agreement and the Arbitration Agreement and (1) do not provide the Court with a meaningful and reliable evidentiary basis on which on which to make a fair factual determination as to whether Melissa's representations in the admissions documents should prevail over her self-contradictory, and indeed self-serving, assertions in her recent affidavit or vice versa and (2) any serious and even-handed effort to address Melissa's contradictions would necessarily require allowing the Facility to supplement the evidentiary record with an affidavit from Kris Milner (the Facility's admissions director who countersigned the Admission Agreement and Arbitration Agreement), indeed, as a practical matter, for Ms. Milner to be deposed, so all sides could question her, and to engage in reasonable discovery on this subject to include, at a minimum, deposing Melissa and the other non-Facility personnel referenced in her affidavit, Plaintiff (i.e., her sister Trina Dawkins) and Mr. Dawkins's "doctors," and follow up on any appropriate evidentiary leads arising therefrom.

Now, therefore, upon careful consideration of the Subject Motions and the parties' written and oral argument thereon (excluding Melissa's affidavit), for the reasons set forth below, the Subject Motions are GRANTED. Accordingly, as between Plaintiff and the Facility, this action is hereby stayed in favor of arbitration, and as between Plaintiff and the Other Defendants, this action is hereby stayed pending the outcome of arbitration between Plaintiff and the Facility.

BACKGROUND

The Facility is a skilled nursing facility. When Mr. Dawkins was admitted to the Facility in April 2017, his daughter Melissa signed a number of documents on his behalf, including an Admission Agreement and an Arbitration Agreement.³

Melissa expressly signed both the Admission Agreement and the Arbitration Agreement as “‘Resident’s[⁴] Durable Power of Attorney for Health Care’/‘Resident’s Legal Guardian’/‘Resident’s Responsible Party.’” The Admission Agreement expressly includes Melissa’s acknowledgement that the “promises and representations [she made therein were] in order to induce Facility to enter into this Agreement” and her understanding that the “Facility [wa]s relying upon the truthfulness of the promises and representations [she] made.” By signing the Arbitration Agreement, Melissa expressly “represent[ed] that . . . she ha[d] authority to sign on [Mr. Dawkins’s] behalf so as to bind [him] as well as [herself].”

In this nursing home malpractice action, Plaintiff asserts claims against the Facility arising out of alleged deficiencies in Mr. Dawkins’s care/treatment during his residency. Based on the Arbitration Agreement Melissa signed for Mr. Dawkins, the Facility asks the Court to compel Plaintiff’s claims against it to arbitration, and in turn, the Other Defendants ask the Court to stay this action pending the outcome of the arbitration the Facility seeks to compel.

³ During the hearing on March 16th, Defendants’ counsel advised the Court that he was unable to state with certainty the nature of the relationship between Melissa and Mr. Dawkins. Plaintiff’s reply memo, filed March 18th, states that Melissa is the daughter of Mr. Dawkins.

⁴ In both the Admission Agreement and the Arbitration Agreement, Mr. Dawkins is referred to as the “Resident.”

ANALYSIS

Ultimately, the Court’s decision to grant the Subject Motions rests on its conclusion that Plaintiff is equitably estopped to deny the Arbitration Agreement’s enforceability. The analytical steps that led the Court to this conclusion are as follows.

1. Both state and federal policy favor arbitration of disputes.

There is a “strong South Carolina and federal policy favoring arbitration . . .” *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020); *see also Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016) (“The policy of the United States and of South Carolina is to favor arbitration of disputes.”). Indeed, “arbitration agreements are *presumed valid*.” *Doe*, 430 S.C. at 607, 846 S.E.2d at 877 (emphasis added).

2. The Arbitration Agreement is governed by the FAA⁵.

The Arbitration Agreement is governed by the FAA, not South Carolina’s Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240 (the “South Carolina Arbitration Act”). This is so for two reasons. One, the Arbitration Agreement expressly states that the FAA applies:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the [FAA], notwithstanding any contrary provision of this Agreement or contrary state law.

This must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) (“We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties ‘specifically agree that this

⁵ The “FAA” is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

transaction involves interstate commerce.’ We must enforce this agreement like any other contract term.”) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding FAA applied because parties had agreed contract involved interstate commerce)). Additionally, and in any event, the FAA applies “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).⁶

⁶ At this juncture, the Court would note the charge in Plaintiff’s reply that the Facility “completely changed [its] argument on the eve of the hearing.” Plaintiff’s premise for this assertion is that “[t]he only supporting grounds for [the Motion to Compel Arbitration] were that the [FAA] should be applied to the 1 page arbitration agreement,” with “[n]othing about any other documents or supporting grounds . . . mentioned.” As an initial matter, Plaintiff’s complaint fails of its essential premise because it misunderstands the relationship between the FAA and the Motion to Compel Arbitration. As explained above, the FAA does in fact govern enforcement of the Arbitration Agreement, i.e., it is indeed the correct procedural mechanism for the Motion to Compel Arbitration, which the Facility’s properly made pursuant thereto. It was also proper for the Facility to attach to the Motion to Compel Arbitration the Arbitration Agreement, the provisions of which not only provided for the arbitration that the Facility sought to compel but also contained Melissa’s express representation that she had all due authority to sign on behalf of her father. Plaintiff’s assertion that more was required of the Facility in moving to compel arbitration pursuant to the terms of the facially valid Arbitration Agreement is without merit. Indeed, contrary to Plaintiff’s assertion that the Facility did not present any evidence in support of its position, the facially valid Arbitration Agreement that the Facility presented was itself evidence in support of the Facility’s position, and Plaintiff did not actually offer any evidence to dispute the facial validity of the Arbitration Agreement until two days after the hearing, when she filed Melissa’s affidavit on March 18th, wherein she contradicts her own prior representation of authority, which, as stated above, the Court rejects. Further still, the Facility’s equitable estoppel argument is not technically an argument for enforcement of the Arbitration Agreement but an argument that Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement, and thus it is not called for unless and until Plaintiff actually attempts to deny enforceability, which

3. The FAA requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina law.

Under the FAA, an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. “[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”⁷ and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). Thus, while a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only

Plaintiff herself did not do until submitting her memo in opposition on March 12th. Even further, and in any event, Plaintiff’s complaint about being “ambushed” is rendered moot by the fact that the Court did in fact allow Plaintiff to supplement her response in opposition to the Motion to Compel Arbitration via post-hearing reply memo. And insofar as Plaintiff’s request for Rule 11 sanctions is concerned, the very fact that Plaintiff would characterize the Facility’s arguments in support of the Motion to Compel Arbitration an “ambush” belies any idea that the Facility did not have a good faith basis to support them. In other words, there would be no reason to complain of being “ambushed” by weak arguments. To claim “ambush” necessarily concedes being presented, albeit unexpected, with arguments requiring a serious response—and, again, the Court provided time for such a response. Indeed, as attached to the Facility’s memo in support, its estoppel argument has been endorsed by at least one of my fellow Circuit Court Judge’s previously. There is no cause for sanctions here. Likewise, Plaintiff’s complaint about not being provided the Arbitration Agreement during the NOI process is wholly immaterial. The NOI process is a separate, statutorily mandated process whereby the parties attempt to resolve the dispute via *mediation*, not arbitration. As Plaintiff concedes, the Facility did provide Mr. Dawkins’s medical records, and Plaintiff suggests no reason why the Arbitration Agreement was necessary to the NOI mediation process. Indeed, logically, it was not until that process did not result in a resolution of the dispute that the question of arbitration as a means of dispute resolution became relevant. And as our Supreme Court has already explained in *Dean*, there is no waiver of arbitration rights arising out of the participation in or delay occasioned by the NOI process. 408 S.C. at 388, 759 S.E.2d at 736 (“We find that Appellants did not delay in filing their demand for arbitration. Rather, Appellants participated in the statutorily required mediation process, and after Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity. Further, even were we to find that Appellants should have filed the motion to compel arbitration immediately after Respondent filed the NOI, rather than after Respondent filed the complaint, Respondent has shown no prejudice or undue burden to her from the four month delay. Thus, we conclude that Respondent’s argument that Appellants’ waived their right to enforce the Agreement is without merit.”).

⁷ *Allied-Bruce*, 513 U.S. at 270.

to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). In other words, “courts *must* place arbitration agreements on *equal footing with other contracts . . .*” *Concepcion* at 339 (emphasis added); see also *Allied–Bruce*, 513 U.S. at 281 (“States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”) (emphasis added) (internal citations omitted).

4. The Arbitration Agreement is valid on its face.

The Arbitration Agreement is valid on its face, i.e., there is nothing within the four corners of the document itself that calls its validity into question.

The Arbitration Agreement sets forth all necessary terms. It contains the parties’ mutual and concurrent promises to submit a certain defined scope of “Disputes” to binding arbitration,⁸ before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction.⁹ To require more just because the

⁸ The parties’ mutual and concurrent promises to arbitrate constitute sufficient consideration. *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) (“A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.”) (citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E. 292 (1996)).

⁹ In this regard, the Court would note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the Arbitration Agreement, should not be

contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *See Concepcion*, 563 U.S. at 339.

Moreover, it signed by Melissa, who expressly represented her authority to sign on Mr. Dawkins's behalf, and it is duly countersigned by the Facility's director of admissions, Ms. Milner.

There is no question raised here as to Melissa's competency. She is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,¹⁰ including, of course, the terms whereby she represented herself to the Facility as having authority to act on Mr. Mr. Dawkins's behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,¹¹ and Melissa is no less bound by this covenant than the Facility. Further still, to require anything more from the Facility as a contracting party just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts. *Concepcion* at 339.

Further still, the Arbitration Agreement is not unconscionable. Unconscionability is a two-part test. There must be both (1) an absence of meaningful choice on the part of one party due to one-sided contract provisions and (2) terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Neither of these is present here. The first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . there are numerous other health care providers in the State

confused with the South Carolina Arbitration Act, which, as addressed above (in explaining the applicability of the FAA), does not apply here.

¹⁰ *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.").

¹¹ *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

where Facility is located that are qualified to provide such care to Resident.” As for the second part of the test (unreasonably oppressive terms), the agreement simply binds the parties (both sides) to submit to arbitration. Not only is this not oppressive “both state and federal policy favor arbitration of disputes.” *Id.* at 24, 644 S.E.2d at 668. And there is nothing about the Arbitration Agreement that suggests it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Id.* at 25, 644 S.E.2d at 668 (“In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.”).

5. Plaintiff’s claims are within the scope of the Arbitration Agreement.

The Court also finds that Plaintiff’s claims are within the scope of the Arbitration Agreement, which, in pertinent part, reads as follows:

It is . . . understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively “Disputes”), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The plain language of the Arbitration Agreement clearly embraces the subject matter of Plaintiff’s claims. Moreover, even were there “any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) (quoting *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272,

273–74 (4th Cir. 1997)) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)) (internal quotation marks omitted).

6. The Arbitration Agreement is enforceable against Plaintiff.

Even though Mr. Dawkins is a nonsignatory to the Arbitration Agreement, it is nonetheless enforceable against his estate, i.e., Plaintiff.

“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.” *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: “Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.”). Here the Court finds that the Arbitration Agreement is enforceable against Plaintiff based on estoppel.

“The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.” *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (quoting *Klutts Resort Realty, Inc. v. Down’Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹² as the Admission Agreement and the Arbitration Agreement were here, there is evidence to upset the presumption of merger. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention* . . .”) (emphasis added). “[I]n attempting to ascertain th[e] [parties’] intention,” the Court “endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, only on actual evidence that—notwithstanding the circumstances giving rise to the merger presumption in the first place (same time, parties, purpose, and transaction)—can support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here.

Here, the “Entire Agreement” clause in the Admission Agreement expressly states that other admissions materials are deemed a part of it. True, the Arbitration Agreement was not required for Mr. Dawkins’s admission to the Facility, but all this means is that it did not have to be agreed to for him to be admitted, i.e., it did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact

¹² *Id.* at 355, 755 S.E.2d at 455.

agreed to. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Mr. Dawkins's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission.

Indeed, the fact that the Arbitration Agreement was not required for admission underscores its connectedness to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement). In other words, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being.

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

Moreover, to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. Again, where, as here, the instruments in question are signed at the same time, by the same parties, for the same purpose, in

the course of the same transaction, merger is presumed. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is at best ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention—is to allow the exception to devour the rule.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement by virtue of the so-called direct benefits test endorsed in our Supreme Court’s recent decision in *Wilson*, 426 S.C. 326, 827 S.E.2d 167. The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which it is now contended that Plaintiff is estopped from refusing to comply with the Arbitration Agreement here. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added). The Court agrees. Without question Mr. Dawkins received direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Plaintiff cannot now deny the validity of the Arbitration Agreement with which the Admission Agreement merged.

7. The Motions to Stay should be granted, too.

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. Accordingly, the above analysis also shows why the Motions to Stay should be granted. *See* 9 U.S.C. § 3 (“If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.”) (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) (“[The] FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.”); *see also Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) (“The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement. However, the Circuit Court included in its order the requirement that all parties be included in one arbitration proceeding. Federal has signed no arbitration agreement and cannot be forced into compulsory arbitration. We feel it was erroneous to condition the relief to which respondents are plainly entitled upon the voluntary submission of Federal to arbitration proceedings. This provision has been deleted from the foregoing Order of the lower court.”).

CONCLUSION

For the reasons set forth herein, the Subject Motions are hereby GRANTED. This action is STAYED, and this matter is COMPELLED to arbitration.

IT IS SO ORDERED.

GRACE GILCHRIST KNIE
Presiding Judge – Seventh Judicial Circuit
Court of Common Pleas – Spartanburg County

Spartanburg, South Carolina

Dated: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	CASE NO. 2020-CP-42-03593
TRINA DAWKINS,	)	
as Personal Representative	)	
of the Estate of William Dawkins,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MOTION TO ALTER, AMEND, AND/OR
	)	RECONSIDER ORDER REGARDING
FUNDAMENTAL CLINICAL AND	)	DEFENDANTS' MOTIONS TO STAY AND
OPERATIONAL SERVICES, LLC;	)	MOTION TO COMPEL ARBITRATION
FUNDAMENTAL ADMINISTRATIVE	)	
SERVICES, LLC; THI OF SOUTH	)	
CAROLINA, LLC; THI OF SOUTH	)	
CAROLINA AT SPARTANBURG, LLC;	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR-SPARTANBURG,	)	
LLC d/b/a Magnolia Manor-Spartanburg,	)	
	)	
Defendants.	)	

TO: THE HONORABLE GRACE GILCHRIST KNIE, Presiding Judge, and WILLIAM A. JORDAN, III, ESQUIRE, JORDAN LAW CENTER, Attorney for Plaintiff

NOW COME Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg (the "Facility"),¹ along with the Other Defendants,² by and through their undersigned counsel, pursuant to Rule 59(e), SCRCF, and, on the grounds set forth below, hereby

¹ In this motion, the reference to the Facility covers both the party identified as "THI of South Carolina at Spartanburg, LLC" and the party identified as "THI of South Carolina at Magnolia Manor-Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg." The correct legal name for the entity doing business as Magnolia Manor-Spartanburg, i.e., the Facility, is "THI of South Carolina at Spartanburg, LLC."

² The "Other Defendants" are Defendants Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina, LLC, collectively. Where this motion simply refers to "Defendants," it refers to the Facility and the Other Defendants, collectively.

move this Honorable Court to alter, amend, and/or reconsider its Order Regarding Defendants' Motions to Stay Action and Compel Arbitration, filed April 8, 2021 (the "Subject Order").

1. **Most respectfully, Defendants ask the Court to (re)consider and expressly rule on each and every distinct issue/argument they raised in support of the Motion to Compel Arbitration³ and the Motions to Stay⁴, i.e., each and every distinct issue/argument set forth in the Motion to Compel Arbitration, the Memo in Support of Arbitration⁵, the Motions to Stay, and the Memos in Support of a Stay⁶, and via oral argument, all of which is/are hereby incorporated herein by reference.**

See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original).

2. **The Court erred in allowing and relying on the Affidavit of Melissa Dawkins ("Melissa").⁷**

Plaintiff initially responded to the Motion to Compel Arbitration with a memo in opposition filed March 12, 2021. The Facility filed the Memo in Support of Arbitration on March 15, 2021. The Court heard the Subject Motions on March 16, 2021, via Webex. During the hearing, the

³ The "Motion to Compel Arbitration" refers to the Facility's Motion to Stay State Court Proceedings and Compel Arbitration, filed February 12, 2021.

⁴ The "Motions to Stay" refers, collectively, to the Other Defendants' respective Motions to Stay, filed February 12, 2021.

⁵ The "Memo in Support of Arbitration" refers to the Facility's memo in support of the Motion to Compel Arbitration, filed March 15, 2021.

⁶ The "Memos in Support of a Stay" refers, collectively, to the Other Defendants' respective memos in support of their Motions to Stay, filed March 15, 2021.

⁷ (See, e.g., Subject Order p. 2 (Stating that "the only evidence in the record concerning the circumstances of the meeting [between Melissa and the Facility's director of admissions] has been presented by Plaintiff" and citing to Melissa's affidavit).)

Court granted Plaintiff permission to file a reply to the Facility's memo in support. Plaintiff thereafter filed such a reply on March 18, 2021. Plaintiff did not only file a reply, however, but also, along with her reply, filed Melissa's affidavit, which, most respectfully, the Court should have rejected for the following reasons:

- (a) Pursuant to Rule 6(d), SCRCP, "opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time." Melissa's affidavit was untimely under Rule 6(d), and the permission granted Plaintiff during the hearing was to file a *reply* (or other supplemental briefing), not to file an affidavit(s);
- (b) Much of the substance of the affidavit is inadmissible hearsay, wherein Melissa states what she allegedly said to Facility staff and what Facility staff allegedly said to her. *See* Rules 801–806, SCRE; and
- (c) The portions of Melissa's affidavit wherein she now states—for the first time, some four years after Mr. Dawkins's admission to the Facility—what she allegedly said to Facility staff and what Facility staff allegedly said to her, contradict Melissa's own contemporaneous representations in the Admission Agreement and the Arbitration Agreement⁸ and (1) did not provide the Court with a meaningful and reliable evidentiary basis on which to make a fair factual determination as to whether Melissa's representations in the admissions documents should prevail over her self-contradictory, and indeed self-serving, assertions in her recent

⁸ In this regard, Defendants note that the Court erred in viewing Melissa's affidavit as "the only evidence in the record concerning the circumstances of the meeting [between Melissa and the Facility's director of admissions]." The Admission Agreement and the Arbitration Agreement are themselves evidence; indeed, the latter contains Melissa's express representation of authority to sign it on her father's behalf.

affidavit or vice versa and (2) any serious and even-handed effort to address Melissa's contradictions would have necessarily required allowing the Facility to supplement the evidentiary record with an affidavit from Kris Milner (the Facility's admissions director who countersigned the Admission Agreement and Arbitration Agreement), indeed, as a practical matter, for Ms. Milner to be deposed, so all sides could question her, and to engage in reasonable discovery on this subject to include, at a minimum, deposing Melissa and the other non-Facility personnel referenced in her affidavit, Plaintiff (i.e., her sister Trina Dawkins) and Mr. Dawkins's "doctors," and follow up on any appropriate evidentiary leads arising therefrom. In fact, Plaintiff's counsel himself recognized the legitimacy of Defendants' complaint about the Court relying on Melissa's unchecked affidavit without any opportunity to examine her about it, emailing the Court and Defendants' counsel as follows:

I've had the chance to review [Defendants'] proposed order. This is unconventional for me to reply in this way but I've never been in a situation where I was completely unable to develop my response to a Defendants' arbitration argument because critical documents were only produced at the very last moment.^[9] It seems from reading the

⁹ Defendants, of course, disagree with Plaintiff's assertion in this regard. This lawsuit was filed October 14, 2020. The Facility timely answered, subject to and without waiving its right to compel arbitration, on November 19, 2020. The Facility moved to compel arbitration on February 12, 2021, attaching the Arbitration Agreement to the motion. The day before the March 16, 2021, motions hearing, the Facility filed the Memo in Support of Arbitration, on March 15, 2021, attaching the Admission Agreement. The Memo in Support of Arbitration was not untimely under any rule of procedure or Court directive—indeed, it is still pretty common practice in our state courts for memos to be handed up in real time during hearings. It was proper for the Facility to attach to the Motion to Compel Arbitration the Arbitration Agreement, the provisions of which not only provided for the arbitration that the Facility sought to compel but also contained Melissa's express representation that she had all due authority to sign on behalf of her father. Plaintiff's suggestion that more was required of the Facility in moving to compel arbitration pursuant to the terms of the facially valid Arbitration Agreement is without merit. Indeed, contrary to Plaintiff's assertion that the Facility did not present any evidence in support of its position, the

Defendants' proposed order that they feel similarly about Ms. Dawkins' affidavit and would like the chance to cross-examine her and her sister about the circumstances of their father's admission to Magnolia Manor. Both sides have essentially alleged that the documents produced by the other in support of their arguments are self-serving and shouldn't be relied on for that reason.^[10] I would propose a simple way to resolve this: hold the record open to allow the Plaintiff to take the deposition of Kris Milner and a 30(b)(6) deposition of THI of South Carolina at Spartanburg, LLC, and to allow the Defendants to take the depositions of Melissa and Trina Dawkins. These depositions could be limited to admissions practices of the defendants and the circumstances of Mr. Dawkins' admission to the Defendants' facility in order to keep the issues narrowly focused on what will be relevant to resolving this motion. It would give both parties the

facially valid Arbitration Agreement that the Facility presented was itself evidence in support of the Facility's position, and Plaintiff did not actually offer any evidence to dispute the facial validity of the Arbitration Agreement until two days after the hearing, when she filed Melissa's affidavit on March 18th, wherein she contradicts her own prior representation of authority, which, as stated above, the Court rejects. Further still, the Facility's equitable estoppel argument is not technically an argument for enforcement of the Arbitration Agreement but an argument that Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement, and thus it is not called for unless and until Plaintiff actually attempts to deny enforceability, which Plaintiff herself did not do until submitting her memo in opposition on March 12th. Moreover, and in any event, when Plaintiff's counsel complained about—which was not until near the end of the hearing—the Court responded (1), if counsel had made the complaint at the outset of the hearing, it would have continued the motion, but (2), since counsel brought it up near the end of the argument, rather than continuing the hearing that had by this point already essentially been held, it will allow counsel 10 days to submit additional briefing. This was not a case where Defendants “produced” (to use Plaintiff's counsel language) some vast trove of discovery documents at the last minute. Rather, the Facility, having already attached the Arbitration Agreement to the filed motion, attached the Admission Agreement to the supporting memo, and made an argument (based on merger/equitable estoppel) that, while the Facility contends the present circumstances should result in a different outcome than in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), is well known in the arbitration arena.

¹⁰ Defendants also disagree with Plaintiff's bothsidesism here. The Admission Agreement and the Arbitration Agreement rightfully do speak for themselves. Unlike Ms. Dawkins and her untested testimony via affidavit, there can be no complaint about not being able to cross-examine the Admission Agreement and the Arbitration Agreement.

right to confront and cross-examine these witnesses, and we would no longer be faced with any allegations of self-serving statements. I would propose a simple way to resolve this: hold the record open to allow the Plaintiff to take the deposition of Kris Milner and a 30(b)(6) deposition of THI of South Carolina at Spartanburg, LLC, and to allow the Defendants to take the depositions of Melissa and Trina Dawkins. These depositions could be limited to admissions practices of the defendants and the circumstances of Mr. Dawkins' admission to the Defendants' facility in order to keep the issues narrowly focused on what will be relevant to resolving this motion. It would give both parties the right to confront and cross-examine these witnesses, and we would no longer be faced with any allegations of self-serving statements.

Another option that I believe is at the Court's disposal is to refer the matter to a Special Referee under Rule 53 of the SCRCF to consider the testimony of these individuals and make a determination as to the arbitration issue. Rule 53(b) allows for the referral of the matter to a Special Referee upon the application of a party or upon the Court's own motion.

(Exhibit 1 at pp. 3-4.) Thereafter, Defendants' counsel responded favorably to Plaintiff's counsel's proposal and suggested a plan of action for implementing it whereby the pending motions would be withdrawn without prejudice, the limited depositions would be taken, and the motions would be refiled. (See Exhibit 1 at pp. 2-3.) The Court itself appeared to view the idea favorably and allowed the parties to try to iron out the details of an agreement in this regard (see Exhibit 1 at p. 1), which Defendants' counsel attempted to do. (See Exhibit 2 at pp. 1-4.) But that effort came to an abrupt halt, however, when Plaintiff's counsel informed Defendant's counsel that what he (Plaintiff's counsel) had meant when he "propose[d] a simple way to resolve this" was that the Facility *would be prejudiced* by proceeding as he proposed and *would risk waiving* its arbitration rights if it participated in discovery. (Exhibit 2 at p. 1 (wherein Plaintiff's counsel advises

Defendants' counsel, "I never agreed that the Defendants wouldn't be prejudiced by this or could engage in discovery and then claim that they hadn't waived their right to compel arbitration.".) Having advised Defendants' counsel thusly, Plaintiff's counsel immediately advised the Court, "We have not been able to reach an agreement on this, I'm happy to have Judge Knie consider the Memoranda, supporting materials, and proposed orders and make a ruling accordingly." (Exhibit 1 at p. 1.)

3. It was not necessary for the Facility to raise arbitration as a defense in the NOI phase.

The Subject Order states, "The Plaintiff filed the Notice of Intent on April 24th, 2020, and asked the Defendants to immediately disclose any Arbitration Agreements or move to compel arbitration if the Defendants believed an arbitration defense existed. The Defendants did not, and instead engaged in NOI-phase mediation on October 12th, 2020, again without raising an arbitration defense." (Subject Order p. 3.) The NOI process is a separate, statutorily mandated process whereby the parties attempt to resolve the dispute via *mediation*, not arbitration. As Plaintiff concedes, the Facility did provide Mr. Dawkins's medical records, and the Arbitration Agreement was unnecessary to the NOI mediation process. Indeed, logically, it was not until that process did not result in a resolution of the dispute that the question of arbitration as a means of dispute resolution became relevant. And as our Supreme Court has already explained in *Dean*, there is no waiver of arbitration rights arising out of the participation in or delay occasioned by the NOI process. 408 S.C. at 388, 759 S.E.2d at 736 ("We find that Appellants did not delay in filing their demand for arbitration. Rather, Appellants participated in the statutorily required mediation process, and after Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity. Further, even were we to find that Appellants should have filed the motion to compel arbitration immediately after Respondent filed the NOI, rather than after Respondent filed

the complaint, Respondent has shown no prejudice or undue burden to her from the four month delay. Thus, we conclude that Respondent's argument that Appellants' waived their right to enforce the Agreement is without merit.").

4. **The Court erred in viewing Melissa's affidavit as "the only evidence in the record concerning the circumstances of the meeting [between Melissa and the Facility's director of admissions]." (Subject Order p. 2.) The Admission Agreement and the Arbitration Agreement are themselves evidence; indeed, the latter contains Melissa's express representation of authority to sign it on her father's behalf. Accordingly, the Arbitration Agreement is valid on its face.**

During the hearing on March 16th, Defendants' counsel advised the Court that he was unable to state with certainty the nature of the relationship between Melissa and Mr. Dawkins. Plaintiff's reply memo, filed March 18th, states that Melissa is the daughter of Mr. Dawkins. When Mr. Dawkins was admitted to the Facility in April 2017, Melissa signed a number of documents on his behalf, including an Admission Agreement and an Arbitration Agreement. Melissa expressly signed both the Admission Agreement and the Arbitration Agreement as "'Resident's^[11] Durable Power of Attorney for Health Care'/'Resident's Legal Guardian'/'Resident's Responsible Party.'" The Admission Agreement expressly includes Melissa's acknowledgement that the "promises and representations [she made therein were] in order to induce Facility to enter into this Agreement" and her understanding that the "Facility [wa]s relying upon the truthfulness of the promises and representations [she] made." By signing the Arbitration Agreement, Melissa expressly "represent[ed] that . . . she ha[d] authority to sign on [Mr. Dawkins's] behalf so as to bind [him] as well as [herself]."

¹¹ In both the Admission Agreement and the Arbitration Agreement, Mr. Dawkins is referred to as the "Resident."

The Arbitration Agreement is valid on its face, i.e., there is nothing within the four corners of the document itself that calls its validity into question.

The Arbitration Agreement sets forth all necessary terms. It contains the parties' mutual and concurrent promises to submit a certain defined scope of "Disputes" to binding arbitration,¹² before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction.¹³ To require more just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *See Concepcion*, 563 U.S. at 339.

Moreover, it signed by Melissa, who expressly represented her authority to sign on Mr. Dawkins's behalf, and it is duly countersigned by the Facility's director of admissions, Ms. Milner.

There is no question raised here as to Melissa's competency. She is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,¹⁴ including, of course, the terms whereby she represented herself to the Facility as having authority to act on Mr. Mr. Dawkins's behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,¹⁵ and Melissa is no less bound by this covenant than the Facility. Further still, to

¹² The parties' mutual and concurrent promises to arbitrate constitute sufficient consideration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.") (citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E. 292 (1996)).

¹³ In this regard, the Court would note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the Arbitration Agreement, should not be confused with the South Carolina Arbitration Act, which, as addressed above (in explaining the applicability of the FAA), does not apply here.

¹⁴ *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.").

¹⁵ *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

require anything more from the Facility as a contracting party just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts. *Concepcion* at 339.

Further still, the Arbitration Agreement is not unconscionable. Unconscionability is a two-part test. There must be both (1) an absence of meaningful choice on the part of one party due to one-sided contract provisions and (2) terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Neither of these is present here. The first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident." As for the second part of the test (unreasonably oppressive terms), the agreement simply binds the parties (both sides) to submit to arbitration. Not only is this not oppressive "both state and federal policy favor arbitration of disputes." *Id.* at 24, 644 S.E.2d at 668. And there is nothing about the Arbitration Agreement that suggests it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Id.* at 25, 644 S.E.2d at 668 ("In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.").

5. **The merger/equitable estoppel analysis in the Subject Order is erroneous. The Court erred in rejecting the Facility's merger/equitable estoppel argument, i.e., it erred in failing to find (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Pace effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement.**

The Facility's merger/equitable estoppel argument is not, as the Court calls it, "essentially an apparent agency argument, arguing that because Melissa Dawkins signed the agreement, she must have held herself out as her father's agent." (Subject Order p. 5.) To be clear, the Facility's merger/equitable estoppel argument is not an argument for the enforceability of the Arbitration Agreement but rather an argument for Plaintiff—as personal representative of Mr. Dawkins's estate—to be estopped to deny the enforceability of the Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Dawkins having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Arbitration Agreement's supposed lack of enforceability is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Facility can show that the Arbitration Agreement is enforceable but whether it can show that Plaintiff should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, the Facility has done so.

Even though Mr. Dawkins is a nonsignatory to the Arbitration Agreement, it is nonetheless enforceable against his estate, i.e., Plaintiff.

"South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: "Appellants' equitable estoppel argument is premised on their contention that,

under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.”). Here the Court finds that the Arbitration Agreement is enforceable against Plaintiff based on estoppel.

“The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.” *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (quoting *Klutts Resort Realty, Inc. v. Down’Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹⁶ as the Admission Agreement and the Arbitration Agreement were here, there is evidence to upset the presumption of merger. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention* . . .”) (emphasis added). “[I]n attempting to ascertain th[e] [parties’] intention,” the Court “endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based

¹⁶ *Id.* at 355, 755 S.E.2d at 455.

on mere conjecture, only on actual evidence that—notwithstanding the circumstances giving rise to the merger presumption in the first place (same time, parties, purpose, and transaction)—can support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here.

Here, the “Entire Agreement” clause in the Admission Agreement expressly states that other admissions materials are deemed a part of it. True, the Arbitration Agreement was not required for Mr. Dawkins’s admission to the Facility, but all this means is that it did not have to be agreed to for him to be admitted, i.e., it did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Mr. Dawkins’s relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission.

Indeed, the fact that the Arbitration Agreement was not required for admission underscores its connectedness to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement). In other words, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement’s) sole reason for being.

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

Moreover, to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. Again, where, as here, the instruments in question are signed at the same time, by the same parties, for the same purpose, in the course of the same transaction, merger is presumed. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is at best ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention—is to allow the exception to devour the rule.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement by virtue of the so-called direct benefits test endorsed in our Supreme Court’s recent decision in *Wilson*, 426 S.C. 326, 827 S.E.2d 167. The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson*

Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which it is now contended that Plaintiff is estopped from refusing to comply with the Arbitration Agreement here. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added). The Court agrees. Without question Mr. Dawkins received direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Plaintiff cannot now deny the validity of the Arbitration Agreement with which the Admission Agreement merged.

6. The Motions to Stay should have been be granted, too.

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. Accordingly, the above analysis also shows why the Motions to Stay should be granted. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly

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

WHEREFORE, for the foregoing reasons, Defendants ask that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Motion to Compel Arbitration and the Motions to Stay.

PLEASE NOTE: Defendants reserve all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,
CLEMENT RIVERS, LLP

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Attorneys for Defendants

Charleston, South Carolina

April 19, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	CASE NO. 2020-CP-42-03593
TRINA DAWKINS,	)	
as Personal Representative	)	
of the Estate of William Dawkins,	)	
	)	
Plaintiff,	)	
	)	MEMO IN SUPPORT OF
vs.	)	MOTION TO ALTER, AMEND, AND/OR
	)	RECONSIDER ORDER REGARDING
FUNDAMENTAL CLINICAL AND	)	DEFENDANTS' MOTIONS TO STAY AND
OPERATIONAL SERVICES, LLC;	)	MOTION TO COMPEL ARBITRATION
FUNDAMENTAL ADMINISTRATIVE	)	
SERVICES, LLC; THI OF SOUTH	)	
CAROLINA, LLC; THI OF SOUTH	)	
CAROLINA AT SPARTANBURG, LLC;	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR-SPARTANBURG,	)	
LLC d/b/a Magnolia Manor-Spartanburg,	)	
	)	
Defendants.	)	

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg (the "Facility"),¹ along with the Other Defendants,² by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, submit this memo in support of their motion, filed April 19, 2021, to alter, amend, and/or reconsider (the "Pending Motion") the Court's Order Regarding Defendants' Motions to Stay Action and Compel Arbitration, filed April 8, 2021 (the "Subject Order").

¹ The reference to the Facility covers both the party identified as "THI of South Carolina at Spartanburg, LLC" and the party identified as "THI of South Carolina at Magnolia Manor-Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg." The correct legal name for the entity doing business as Magnolia Manor-Spartanburg, i.e., the Facility, is "THI of South Carolina at Spartanburg, LLC."

² The "Other Defendants" are Defendants Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina, LLC, collectively. "Defendants" refers to the Facility and the Other Defendants, collectively.

In respect of the Pending Motion, Defendants would address/clarify the following.

(a) Re: the exhibits referenced in the Pending Motion

The Pending Motion references an Exhibit 1 and an Exhibit 2. Although they were previously served on Plaintiff's counsel via email (as shown in the attached Exhibit 3), they were mistakenly omitted as attachments to the Pending Motion when it was e-filed, and they are now being e-filed as attachments hereto.

(b) Re: the correction of certain typographical errors in the Pending Motion

As the Court will recall, it requested proposed orders from both sides. Defendants' proposed order served as the backbone of the Pending Motion. Through inadvertence, certain language in Defendants' proposed order was not edited out of the Pending Motion. Accordingly, in the interest of avoiding any potential for confusion, please note that, in the following quotes from the Pending Motion, the language that has been struck through should have been omitted:

- From footnote 9, beginning on page 4 and ending on page 5: "Indeed, contrary to Plaintiff's assertion that the Facility did not present any evidence in support of its position, the facially valid Arbitration Agreement that the Facility presented was itself evidence in support of the Facility's position, and Plaintiff did not actually offer any evidence to dispute the facial validity of the Arbitration Agreement until two days after the hearing, when she filed Melissa's affidavit on March 18th, wherein she contradicts her own prior representation of authority, ~~which, as stated above, the Court rejects.~~"
- From footnote 13 on page 9: "In this regard, ~~the Court would~~ note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the Arbitration Agreement, should not be confused with the South

Carolina Arbitration Act, which, as addressed above (in explaining the applicability of the FAA), does not apply here.”

- From page 12: “Here ~~the Court finds that~~ the Arbitration Agreement is enforceable against Plaintiff based on estoppel.”
- From page 15: “~~The Court agrees.~~ Without question Mr. Dawkins received direct benefits”

Besides the foregoing, in the interest of avoiding any potential for confusion, Defendants would address two additional typos. The first begins with the sentence that begins “It would give both parties the” in the final line of the indented quotation on page 5 and runs through the end of the sentence ending “allegations of self-serving statements” at the end of that paragraph of indented text on page 6. As with the above quotations, the language that should have been omitted from the Pending Motion is struck through below:

~~It would give both parties the right to confront and cross-examine these witnesses, and we would no longer be faced with any allegations of self-serving statements. I would propose a simple way to resolve this: hold the record open to allow the Plaintiff to take the deposition of Kris Milner and a 30(b)(6) deposition of THH of South Carolina at Spartanburg, LLC, and to allow the Defendants to take the depositions of Melissa and Trina Dawkins. These depositions could be limited to admissions practices of the defendants and the circumstances of Mr. Dawkins’ admission to the Defendants’ facility in order to keep the issues narrowly focused on what will be relevant to resolving this motion. It would give both parties the right to confront and cross-examine these witnesses, and we would no longer be faced with any allegations of self-serving statements.~~

Lastly, in heading 5 on page 10, instead of referring to “Mr. Pace,” the Pending Motion should have, of course, referred to “Mr. Dawkins.”

WHEREFORE, Defendants reiterate their request that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Motion to Compel Arbitration and the Motions to Stay.

PLEASE NOTE: Defendants continue to reserve all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,
CLEMENT RIVERS, LLP

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April 26, 2021

From: [William Jordan](#)
To: [Knie, Grace Secretary \(Ashley Searcy\)](#)
Cc: [Hines, Russell](#); [Teri Lackey](#); [Davis, Jay](#); [Knie, Grace Law Clerk \(Brittany Biggs\)](#)
Subject: Re: Dawkins v. FCOS, et al.
Date: Thursday, April 1, 2021 11:59:03 AM
Attachments: [image001.png](#)

Ashley,

We have not been able to reach an agreement on this, I'm happy to have Judge Knie consider the Memoranda, supporting materials, and proposed orders and make a ruling accordingly.

-William

On Tue, Mar 30, 2021 at 2:16 PM Knie, Grace Secretary (Ashley Searcy) <gkniesc@sccourts.org> wrote:

Mr. Hines,

Thank you for your email. Judge Knie is in agreement with your request and will look forward to hearing for you all on Thursday at 5:00 p.m.

Best,

Ashley Searcy



Administrative Assistant to The Honorable Grace Gilchrist Knie

Seventh Judicial Circuit

180 Magnolia Street

Spartanburg, SC 29306

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From: Knie, Grace Law Clerk (Brittany Biggs)
Sent: Tuesday, March 30, 2021 1:53 PM
To: Knie, Grace Secretary (Ashley Searcy) <gkniesc@sccourts.org>; Knie, Grace G. <gkniej@sccourts.org>
Subject: FW: Dawkins v. FCOS, et al.

From: Hines, Russell <RHines@ycrlaw.com>
Sent: Tuesday, March 30, 2021 12:53 PM
To: 'William Jordan' <william@jordanlawcenter.com>; Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>
Cc: Knie, Grace G. <gkniej@sccourts.org>; Teri Lackey <teri@jordanlawcenter.com>; Davis, Jay <jdavis@ycrlaw.com>
Subject: RE: Dawkins v. FCOS, et al.

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Judge Knie,

Please accept my apologies for the continued email traffic on this matter, but I'm hopeful that the parties will be able to reach an agreement that, provided it is acceptable to the Court, will allow us to remove the subject motions from Your Honor's docket and re-file them later.

With thanks to Mr. Jordan for his suggestion, I believe the idea of developing the record through appropriately limited depositions is promising, but we need a bit more time on this end to determine if we can agree to the idea.

If the Court would please allow me through this Thursday (4/1) to do so, I will (a) determine whether the Facility can agree to Mr. Jordan's proposal; (b) if so, contact Mr. Jordan in hopes of confirming an agreement between the parties to withdraw the four pending motions without prejudice, conduct the limited depositions, and then re-file the motions; and (c) report back to the Court, hopefully, to advise that the parties are in agreement, but either way, to advise where the

parties' stand.

Thank you very much.

Russell G. Hines

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Charleston, South Carolina 29401

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Phone: (843) 720-5488

Fax: (843) 579-1327

Email: rhines@ycrlaw.com



CLEMENT RIVERS, LLP

25 Calhoun Street • Suite 400 • Charleston, SC 29401
ycrlaw.com

From: William Jordan <william@jordanlawcenter.com>

Sent: Monday, March 29, 2021 2:09 PM

To: Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>

Cc: Hines, Russell <RHines@ycrlaw.com>; Knie, Grace G. <gkniej@sccourts.org>; Teri Lackey <teri@jordanlawcenter.com>; Davis, Jay <jdavis@ycrlaw.com>

Subject: Re: Dawkins v. FCOS, et al.

Judge Knie,

I've had the chance to review this proposed order. This is unconventional for me to reply in this way but I've never been in a situation where I was completely unable to develop my response to a Defendants' arbitration argument because critical documents were only

produced at the very last moment. It seems from reading the Defendants' proposed order that they feel similarly about Ms. Dawkins' affidavit and would like the chance to cross-examine her and her sister about the circumstances of their father's admission to Magnolia Manor. Both sides have essentially alleged that the documents produced by the other in support of their arguments are self-serving and shouldn't be relied on for that reason. I would propose a simple way to resolve this: hold the record open to allow the Plaintiff to take the deposition of Kris Milner and a 30(b)(6) deposition of THI of South Carolina at Spartanburg, LLC, and to allow the Defendants to take the depositions of Melissa and Trina Dawkins. These depositions could be limited to admissions practices of the defendants and the circumstances of Mr. Dawkins' admission to the Defendants' facility in order to keep the issues narrowly focused on what will be relevant to resolving this motion. It would give both parties the right to confront and cross-examine these witnesses, and we would no longer be faced with any allegations of self-serving statements.

Another option that I believe is at the Court's disposal is to refer the matter to a Special Referee under Rule 53 of the SCRCF to consider the testimony of these individuals and make a determination as to the arbitration issue. Rule 53(b) allows for the referral of the matter to a Special Referee upon the application of a party or upon the Court's own motion.

Sincerely,

William Jordan

On Mon, Mar 29, 2021 at 10:16 AM Knie, Grace Law Clerk (Brittany Biggs)

<gknielc@sccourts.org> wrote:

Thank you Mr. Hines.

Sincerely,

Brittany L. Biggs

Law Clerk to the Honorable Grace Gilchrist Knie

Seventh Judicial Circuit

180 Magnolia Street

Spartanburg, South Carolina 29306

Ph: (864) 596-4235

Fax: (864) 562-4234

gknielc@sccourts.org

From: Hines, Russell <RHines@ycrlaw.com>

Sent: Monday, March 29, 2021 10:00 AM

To: Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>; William Jordan <william@jordanlawcenter.com>; Knie, Grace G. <gkniej@sccourts.org>

Cc: Teri Lackey <teri@jordanlawcenter.com>; Davis, Jay <jdavis@ycrlaw.com>

Subject: RE: Dawkins v. FCOS, et al.

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Thank you!

Defendants' proposed order is attached.

Russell G. Hines

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Charleston, South Carolina 29401

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Fax: (843) 579-1327

Email: rhines@ycrlaw.com



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25 Calhoun Street • Suite 400 • Charleston, SC 29401
ycrlaw.com

From: Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>
Sent: Monday, March 29, 2021 9:41 AM
To: Hines, Russell <RHines@ycrlaw.com>; William Jordan <william@jordanlawcenter.com>;
Knie, Grace G. <gkniej@sccourts.org>
Cc: Teri Lackey <teri@jordanlawcenter.com>; Davis, Jay <jdavis@ycrlaw.com>
Subject: RE: Dawkins v. FCOS, et al.

Mr. Hines,

That will be fine to submit the proposed order this morning, Monday, March 29, 2021 at 10:00 am.

Sincerely,

Brittany L. Biggs

Law Clerk to the Honorable Grace Gilchrist Knie

Seventh Judicial Circuit

180 Magnolia Street

Spartanburg, South Carolina 29306

Ph: (864) 596-4235

Fax: (864) 562-4234

gknielc@sccourts.org

From: Hines, Russell <RHines@ycrlaw.com>
Sent: Friday, March 26, 2021 11:57 PM
To: Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>; William Jordan <william@jordanlawcenter.com>; Knie, Grace G. <gkniej@sccourts.org>
Cc: Teri Lackey <teri@jordanlawcenter.com>; Davis, Jay <jdavis@ycrlaw.com>
Subject: RE: Dawkins v. FCOS, et al.

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Thank you very much, Ms. Biggs.

With sincere apologies for having to ask, I would very much appreciate the Court's indulgence of a modest amount of additional time to submit the proposed order, specifically, until 10:00 am Monday morning? I fully believed and expected I would have the order completed today (3/26), and indeed it is nearly complete, but on account of work-related and other time commitments, it still needs a bit more work before it is ready for the Court's consideration.

(I realize that, as a practical matter, given the very late hour on a Friday, the Court may well not even become aware of this request before 10:00 am on Monday, by which time I can assure the Court that my proposed order will be completed and submitted, but I did not want to let the day end without at least making some communication to the Court regarding the status of my proposed order.)

Russ

Russell G. Hines

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Phone: (843) 720-5488

Fax: (843) 579-1327

Email: rhines@ycrlaw.com



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25 Calhoun Street • Suite 400 • Charleston, SC 29401
ycrlaw.com

From: Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>

Sent: Friday, March 26, 2021 11:29 AM

To: Hines, Russell <RHines@ycrlaw.com>; William Jordan <william@jordanlawcenter.com>;
Knie, Grace G. <gkniej@sccourts.org>

Cc: Teri Lackey <teri@jordanlawcenter.com>; Davis, Jay <jdavis@ycrlaw.com>

Subject: RE: Dawkins v. FCOS, et al.

Mr. Hines,

You are good. You have the calculation correct. I am sorry if I caused any miss confusion with my last email.

Sincerely,

Brittany L. Biggs

Law Clerk to the Honorable Grace Gilchrist Knie

Seventh Judicial Circuit

180 Magnolia Street

Spartanburg, South Carolina 29306

Ph: (864) 596-4235

Fax: (864) 562-4234

gknielc@sccourts.org

From: Hines, Russell <RHines@ycrlaw.com>

Sent: Friday, March 26, 2021 11:24 AM

To: Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>; William Jordan <william@jordanlawcenter.com>; Knie, Grace G. <gkniej@sccourts.org>

Cc: Teri Lackey <teri@jordanlawcenter.com>; Davis, Jay <jdavis@ycrlaw.com>

Subject: RE: Dawkins v. FCOS, et al.

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Ms. Biggs,

Please accept my sincere apologies if I've miscalculated the due date for my proposed order, but I have it calendared for today, and I will have it submitted before the day is out.

Russ

Russell G. Hines

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From: Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>

Sent: Friday, March 26, 2021 11:16 AM

To: William Jordan <william@jordanlawcenter.com>; Knie, Grace G. <gkniej@sccourts.org>

Cc: Teri Lackey <teri@jordanlawcenter.com>; Davis, Jay <jdavis@ycrlaw.com>; Hines, Russell <RHines@ycrlaw.com>

Subject: RE: Dawkins v. FCOS, et al.

Thank you Mr. Jordan for the Plaintiff's proposed order. We are still waiting on Mr. Hines proposed order.

Sincerely,

Brittany L. Biggs

Law Clerk to the Honorable Grace Gilchrist Knie

Seventh Judicial Circuit

180 Magnolia Street

Spartanburg, South Carolina 29306

Ph: (864) 596-4235

Fax: (864) 562-4234

gknielc@sccourts.org

From: William Jordan <william@jordanlawcenter.com>

Sent: Thursday, March 25, 2021 5:08 PM

To: Knie, Grace G. <gkniej@sccourts.org>

Cc: Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>; Teri Lackey <teri@jordanlawcenter.com>; Davis, Jay <jdavis@ycrlaw.com>; RHines@ycrlaw.com

Subject: Dawkins v. FCOS, et al.

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Dear Judge Knie,

Attached please find Plaintiff's proposed Order as requested at the hearing last week.

Thank You,

--

William A. Jordan, III

Jordan Law Center
622 Wade Hampton Boulevard
Greenville, S.C. 29609

william@jordanlawcenter.com

Phone: [864-235-0147](tel:864-235-0147)

Fax: [864-467-9349](tel:864-467-9349)

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--

William A. Jordan, III

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[william@jordanlawcenter.com](mailto:william@jordanlawcenter.com)

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--

William A. Jordan, III

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Phone: [864-235-0147](tel:864-235-0147)

Fax: [864-467-9349](tel:864-467-9349)

**From:** [William Jordan](#)  
**To:** [Hines, Russell](#)  
**Cc:** [Davis, Jay](#); [Wakeham, Rebecca \(Becky\)](#); [Gandy, III, James D. \(Tripp\)](#); [Phillips, Ashton](#); [Mettler, Kate C.](#); [Teri Lackey](#)  
**Subject:** Re: Dawkins v. FCOS, et al.  
**Date:** Thursday, April 1, 2021 11:56:44 AM  
**Attachments:** [image001.png](#)

---

Russ,

I'm not in agreement, this goes well beyond anything I proposed to the Court. Frankly I never made any kind of proposal to you or your clients, I simply made a suggestion to the Court about how the record might be supplemented. I never agreed that the Defendants wouldn't be prejudiced by this or could engage in discovery and then claim that they hadn't waived their right to compel arbitration. I never agreed to withdraw the motion either, that is just a further delay tactic. It also sounds like Ms. Milner may not even be available to be deposed, making this all moot. It's best to just have this decided on the filed materials at this point.

-William

On Thu, Apr 1, 2021 at 11:03 AM Hines, Russell <[RHines@ycrlaw.com](mailto:RHines@ycrlaw.com)> wrote:

William,

Please know I don't mean to be a pest, but since Judge Knie is expecting to hear back by 5:00 this afternoon, I wanted to make sure that you've received my emails below.

Even if you need a bit more time to consider whether or not you can agree, if you see this email, will you please send a quick reply just to let me know that you got my other emails below and that you'll be letting me know whether or not we've got an agreement before 5:00 today?

Russ

Russell G. Hines

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25 Calhoun Street, Suite 400

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[ycrlaw.com](http://ycrlaw.com)

---

**From:** Hines, Russell

**Sent:** Wednesday, March 31, 2021 5:13 PM

**To:** 'William Jordan' <[william@jordanlawcenter.com](mailto:william@jordanlawcenter.com)>

**Cc:** Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>; Wakeham, Rebecca (Becky) <[bwakeham@ycrlaw.com](mailto:bwakeham@ycrlaw.com)>;  
Gandy, III, James D. (Tripp) <[tgandy@ycrlaw.com](mailto:tgandy@ycrlaw.com)>; Phillips, Ashton <[aphillips@ycrlaw.com](mailto:aphillips@ycrlaw.com)>;  
Mettler, Kate C. <[kmettler@ycrlaw.com](mailto:kmettler@ycrlaw.com)>

**Subject:** RE: Dawkins v. FCOS, et al.

William,

Sorry for the multiple emails, but I now have Ms. Milner's last known address:

Kristine Milner

REDACTED

A large rectangular gray box used to redact information, likely a phone number or address.

Please let me know if we've got an agreement as soon as you can. I think Judge Knie is expecting to hear back on this by 5:00 pm tomorrow.

Russ

Russell G. Hines

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---

**From:** Hines, Russell

**Sent:** Wednesday, March 31, 2021 4:53 PM

**To:** 'William Jordan' <[william@jordanlawcenter.com](mailto:william@jordanlawcenter.com)>

**Cc:** Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>; Wakeham, Rebecca (Becky) <[bwakeham@ycrlaw.com](mailto:bwakeham@ycrlaw.com)>;  
Gandy, III, James D. (Tripp) <[tgandy@ycrlaw.com](mailto:tgandy@ycrlaw.com)>; Phillips, Ashton <[aphillips@ycrlaw.com](mailto:aphillips@ycrlaw.com)>;  
Mettler, Kate C. <[kmettler@ycrlaw.com](mailto:kmettler@ycrlaw.com)>

**Subject:** RE: Dawkins v. FCOS, et al.

William,

Regarding your proposal about taking limited depositions, provided you agree there will not be any prejudice\* to Defendants for doing so, we can agree to the following:

(1) Withdraw the motions that are currently before Judge Knie without prejudice;

(2) Take limited depositions (specifically, your depositions of Kris Milner, assuming she is able to be deposed\*\*, and a 30(b)(6) designee of the Facility and our depositions of Melissa and Trina Dawkins, with all of these depositions being limited to admissions practices and the circumstances of Mr. Dawkins's admission/Melissa's authority to sign for him); and

(3) Re-file the motions once we have the benefit of the depositions.

\*By this I mean not only that the motions would be withdrawn without prejudice to re-file them but also that there would be no other prejudice associated with the withdrawal/re-filing of the motions or the taking of the limited discovery in the interim, e.g., there would be no waiver of any arbitration rights (i.e., the rights we contend that we have) by our participating in discovery (to be clear, I'm not asking you to agree that we have arbitration rights, just to agree that the rights we claim would not be waived by our participating in the discovery) or as a result of delay associated with the withdrawal/re-filing of the motions or taking the discovery.

\*\*Kris Milner no longer works at the Facility, so I cannot promise to make her available to you for a deposition. I assume the Facility will have a last known address/telephone number for her, and assuming I'm correct about that, I will provide it to you so you can try to make contact with her about the deposition.

Is this agreeable to you?

Russ

Russell G. Hines

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**Sent:** Monday, March 29, 2021 2:09 PM

**To:** Knie, Grace Law Clerk (Brittany Biggs) <[gknielc@sccourts.org](mailto:gknielc@sccourts.org)>

**Cc:** Hines, Russell <[RHines@ycrlaw.com](mailto:RHines@ycrlaw.com)>; Knie, Grace G. <[gkniej@sccourts.org](mailto:gkniej@sccourts.org)>; Teri Lackey <[teri@jordanlawcenter.com](mailto:teri@jordanlawcenter.com)>; Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>

**Subject:** Re: Dawkins v. FCOS, et al.

Judge Knie,

I've had the chance to review this proposed order. This is unconventional for me to reply in this way but I've never been in a situation where I was completely unable to develop my response to a Defendants' arbitration argument because critical documents were only produced at the very last moment. It seems from reading the Defendants' proposed order that they feel similarly about Ms. Dawkins' affidavit and would like the chance to cross-examine her and her sister about the circumstances of their father's admission to Magnolia Manor. Both sides have essentially alleged that the documents produced by the other in support of their arguments are self-serving and shouldn't be relied on for that reason. I would propose a simple way to resolve this: hold the record open to allow the Plaintiff to take the deposition of Kris Milner and a 30(b)(6) deposition of THI of South Carolina at Spartanburg, LLC, and to allow the Defendants to take the depositions of Melissa and Trina Dawkins. These depositions could be limited to admissions practices of the defendants and the circumstances of Mr. Dawkins' admission to the Defendants' facility in order to keep the issues narrowly focused on what will be relevant to resolving this motion. It would give both parties the right to confront and cross-examine these witnesses, and we would no longer be faced with any allegations of self-serving statements.

Another option that I believe is at the Court's disposal is to refer the matter to a Special Referee under Rule 53 of the SCRCF to consider the testimony of these individuals and make a determination as to the arbitration issue. Rule 53(b) allows for the referral of the matter to a Special Referee upon the application of a party or upon the Court's own motion.

Sincerely,

William Jordan

On Mon, Mar 29, 2021 at 10:16 AM Knie, Grace Law Clerk (Brittany Biggs) <[gknielc@sccourts.org](mailto:gknielc@sccourts.org)> wrote:

Thank you Mr. Hines.

Sincerely,

Brittany L. Biggs

Law Clerk to the Honorable Grace Gilchrist Knie

Seventh Judicial Circuit

180 Magnolia Street

Spartanburg, South Carolina 29306

Ph: (864) 596-4235

Fax: (864) 562-4234

[gknielc@sccourts.org](mailto:gknielc@sccourts.org)

---

**From:** Hines, Russell <[RHines@ycrlaw.com](mailto:RHines@ycrlaw.com)>

**Sent:** Monday, March 29, 2021 10:00 AM

**To:** Knie, Grace Law Clerk (Brittany Biggs) <[gknielc@sccourts.org](mailto:gknielc@sccourts.org)>; William Jordan <[william@jordanlawcenter.com](mailto:william@jordanlawcenter.com)>; Knie, Grace G. <[gkniej@sccourts.org](mailto:gkniej@sccourts.org)>

**Cc:** Teri Lackey <[teri@jordanlawcenter.com](mailto:teri@jordanlawcenter.com)>; Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>

**Subject:** RE: Dawkins v. FCOS, et al.

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Thank you!

Defendants' proposed order is attached.

Russell G. Hines

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---

**From:** Knie, Grace Law Clerk (Brittany Biggs) <[gknielc@sccourts.org](mailto:gknielc@sccourts.org)>

**Sent:** Monday, March 29, 2021 9:41 AM

**To:** Hines, Russell <[RHines@ycrlaw.com](mailto:RHines@ycrlaw.com)>; William Jordan <[william@jordanlawcenter.com](mailto:william@jordanlawcenter.com)>;  
Knie, Grace G. <[gkniej@sccourts.org](mailto:gkniej@sccourts.org)>

**Cc:** Teri Lackey <[teri@jordanlawcenter.com](mailto:teri@jordanlawcenter.com)>; Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>

**Subject:** RE: Dawkins v. FCOS, et al.

Mr. Hines,



That will be fine to submit the proposed order this morning, Monday, March 29, 2021 at 10:00 am.

Sincerely,

Brittany L. Biggs

Law Clerk to the Honorable Grace Gilchrist Knie

Seventh Judicial Circuit

180 Magnolia Street

Spartanburg, South Carolina 29306

Ph: (864) 596-4235

Fax: (864) 562-4234

[gknielc@sccourts.org](mailto:gknielc@sccourts.org)

---

**From:** Hines, Russell <[RHines@ycrlaw.com](mailto:RHines@ycrlaw.com)>

**Sent:** Friday, March 26, 2021 11:57 PM

**To:** Knie, Grace Law Clerk (Brittany Biggs) <[gknielc@sccourts.org](mailto:gknielc@sccourts.org)>; William Jordan <[william@jordanlawcenter.com](mailto:william@jordanlawcenter.com)>; Knie, Grace G. <[gkniej@sccourts.org](mailto:gkniej@sccourts.org)>

**Cc:** Teri Lackey <[teri@jordanlawcenter.com](mailto:teri@jordanlawcenter.com)>; Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>

**Subject:** RE: Dawkins v. FCOS, et al.

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Thank you very much, Ms. Biggs.

With sincere apologies for having to ask, I would very much appreciate the Court's indulgence of a modest amount of additional time to submit the proposed order, specifically, until 10:00 am Monday morning? I fully believed and expected I would have the order completed today (3/26), and indeed it is nearly complete, but on account of work-related and other time commitments, it still needs a bit more work before it is ready for the Court's consideration.

(I realize that, as a practical matter, given the very late hour on a Friday, the Court may well not even become aware of this request before 10:00 am on Monday, by which time I can assure the Court that my proposed order will be completed and submitted, but I did not want to let the day end without at least making some communication to the Court regarding the status of my proposed order.)

Russ

Russell G. Hines

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**From:** Knie, Grace Law Clerk (Brittany Biggs) <[gknielc@sccourts.org](mailto:gknielc@sccourts.org)>  
**Sent:** Friday, March 26, 2021 11:29 AM  
**To:** Hines, Russell <[RHines@ycrlaw.com](mailto:RHines@ycrlaw.com)>; William Jordan <[william@jordanlawcenter.com](mailto:william@jordanlawcenter.com)>;  
Knie, Grace G. <[gkniej@sccourts.org](mailto:gkniej@sccourts.org)>  
**Cc:** Teri Lackey <[teri@jordanlawcenter.com](mailto:teri@jordanlawcenter.com)>; Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>  
**Subject:** RE: Dawkins v. FCOS, et al.

Mr. Hines,

You are good. You have the calculation correct. I am sorry if I caused any miss confusion with my last email.

Sincerely,

Brittany L. Biggs

Law Clerk to the Honorable Grace Gilchrist Knie

Seventh Judicial Circuit

180 Magnolia Street

Spartanburg, South Carolina 29306

Ph: (864) 596-4235

Fax: (864) 562-4234

[gknielc@sccourts.org](mailto:gknielc@sccourts.org)

---

**From:** Hines, Russell <[RHines@ycrlaw.com](mailto:RHines@ycrlaw.com)>  
**Sent:** Friday, March 26, 2021 11:24 AM  
**To:** Knie, Grace Law Clerk (Brittany Biggs) <[gknielc@sccourts.org](mailto:gknielc@sccourts.org)>; William Jordan

<[william@jordanlawcenter.com](mailto:william@jordanlawcenter.com)>; Knie, Grace G. <[gkniej@sccourts.org](mailto:gkniej@sccourts.org)>

**Cc:** Teri Lackey <[teri@jordanlawcenter.com](mailto:teri@jordanlawcenter.com)>; Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>

**Subject:** RE: Dawkins v. FCOS, et al.

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Ms. Biggs,

Please accept my sincere apologies if I've miscalculated the due date for my proposed order, but I have it calendared for today, and I will have it submitted before the day is out.

Russ

Russell G. Hines

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---

**From:** Knie, Grace Law Clerk (Brittany Biggs) <[gknielc@sccourts.org](mailto:gknielc@sccourts.org)>

**Sent:** Friday, March 26, 2021 11:16 AM

**To:** William Jordan <[william@jordanlawcenter.com](mailto:william@jordanlawcenter.com)>; Knie, Grace G. <[gkniej@sccourts.org](mailto:gkniej@sccourts.org)>

**Cc:** Teri Lackey <[teri@jordanlawcenter.com](mailto:teri@jordanlawcenter.com)>; Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>; Hines, Russell <[RHines@ycrlaw.com](mailto:RHines@ycrlaw.com)>

**Subject:** RE: Dawkins v. FCOS, et al.

Thank you Mr. Jordan for the Plaintiff's proposed order. We are still waiting on Mr. Hines proposed order.

Sincerely,

Brittany L. Biggs

Law Clerk to the Honorable Grace Gilchrist Knie

Seventh Judicial Circuit

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---

**From:** William Jordan <[william@jordanlawcenter.com](mailto:william@jordanlawcenter.com)>

**Sent:** Thursday, March 25, 2021 5:08 PM

**To:** Knie, Grace G. <[gkniej@sccourts.org](mailto:gkniej@sccourts.org)>

**Cc:** Knie, Grace Law Clerk (Brittany Biggs) <[gknielc@sccourts.org](mailto:gknielc@sccourts.org)>; Teri Lackey <[teri@jordanlawcenter.com](mailto:teri@jordanlawcenter.com)>; Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>; [RHines@ycrlaw.com](mailto:RHines@ycrlaw.com)

**Subject:** Dawkins v. FCOS, et al.

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Dear Judge Knie,

Attached please find Plaintiff's proposed Order as requested at the hearing last week.

Thank You,

--

William A. Jordan, III

Jordan Law Center  
622 Wade Hampton Boulevard  
Greenville, S.C. 29609

[william@jordanlawcenter.com](mailto:william@jordanlawcenter.com)

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--

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--

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Hines, Russell

From: Hines, Russell
Sent: Monday, April 19, 2021 11:59 PM
To: 'William Jordan'
Subject: Dawkins Motion to Reconsider
Attachments: Motion to Reconsider.pdf; Exhibit 1 (Emails Between Counsel and the Court).pdf; Exhibit 2 (Emails Between Counsel).pdf

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EXHIBIT

3

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Trina Dawkins, as Personal Representative of
the Estate of William Dawkins,

CASE NO. 2020-CP-42-03593

Plaintiff,

vs.

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

Defendant(s).

**PLAINTIFF'S REPLY IN OPPOSITION TO
DEFENDANTS' MOTION TO ALTER, AMEND,
AND/OR RECONSIDER ORDER REGARDING
DEFENDANTS' MOTIONS TO STAY AND MOTION
TO COMPEL ARBITRATION**

TO: THE HONORABLE GRACE GILCHRIST KNIE, Presiding Judge, and D. JAY DAVIS, JR. and
RUSSELL G. HINES, Attorneys for Defendants

Plaintiff respectfully submits this response in opposition to Defendants' Motion to Alter, Amend, and/or Reconsider Order Regarding Defendants' Motion to Stay and Motion to Compel Arbitration. In its April 8, 2021 Order, this Court properly denied Defendants' Motion to Stay and Motion to Compel Arbitration. Plaintiff contends that this motion to reconsider should be denied.

The parties have extensively briefed these arguments, and in large part the Plaintiff will stand on her twin memoranda filed with the Court on March 12, 2021 and March 18, 2021. The Court found that this arbitration agreement was unenforceable, and the primary thrust of the Court's reasoning is simple: "In this case, there is no valid and enforceable contract. William Dawkins signed no Arbitration Agreement nor did he sign any other document giving Melissa the express authority to sign for him." (Circuit Court Order denying motion to enforce arbitration, April 8, 2021). The Defendants continue to contort the longstanding and well-established case

law of this state to reach their desired result. The facts and law of this case are ultimately a simple matter, and no amount of straining on the Defendants' behalf can change that.

In filing this Rule 59(e) Motion, the Defendants have improperly raised a number of issues that were not previously presented in their Motion and were not considered as part of the Court's ruling in this matter. These issues are not proper for the Court's consideration under Rule 59(e): A party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment. *Kan Enterprises, Inc. v. S.C. Dep't of Revenue*, 420 S.C. 596, 608, 803 S.E.2d 882, 888 (Ct. App. 2017), reh'g denied (Sept. 22, 2017). "[A] party cannot use a motion to reconsider, alter, or amend a judgment to present an issue that could have been raised prior to the judgment but was not so raised." *Anonymous v. State Board of Medical Examiners*, 323 S.C. 260, 473 S.E.2d 870, 880 (Ct. App. 1996). "Matters not argued to or ruled on by the trial court are not preserved for review." *Anonymous v. State Board of Medical Examiners*, 323 S.C. 260, 473 S.E.2d 870, 879 (Ct. App. 1996).

In their Motion to Reconsider, Defendants raised the following issues: (1) whether the filing of Melissa Dawkins' affidavit was proper; (2) whether additional discovery should have been allowed as to the matter¹; (3) whether it was necessary for the Defendants to raise an arbitration defense at the NOI phase (Defendants' Motion to Reconsider, filed 4-19-2021). Defendants had every opportunity to raise these issues prior to the Court's issuance of an Order on this matter, but they failed to do so. Defendants never objected to the filing of Melissa Dawkins' affidavit,

¹ Plaintiff would also note that Defendants requests for "reasonable discovery" on this matter, only after the arbitration argument has been lost, is completely absurd. Defendants stonewalled on all matters of discovery for over a year and concealed critical documents until the eve of the hearing on the arbitration, affording the Plaintiff zero opportunity to even understand the grounds for the motion, much less to refute the Defendants' obvious factual distortions. Defendants are solely to blame for the procedural posture that they find themselves in.

and never sought leave of Court to raise these additional issues after the Plaintiff filed her Reply. They are not proper for the Court's consideration under Rule 59(e) and should not even be considered at this point in the motions practice.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully request that the Court deny Defendants' Motion to Alter, Amend, and/or Reconsider.

Respectfully submitted,

s/William A. Jordan, III

William A. Jordan, III, S.C. Bar #: 101271

William@jordanlawcenter.com

622 Wade Hampton Boulevard
Greenville, South Carolina 29609
(864) 235-0147
Attorney for Plaintiff

Greenville, South Carolina
May 3, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	CASE NO. 2020-CP-42-03593
TRINA DAWKINS,	)	
as Personal Representative	)	
of the Estate of William Dawkins,	)	
	)	
Plaintiff,	)	DEFENDANTS' SUR REPLY TO
	)	PLAINTIFF'S REPLY IN OPPOSITION TO
vs.	)	DEFENDANTS' MOTION TO ALTER,
	)	AMEND, AND/OR RECONSIDER ORDER
FUNDAMENTAL CLINICAL AND	)	REGARDING DEFENDANTS' MOTIONS
OPERATIONAL SERVICES, LLC;	)	TO STAY AND MOTION TO COMPEL
FUNDAMENTAL ADMINISTRATIVE	)	ARBITRATION
SERVICES, LLC; THI OF SOUTH	)	
CAROLINA, LLC; THI OF SOUTH	)	
CAROLINA AT SPARTANBURG, LLC;	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR-SPARTANBURG,	)	
LLC d/b/a Magnolia Manor-Spartanburg,	)	
	)	
Defendants.	)	

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg (the "Facility"),¹ along with the Other Defendants,² by and through their undersigned counsel, pursuant to the Court's Initial Order Regarding Motion for Reconsideration, filed May 13, 2021, and in further support of their motion, filed April 19, 2021, to alter, amend, and/or reconsider (the "Pending Motion") the Court's Order Regarding Defendants' Motions to Stay Action and Compel

¹ The reference to the Facility covers both the party identified as "THI of South Carolina at Spartanburg, LLC" and the party identified as "THI of South Carolina at Magnolia Manor-Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg." The correct legal name for the entity doing business as Magnolia Manor-Spartanburg, i.e., the Facility, is "THI of South Carolina at Spartanburg, LLC."

² The "Other Defendants" are Defendants Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina, LLC, collectively. "Defendants" refers to the Facility and the Other Defendants, collectively.

Arbitration, filed April 8, 2021 (the “Subject Order”), submit this sur reply to Plaintiff’s reply in opposition to the Pending Motion, filed May 3, 2021 (“Plaintiff’s Reply”).

In pertinent part, Plaintiff’s Reply states as follows:

In filing this Rule 59(e) Motion, the Defendants have improperly raised a number of issues that were not previously presented in their Motion and were not considered as part of the Court’s ruling in this matter. These issues are not proper for the Court’s consideration under Rule 59(e): A party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment. *Kan Enterprises, Inc. v. S.C. Dep’t of Revenue*, 420 S.C. 596, 608, 803 S.E.2d 882, 888 (Ct. App. 2017), reh’g denied (Sept. 22, 2017). “[A] party cannot use a motion to reconsider, alter, or amend a judgment to present an issue that could have been raised prior to the judgment but was not so raised.” *Anonymous v. State Board of Medical Examiners*, 323 S.C. 260, 473 S.E.2d 870, 880 (Ct. App. 1996). “Matters not argued to or ruled on by the trial court are not preserved for review.” *Anonymous v. State Board of Medical Examiners*, 323 S.C. 260, 473 S.E.2d 870, 879 (Ct. App. 1996).

In their Motion to Reconsider, Defendants raised the following issues: (1) whether the filing of Melissa Dawkins’ affidavit was proper; (2) whether additional discovery should have been allowed as to the matter; (3) whether it was necessary for the Defendants to raise an arbitration defense at the NOI phase (Defendants’ Motion to Reconsider, filed 4-19-2021). Defendants had every opportunity to raise these issues prior to the Court’s issuance of an Order on this matter, but they failed to do so. Defendants never objected to the filing of Melissa Dawkins’ affidavit, and never sought leave of Court to raise these additional issues after the Plaintiff filed her Reply. They are not proper for the Court’s consideration under Rule 59(e) and should not even be considered at this point in the motions practice.

(Plaintiff’s Reply pp. 2–3 (internal footnote omitted).) In a footnote, Plaintiff’s Reply adds:

Plaintiff would also note that Defendants requests for “reasonable discovery” on this matter, only after the arbitration argument has been lost, is completely absurd. Defendants stonewalled on all matters of discovery for over a year and concealed critical documents until the eve of the hearing on the arbitration, affording the Plaintiff zero opportunity to even understand the grounds for the motion, much less to refute the

Defendants' obvious factual distortions. Defendants are solely to blame for the procedural posture that they find themselves in.

(Plaintiff's Reply p. 2 n.1.)

Regarding the above-quoted language from Plaintiff's Reply, Defendants would make two points.

1. Defendants have not improperly raised new issues in the Pending Motion.

As the Court will recall, at the conclusion of the March 16, 2021, hearing on the Underlying Motions,³ it requested proposed orders from both sides. As the Court will also recall, Plaintiff did not even file Melissa Dawkins's affidavit until two days after the motion hearing, on March 18, 2021. Every one of the issues Plaintiff claims to be improperly raised for the first time in the Pending Motion (i.e., "(1) whether the filing of Melissa Dawkins' affidavit was proper; (2) whether additional discovery should have been allowed as to the matter; [and] (3) whether it was necessary for the Defendants to raise an arbitration defense at the NOI phase") was in fact properly raised to the Court, before it ruled on the Underlying Motions, via Defendants' proposed order. (A copy of Defendant's proposed order, along with counsel's transmittal email to the Court and opposing counsel, is attached hereto as **Exhibit A**.) Indeed, as shown in Exhibit 1 to Defendant's memo in support of the Pending Motion, filed April 26, 2021 ("Defendants' Memo in Support"), in response to Defendants' proposed order, Plaintiff's counsel himself emailed the Court not only acknowledging Defendants' objection to Melissa Dawkins's affidavit ("It seems from reading the Defendants' proposed order that they feel . . . Ms. Dawkins' affidavit . . . shouldn't be relied on . . .") but also "propos[ing]" a resolution (to both Defendants' objection to Melissa Dawkins's affidavit and his own complaint about Defendants' reliance on the Arbitration Agreement and the

³ The "Underlying Motions" are, of course, the Facility's motion to compel arbitration and the Other Defendants' motions to stay, all of which were filed February 12, 2021.

Admission Agreement) whereby the Court would “hold the record open to allow . . . [certain] deposition[s].” (Defendants’ Memo in Support at Exhibit 1 pp. 3–4.) As also shown in Exhibit 1, together with Exhibit 2, to Defendants’ Memo in Support, in response to Plaintiff’s counsel’s proposal, Defendants’ counsel, suggested a plan of action (which he believed to be consistent with what Plaintiff’s counsel had proposed) whereby the Underlying Motions would be withdrawn without prejudice, the targeted discovery would be conducted, and the Underlying Motions would be re-filed (Defendants’ Memo in Support at Exhibit 1 pp. 2–3), which plan, despite seeming to meet with the Court’s approval (*id.* at p. 1), Plaintiff’s counsel abruptly rejected. (See Defendants’ Memo in Support at Exhibit 2 pp. 1–4.) Respectfully, Plaintiff’s assertion that the above-referenced issues/arguments were only presented to the Court for the first time in the Pending Motion is simply wrong.

2. Plaintiff’s assertion that “Defendants stonewalled on all matters of discovery for over a year and concealed critical documents until the eve of the hearing on the arbitration” is untrue and unfair.

The assertion that Defendants have “stonewalled on all matters of discovery *for over a year*” (emphasis added) is demonstrably false, as this action was only filed on October 14, 2020. To the extent that Plaintiff is referring to the pre-suit NOI process, Plaintiff has identified no instance of “stonewalling” with respect to any material relevant to that process. The NOI process is a separate, statutorily mandated process whereby the parties attempt to resolve the dispute via mediation, not arbitration. Plaintiff does not assert that the Facility did not provide Mr. Dawkins’s medical records, and Plaintiff suggests no reason why the Arbitration Agreement, or, for that matter, the Admission Agreement, was necessary to the NOI mediation process. Indeed, logically, it was not until that process did not result in a resolution of the dispute that the question of arbitration as a means of dispute resolution became relevant. The Facility attached the Arbitration

Agreement to its motion to compel arbitration filed February 12, 2021, and thereafter attached the Admission Agreement to its memo in support, to which Plaintiff was allowed to and did respond via a post-hearing brief. Plaintiff's charges of "stonewalling" and document concealment are untrue and unfair and should not be given any credence.

WHEREFORE, for the foregoing reasons, along with those set forth in the Pending Motion and Defendants' Memo in Support, Defendants reiterate their request that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Motion to Compel Arbitration and the Motions to Stay.

PLEASE NOTE: Defendants continue to reserve all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.
D. Jay Davis, Jr.
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25 Calhoun Street, Suite 400
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Attorneys for Defendants

Charleston, South Carolina

May 21, 2021

RECEIVED

Jul 01 2021

SC Court of Appeals

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

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2020-CP-42-03593

Trina Dawkins,
as Personal Representative of the Estate of William Dawkins,

Respondent,

v.

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

Appellants.

NOTICE OF APPEAL

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy, III (SC Bar No. 11925)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
25 Calhoun Street, Suite 400
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(843) 720-5488

Attorneys for Appellants

Other Counsel of Record:

William A. Jordan III (SC Bar No. 101271)
JORDAN LAW CENTER, LLC
622 Wade Hampton Boulevard
Greenville, South Carolina 29609
(864) 235-0147

Attorney for Respondent

Defendants, Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina, LLC; THI of South Carolina at Spartanburg, LLC; THI of South Carolina at Magnolia Manor-Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg (collectively, “Appellants”),¹ hereby appeal the following orders of the Honorable Grace Gilchrist Knie, Circuit Court Judge:

- **Order Regarding Defendants’ Motions to Stay and Motion to Compel Arbitration**, filed April 8, 2021, and
- **Final Order Regarding Motion for Reconsideration**, filed June 1, 2021.²

Copies of the above-referenced appealed orders are attached hereto and incorporated herein by reference. Appellants received written notice of entry of the most recent order on June 1, 2021.

<SIGNED ON THE FOLLOWING PAGE>

¹ Appellants are named consistent with the way Plaintiff/Respondent named them as Defendants in this action. Accordingly, the named Appellants include the named Defendants “THI of South Carolina at Spartanburg, LLC” and “THI of South Carolina at Magnolia Manor-Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg;” however, the correct legal name for the entity doing business as Magnolia Manor-Spartanburg is “THI of South Carolina at Spartanburg, LLC.”

² This “Final” order was preceded by an Initial Order Regarding Motion for Reconsideration, filed May 13, 2021. As stated in the “Final” order, the “Initial” order simply advised the parties that the Court would decide Defendants’/Appellants’ motion for reconsideration without a hearing and, without requiring any additional written submission from any party, established deadlines for the filing of such submissions and replies thereto as the parties wished for the Court to consider in deciding the motion. Appellants do not believe it is necessary to appeal the Court’s “Initial” order; however, out of an abundance of caution, to the extent it may be necessary to include the “Initial” order in this appeal, it is so included.

Respectfully submitted,
CLEMENT RIVERS, LLP

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D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy, III (SC Bar No. 11925)
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Attorneys for Appellants

Charleston, South Carolina

July 1, 2021

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

RECEIVED
Jul 01 2021
SC Court of Appeals

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2020-CP-42-03593

Trina Dawkins,
as Personal Representative of the Estate of William Dawkins,

Respondent,

v.

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

Appellants.

PROOF OF SERVICE

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy, III (SC Bar No. 11925)
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Attorneys for Appellants

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that Appellants' **NOTICE OF APPEAL** was served on Respondent on July 1, 2021, by emailing (see attached email) a copy of the same to Respondent's counsel of record:

William A. Jordan III, Esquire
william@jordanlawcenter.com
JORDAN LAW CENTER, LLC
622 Wade Hampton Boulevard
Greenville, SC 29609

Attorney for Respondent

I also certify that a copy of this **NOTICE OF APPEAL** was this day, July 1, 2021, E-Filed with the lower court (see attached NEF), thus also, i.e., in addition to service by email, effecting service of the notice today on Respondent's above-identified counsel of record via the E-Filing System.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)
Attorneys for Appellants

Charleston, South Carolina

July 1, 2021

From: [Hines, Russell](#)
To: ["william@jordanlawcenter.com"](mailto:william@jordanlawcenter.com)
Cc: ["Brown, Steve"](#); [Davis, Jay](#); [Gandy, III, James D. \(Tripp\)](#); [Phillips, Ashton](#); [McNeil, Tasha](#); [Wakeham, Rebecca \(Becky\)](#); [Justman, Aimee](#); [Bell, Pollyana \(Polly\)](#)
Subject: Dawkins v. Fundamental (Circuit Court Case No. 2020-CP-42-03593) -- Notice of Appeal
Date: Thursday, July 1, 2021 7:49:30 PM
Attachments: [image001.png](#)
[Dawkins v. Fundamental -- Notice of Appeal.pdf](#)
[Appealed Order filed 4-8-21 \(Order Denying Mots. to Stay and Mot. to Compel Arb.\).pdf](#)
[Appealed Order filed 6-1-21 \(Order Denying Mot. to Reconsider\).pdf](#)

Attached please find Appellants' **Notice of Appeal** in the above-referenced matter, along with copies of the **Appealed Orders** referenced in the notice.

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***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2020CP4203593

Official File Stamp: 07-01-2021 07:55:19 PM
Court: CIRCUIT COURT
Common Pleas
Spartanburg
Case Caption: Trina Dawkins, As Pr Of The Estate Of William Dawkins VS Fundamental Clinical And Operational Services, Llc , defendant, et al
Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
Filed by or on behalf of: Donald Jay Davis, Jr.

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

James D. Gandy, III for Fundamental Clinical And Operational Services, Llc, Thi Of South Carolina At Spartanburg, Llc, Thi Of South Carolina, Llc, Fundamental Administrative Services, Llc
Ted Ashton Phillips, III for Fundamental Clinical And Operational Services, Llc, Thi Of South Carolina At Spartanburg, Llc, Thi Of South Carolina, Llc, Fundamental Administrative Services, Llc
William Ashley Jordan, III for Trina Dawkins, As Pr Of The Estate Of William Dawkins
Donald Jay Davis, Jr. for Fundamental Clinical And Operational Services, Llc, Thi Of South Carolina At Spartanburg, Llc, Thi Of South Carolina, Llc, Fundamental Administrative Services, Llc

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Thi Of South Carolina At Magnolia Manor-Spartanburg, Llc D/B

Apr 06 2022

CERTIFICATE OF COUNSEL

SC Court of Appeals

I, the undersigned counsel for Appellants, hereby certify that this **Record on Appeal** contains all material proposed to be included by any party that was presented to the lower court and not any other material, see Rule 210(c) and (g), SCACR, and that it complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

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James D. Gandy, III (SC Bar No. 11925)

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April 6, 2022