IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

NINA KIMYAGAROVA, as the personal representative of the Estate of Sara Kimiagarova (deceased),	)	CASE NO. 793459
	)	JUDGE SHIRLEY STRICKLAND SAFFOLD
Plaintiff,	)	PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S THIRD MOTION TO STAY
vs.	)	
THE MONTEFIORE HOME, et al.,	)	AND
Defendants.	)	PLAINTIFF'S MOTION FOR SANCTIONS.

Now comes Plaintiff Nina Kimyagarova, as the personal representative of the Estate of Sara Kimiagarova (deceased), by and through her attorneys, Blake A. Dickson and Mark D. Tolles, II of The Dickson Firm, L.L.C., and, for her Brief in Opposition to Defendant's Third Motion to Stay and her Motion for Sanctions, states as follows:

I. INTRODUCTION.

Defendant The Montefiore Home, by and through its counsel, has moved this Court, for the third time, to permanently stay all proceedings in this case pending arbitration on all of Plaintiff's claims in this case, pursuant to O.R.C. § 2711.02. Defendant relies upon the arbitration clause contained in the Admission Agreement relative to Sara Kimagarova's admission to The Montefiore Home on June 4, 2009. [1] In its third Motion to Stay, Defendant provides cursory arguments, at best, for why the within case should be stayed pending arbitration. Defendant's third Motion to Stay

[1] Although Defendant has attached Admission Agreements from each of Sara Kimiagarova's four (4) respite admissions to The Montefiore Home as exhibits to its third Motion to Stay, there is no dispute that Plaintiff's claims in this case relate solely to the Sara Kimiagarova's admission to The Montefiore Home from June 4, 2009 through June 13, 2009. As a result, the Admission Agreements pertaining to Sara Kimiagarova's three (3) other admissions to The Montefiore Home do not apply, in any way, to Plaintiff's claims in this case. Further, even if the other Admission Agreements applied to Plaintiff's claims in this case, they would be invalid and unenforceable for the same reasons discussed below.

should be promptly denied.

O.R.C. § 2711.02 permits a party to request a stay of proceedings when an "action is brought upon any issue referable to arbitration under an agreement in writing for arbitration". O.R.C. § 2711.02(B) states, as follows:

> (B) If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

O.R.C. § 2711.01(A) states that arbitration clauses in written contracts are generally valid and enforceable, subject to several statutory exceptions as well as "grounds that exist at law or in equity for the revocation of any contract."

Defendant's Admission Agreement, including the arbitration clause contained therein, is invalid and unenforceable against the Estate of Sara Kimiagarova (deceased) and Sara Kimiagarova's heirs for the following reasons:

1. Collateral estoppel, also known as issue preclusion, prevents Defendant from relitigating, for the third time, an issue that has already been decided by this Court, in this case between these same parties. This Court's previous two (2) decisions denying Defendant's previously filed two (2) Motions to Stay, are binding on the parties. Accordingly, this Court should summarily deny Defendant's third Motion to Stay. Defendant's attempt, by and through its counsel, to have this case stayed a third time, should be sanctioned pursuant to Ohio Civil Rule 11.

2. Defendant has waived any alleged right to arbitration by actively participating in this case, including by extensively engaging in discovery. By actively participating in this case in a judicial forum, Defendant has waived any alleged right to arbitrate this case. Once a party litigates a case they waive their right to arbitrate it. Defendant's attempt, by and through its counsel, to have this case stayed pending arbitration, having actively engaged in litigation, should be sanctioned pursuant to Ohio Civil Rule 11.

3. The express language of the Defendant's Admission Agreement clearly states that the Agreement, including the arbitration clause, automatically terminated upon Sara Kimiagarova's death, which occurred on October 3, 2011. As a result, the Admission Agreement and its arbitration clause are now void. Defendant's attempt, by and through its counsel, to enforce a contract that is void, based on the unequivocal language of its terms, should be sanctioned pursuant to Ohio Civil Rule 11 and O.R.C. § 2323.51.

4. Further, as indicated in Defendant's Answers to Plaintiff's Complaint and Plaintiff's First Amended Complaint in Case No. 728974, as well as Defendant's Answer to Plaintiff's Complaint in Case No. 793459, Defendant's Admission Agreement, including its arbitration clause, is void. Defendant's continuous attempts, by and through its counsel, to knowingly enforce a void contract should be sanctioned pursuant to Ohio Civil Rule 11 and O.R.C. § 2323.51.

5. Pursuant to O.R.C. § 2711.23, an arbitration agreement involving a medical claim is only valid and enforceable if it is separate from any other agreement, consent, or document. Since the arbitration clause that Defendant is relying upon is buried on Page 6 of Defendant's 9-page Admission Agreement and is not contained in a separate agreement requiring separate consent, it is invalid and unenforceable.

6. The Admission Agreement which contains the Arbitration Clause is not enforceable against Sara Kimiagarova nor the Estate of Sara Kimiagarova (deceased) in this case because it was never signed by Sara Kimiagarova nor anyone with authority to sign on her behalf. The Admission Agreement was signed by Nina Kimyagarova. Nina Kimyagarova had no authority to sign a contract for her mother.

7. Pursuant to O.R.C. § 2711.24, an arbitration agreement is only valid and enforceable if the person executing the agreement is able to effectively communicate in spoken and written English. Nina Kimyagarova had no authority to sign a contract on behalf of Sara Kimiagarova and she could not effectively communicate in spoken and written English.

8. The Admission Agreement which contained the Arbitration Clause only purported to bind Sara Kimiagarova. Under no circumstances would this clause bind her next of kin and prevent them from pursuing their wrongful death claims. Pursuant to the Ohio Supreme Court's decision in *Peters v. Columbus Steel Castings, Co.*, 115 Ohio St.3d 134, 2007-Ohio-4784, 873 N.E.2d 1258 (2007), wrongful death claims brought by Decedent Sara Kimiagarova's next-of-kin are not subject to arbitration based upon an arbitration agreement signed by the Decedent.

9. The arbitration clause contained within the Defendant's Admission Agreement is procedurally and substantively unconscionable, and, as a result, it is not enforceable.

10. The selected forum for arbitration, the American Health Lawyers Association, will not administer the arbitration of a "consumer health care liability claim" unless all of the parties agreed in writing to arbitrate the claim **after** the injury occurred. There is no agreement in

this case that was signed by anyone after Sara Kimiagarova was injured at the Montefiore Home. Since the selection of the American Health Lawyers Association is an integral term of the arbitration clause, the unavailability of the American Health Lawyers Association to arbitrate any of Plaintiff's claims in this case renders the arbitration agreement unenforceable due to impossibility of performance.

For all of the above **ten (10)** reasons, this Court should promptly deny Defendants' third Motion to Stay and impose the appropriate sanctions on Defendant and its counsel, pursuant to Ohio Civil Rule 11 and O.R.C. § 2323.51, for filing this untimely and frivolous Motion, which is not warranted under existing law, outright violates existing law, and cannot be supported by the evidence in this case, including the express language of the Defendant's Admission Agreement and its arbitration clause.

II. STATEMENT OF THE FACTS AND OF THE CASE.

Sara Kimiagarova lived with her daughter, Nina Kimyagarova, who cared for her full-time. On June 4, 2009, Sara Kimiagarova, who had dementia and an unsteady gait, was admitted to The Montefiore Home nursing home for fourteen (14) days of respite care while her daughter was traveling out of town. Sara Kimiagarova was expected to be at The Montefiore Home until June 17, 2009 when her daughter was scheduled to return home. In connection with this respite admission Defendant The Montefiore Home had Sara Kimiagarova's daughter, Nina Kimyagarova, who did not hold a power of attorney to act on her mother's behalf, sign an Admission Agreement, a copy of which is attached hereto as Exhibit "A", as well as other admission paperwork. The admission paperwork was placed in front of Nina Kimyagarova, and she was told that she had to sign it in order to get her mother, Sara Kimiagarova, admitted to The Montefiore Home. *See* Nina Kimyagarova Depo. 26:2-10 (Oct. 10, 2012). Nina Kimyagarova was told that if she signed the paperwork that everything would be normal. *Id.* Nina Kimyagarova did not hold power of attorney to sign contracts on behalf of her mother. Nina Kimyagarova does not even know or understand what a

power of attorney is. *See* Nina Kimyagarova Depo. 44:11-21. Nina Kimyagarova did not understand herself to have any authority to enter into an agreement on behalf of Sara Kimiagarova at that time. *See* Nina Kimyagarova Depo. 29:9-13. She simply signed the admission paperwork at the direction of Defendant The Montefiore Home.

When Nina Kimyagarova signed the admission paperwork, she was concerned with making sure that her mother would be safe and properly supervised at The Montefiore Home while she was out of town. *See* Nina Kimyagarova Depo. 28:3-12, 55:15-24. Nina Kimyagarova did not read the Admission Agreement. *See* Nina Kimyagarova Depo. 25:11-17. Even if Nina Kimyagarova had read the Admission Agreement, she would not have understood it because her primary language is Russian and she is not fluent in English. *See* Nina Kimyagarova Depo. 28:17-20. Although the Defendant's employees and/or agents tried to explain the Admission Agreement to Nina Kimyagarova, she could not understand it. *Id.* Nina Kimyagarova explained to the Defendant's employees and/or agents that she did not understand the Admission Agreement. *See* Nina Kimyagarova Depo. 25:21-24. Despite the fact that Defendant The Montefiore Home employs Russian-speaking staff who might have been able to interpret the Admission Agreement and assist Nina Kimyagarova in understanding it, the Defendant did not provide or offer to provide any such interpreters to Nina Kimyagarova during the admission process or at any other time. *See* Nina Kimyagarova Depo. 25:25-26:10, 51:14-24. No one at The Montefiore Home ever told Nina Kimyagarova that an interpreter could be provided if she needed assistance in understanding the admission paperwork. *See* Nina Kimyagarova Depo. 25:25-26:1. The employee and/or agent of the Defendant who conducted the admission process for Sara Kimiagarova's admission to The Montefiore Home told Nina Kimiagarova to just sign the admission paperwork and everything would be normal. *See* Nina Kimyagarova Depo. 26:2-10.

Nina Kimyagarova understood that the Admission Agreement concerned the care and services that The Montefiore Home and its staff would provide to Sara Kimiagarova. *See* Nina Kimyagarova Depo. 26:20-24, 28:3-12. No one at The Montefiore Home ever told Nina Kimyagarova that the admission paperwork had anything to do with arbitration or litigation. She did not know that the Admission Agreement contained any terms or provisions regarding the resolution of any disputes with The Montefiore Home, including any disputes that might arise from its negligent care of Sara Kimiagarova. *See* Nina Kimiagarova Depo. 27:9-28:2.

Defendant's Admission Agreement is a nine (9) page document. On Page 6 of the Admission Agreement, following sections relating to financial obligations and termination of the Agreement, is an arbitration clause. The admission paperwork, including Defendant's Admission Agreement, was drafted by Defendant and provided to Nina Kimyagarova by and through Defendant's employees and/or agents.

Nina Kimyagarova is not an attorney. She does not have any formal education beyond middle school, which she received prior to her emigrating from Uzbekistan to the United States. *See* Nina Kimyagarova Depo. 9:10-14. Her current employment involves caring only for Russian-speaking individuals. *See* Nina Kimyagarova Depo. 19:2-4. Her training for that position was provided in Russian. *See* Nina Kimyagarova Depo. 20:21-23. Although Nina Kimyagarova can read some English, it is very difficult for her to understand what she reads in English. *See* Nina Kimyagarova Depo. 13:17-20. Her command of the English language is at a first grade level. *See* Nina Kimyagarova Depo. 15:6-10. For these reasons, it is very difficult for Nina Kimyagarova to engage in commercial transactions using the English language. *See* Nina Kimyagarova Depo. 19:25-20:7. Nina Kimyagarova lets her husband, who has a better command of the English language and a better understanding of written English, take care of commercial transactions, such as handling

transactions and issues involving utility bills, automobile insurance, etc. *See* Nina Kimyagarova Depo. 21:14-22:4.

Nina Kimyagarova does not have any experience with litigation or arbitration. *See* Nina Kimyagarova Depo. 29:25-30:2. She does not really know what arbitration is or how it works. She does not have any experience with drafting or negotiating contracts, as Nina Kimyagarova has never even purchased a vehicle. *See* Nina Kimyagarova Depo. 21:23-25. No one at The Montefiore Home ever explained to Nina Kimyagarova the difference between litigation and arbitration. No one ever mentioned nor explained to Nina Kimyagarova that if she signed the Admission Agreement, that her mother would allegedly be waiving her right to a jury trial, if she received substandard care at The Montefiore Home. No one ever explained to Nina Kimyagarova nor gave her or her mother, any choice relative to whether Sara Kimiagarova would want to be able to sue the owners and operators of The Montefiore Home if they ever provided her substandard care or whether she would want to waive her right to a jury trial and arbitrate such a claim. Nina Kimyagarova never bargained with anyone over the arbitration provision in Defendant's Admission Agreement. She did not even know that such a provision existed.

No one at The Montefiore Home ever mentioned arbitration to Nina Kimyagarova during the admission process for any of Sara Kimiagarova's four (4) respite stays there. When Nina Kimyagarova signed the Admission Agreement, she had no idea that she was signing any document that had anything to do with arbitration. She had no idea that she was signing any document that would allegedly waive her mother's right to a jury trial.

When Nina Kimyagarova signed the admission paperwork on behalf of her mother, including the Defendant's Admission Agreement, she was never told that she could have an attorney present. Nor was she ever told that she could have an attorney review the paperwork before she signed it.

Nina Kimyagarova did not have an attorney present when she signed the admission paperwork.

On June 4, 2009, when Sara Kimiagarova was admitted to The Montefiore Home, she was 85 years old.

Upon admission to The Montefiore Home, the nursing staff noted that wheelchair and bed alarms were needed to prevent Sara Kimiagarova from attempting to walk or get out of bed on her own, so she would not fall. However, the Defendant, by and through its employees and/or agents, never equipped Sara Kimiagarova's wheelchair and bed with any alarms. As a direct and proximate result of the Defendant's negligence and recklessness, Sara Kimiagarova fell at least three times during the nine (9) days that she spent at The Montefiore Home. On June 10, 2009, Sara Kimiagarova fell twice; once while trying to get out of her wheelchair. On June 12, 2009, two days later, Sara Kimiagarova was found on the floor, after suffering another fall. After this fall, Sara Kimiagarova was taken to Hillcrest Hospital, where she was diagnosed with intracranial bleeding, which required her to have brain surgery. Sara Kimiagarova suffered severe brain damage at The Montefiore Home as a direct and proximate result of this fall, which was caused by the Defendant's negligence and/or recklessness. She no longer recognized her family. She incurred over $236,000.00 in medical bills. On October 3, 2011, Sara Kimiagarova died as a direct and proximate cause of the Defendant's negligence and/or recklessness.

On June 10, 2010, Plaintiff Irene Dubson, as the appointed guardian of Sara Kimiagarova, filed a Complaint in the Cuyahoga County Court of Common Pleas against Defendant The Montefiore Home in Case No. 728974.

On July 19, 2010, Defendant filed an Answer to Plaintiff's Complaint. **Defendant <u>did not</u> file a Motion to Stay the case and demand arbitration at that time.**

On July 20, 2010, Plaintiff filed her First Amended Complaint in this case.

On July 30, 2010, Defendant filed an Answer to Plaintiff's First Amended Complaint. **Again, Defendant did not file a Motion to Stay and demand arbitration at that time.**

Thereafter, Defendant propounded Interrogatories, Requests for Admissions, and Requests for Production of Documents. Plaintiff responded to all of these discovery requests and produced thousands of pages of records in response to Defendant's discovery requests. Defendant also filed a number of motions, including several motions on discovery issues.

On May 13, 2011, nearly a year into this case, Defendant filed its **first Motion to Stay**. Plaintiff filed a Brief in Opposition.

On May 27, 2011, this Court issued a Journal Entry denying Defendant's Motion to Stay.

On June 8, 2011, several weeks later, Defendant filed its **second Motion to Stay**. Plaintiff filed a Brief in Opposition.

Again, this Court denied Defendant's Motion to Stay.

Thereafter, Defendant continued to engage in discovery in this case. Defendant filed a number of discovery-related motions. Defendant even appealed to the Eighth District Court of Appeals from two of this Court's Journal Entries, which granted, in part, Plaintiff's Motion to Compel and denied Defendant's Motion for Protective Order. Defendant has continued to produce information and documents relevant to Sara Kimiagarova and this case. Defendant's counsel has conducted the depositions of Plaintiff Nina Kimyagarova, Decedent's Granddaughter Irene Dubson and Decedent's Grandson Yelizar Khaimov. Defendant's counsel has participated in the depositions of Defendant's current and former employees who cared for Sara Kimiagarova during her residency at The Montefiore Home. Defendant has produced expert reports from three (3) expert witnesses that it intends to call to testify at the jury trial of this case. Defendant has even noticed the

videotaped trial deposition of one of its experts. Defendant has also filed trial motions.

On October 12, 2012, Plaintiff filed a Notice of Voluntary Dismissal in Case No. 728974 pursuant to Civ.R. 41(A)(1)(a). That same day, Plaintiff Nina Kimyagarova, as the personal representative of the Estate of Sara Kimiagarova (deceased), filed her Complaint in the within refiled case, Case No. 793459.

On November 20, 2012, Defendant filed an Answer to Plaintiff's Complaint. **Again, Defendant did not file a Motion to Stay and demand arbitration at that time.**

On November 28, 2012, after this case has been pending for nearly two and a half (2 ½) years, during which time this Court has denied Defendant's two previous Motions to Stay, Defendant filed its **third Motion to Stay** in this case pursuant to O.R.C. § 2711.02.

III. LAW AND ARGUMENT.

Defendant The Montefiore Home, by and through its counsel, has filed, for the third time, an untimely and frivolous Motion to Stay the within case pursuant to O.R.C. § 2711.02, requesting this Court to stay all proceedings in this case on all of Plaintiff's claims pending binding arbitration. Defendant's Motion to Stay has no support in law or fact. This Court has denied Defendant's Motion to Stay both times that it was previously filed. Defendant offers no new justification in its third Motion to Stay for why this case should now be stayed pursuant to O.R.C. § 2711.02. Defendant knows that there is no legal nor factual basis for its arguments that this case should now be stayed. Yet, Defendant, by and through its counsel, filed its third Motion to Stay for the sole purpose of burdening Plaintiff's counsel and causing unnecessary delay in this case. Such frivolous conduct violates Ohio Civil Rule 11 and is sanctionable under Ohio Civil Rule 11 and O.R.C. § 2323.51. In addition to denying Defendant's third Motion to Stay, Plaintiff respectfully requests that this Honorable Court impose appropriate sanctions on Defendant and its counsel pursuant to Ohio

Civil Rule 11 and O.R.C. § 2323.51, including Plaintiff's reasonable attorney's fees and other reasonable expenses incurred in responding to Defendant's frivolous and third Motion to Stay in the amount of $2,500.00.

A. Defendant is precluded from relitigating an issue that has already been decided by this Court.

In *State ex rel. Stacy v. Batavia Local Sch. Dist. Bd. of Educ.*, 97 Ohio St.3d 269, 2002-Ohio-6322, 779 N.E.2d 216 (2002), the Supreme Court of Ohio stated:

> The doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different. Consequently, collateral estoppel prevents parties from relitigating in a subsequent case facts and issues that were fully litigated in a previous case.

See State ex. rel. Stacy, 97 Ohio St.3d at 272 (internal citations omitted), quoting *Fort Fry Teachers Assn. v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 1998-Ohio-435, 692 N.E.2d 140 (1998) and citing *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67, at paragraph three of the syllabus (1943) and *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 64, 2002-Ohio-1627, 765 N.E.2d 345 (2002).

In *Thompson v. Wing*, 70 Ohio St.3d 176,1994-Ohio-358, 637 N.E.2d 917 (1994), the Supreme Court of Ohio set forth the elements that must be proven in order for issue preclusion to apply:

> Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.

See Thompson, 70 Ohio St.3d at 183, citing *Whitehead v. Gen. Tel. Co.*, 20 Ohio St.2d 108, 254 N.E.2d 10, at paragraph two of the syllabus (1969).

In this case, each of the three elements required for issue preclusion are satisfied. There is no question that the issue of whether Plaintiff's claims in this case should be stayed pending arbitration has been actually and directly litigated in a prior action, as Defendant filed two Motions to Stay in Case No. 728974 on May 13, 2011 and on June 8, 2011 and this Court denied both of those Motions. As a result, the first element if issue preclusion is clearly satisfied. The second element is also satisfied, as there is no dispute that this Court is a court of competent jurisdiction. The third element of issue preclusion requires the party against whom issue preclusion is asserted to be a party or in privity with a party to the prior action. Here, Defendant The Montefiore Home is the sole named defendant in both Case Nos. 728974 and 793459. Thus, there is no question that the third element is satisfied. Accordingly, Defendant is barred under the doctrine of issue preclusion, which is also known as collateral estoppel, from relitigating the issue of whether Plaintiff's claims in this case should be stayed pending arbitration.

Accordingly, this Court should promptly and summarily deny Defendant's third Motion to Stay Plaintiff's claims in this action pending arbitration.

B. Defendant has waived any alleged right to arbitrate any claims in this case by actively participating in the litigation of this case.

Having actively participated in th e litigation of this case is lawsuit, Defendant has acquiesced to proceeding in a judicial forum, rather than arbitrating this case. Defendant's active participation in this case supports this Court's finding that the Defendant has waived any alleged right of arbitration. *See Jones v. Honchell*, 14 Ohio App.3d 120, 470 N.E.2d 219 (12th Dist. 1984).

In *Milling Away, LLC v. UGP Properties*, *LLC*, 2011-Ohio-1103, at ¶¶ 8-9 (8th Dist. 2011) the Eighth District Court of Appeals held:

> Like any other contractual right, the right to arbitration may be waived. *Rock v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1992), 79 Ohio App.3d 126, 128, 606*

> *N.E.2d 1054*. But in light of Ohio's strong policy in favor of arbitration, waiver of the right to arbitrate is not to be lightly inferred. *Griffith v. Linton (1998), 130 Ohio App.3d 746, 751, 721 N.E.2d 146*. A party asserting waiver must prove the waiving party (1) knew of the existing right to arbitrate; and (2) acted inconsistently with that right. *Checksmart v. Morgan, 8th Dist. No. 80856, 2003 Ohio 163, ¶22*. "'The essential question is whether, based upon the totality of the circumstances, the party seeking arbitration has acted inconsistently with the right to arbitrate.'" Id., quoting *Wishnosky v. Star-Lite Bldg. & Dev. Co. (Sept. 7, 2000), 8th Dist. No. 77245, 2000 Ohio App. LEXIS 4081*.

See also Hausser & Taylor, LLP v. Accelerated Sys. Integration, Inc., 2005-Ohio-1017, at ¶18 (8th Dist. 2005).

In *Skerlec v. Ganley Chevrolet, Inc.*, 2012-Ohio-5748 (8th Dist. 2012), the Eighth District Court of Appeals recently reiterated that a trial court should consider the following factors in determining whether a defendant has acted inconsistently with its right to arbitration:

> (1) any delay in the requesting party's demand to arbitrate via a motion to stay judicial proceedings and an order compelling arbitration; (2) the extent of the requesting party's participation in the litigation prior to its filing a motion to stay the judicial proceeding, including a determination of the status of discovery, dispositive motions, and the trial date; (3) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim or third-party complaint without asking for a stay of the proceedings; and (4) whether the non-requesting party has been prejudiced by the requesting party's inconsistent acts.

See Skerlec, 2012-Ohio-5748, at ¶ 24, citing *Phillips v. Lee Homes, Inc.*, 1994 Ohio App. LEXIS 596 (8th Dist. 1994), *Rock v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 79 Ohio App.3d 126, 606 N.E.2d 1054 (8th Dist. 1992), and *Brumm v. McDonald & Co. Secs., Inc.*, 78 Ohio App.3d 96, 603 N.E.2d 1141 (4th Dist. 1992).

As stated above, Defendant The Montefiore Home delayed its demand to arbitrate via a motion to stay judicial proceedings all three times. Now it has been years since this case was first filed. As stated above, Defendant The Montefiore Home has actively participated in the litigation for years prior to its filing its most recent motion to stay. Discovery is virtually complete. The

parties need to complete a few depositions and this case will be ready for trial. Written discovery has been propounded and answered. Most of the depositions have been taken. The case has been scheduled for trial. Plaintiff has clearly been prejudiced by Defendant The Montefiore Home's inconsistent acts. A party cannot benefit from the discovery afforded by litigation and then turn around and deny its adversary their day in Court. That is the whole point behind the doctrine of waiver.

Ohio courts have repeatedly held that a defendant waives its alleged right to arbitrate any claim when the defendant files a responsive pleading without immediately moving for a stay pending arbitration and otherwise engages in the litigation of the claims.

In *Hausser & Taylor, LLP v. Accelerated Sys. Integration, Inc.*, 2005-Ohio-1017, at ¶22 (8th Dist. 2005), the Eighth District Court of Appeals held that the defendants in that case had waived their alleged right to arbitration where the defendants, by and through their counsel, had participated in pretrials and filed numerous pleadings:

> After reviewing this case, we find appellants waived their rights by participating in the litigation including pretrials, filing numerous pleadings including a counterclaim, and waiting until after the court appointed a neutral accountant to file a motion requesting that the action be stayed. Accordingly, we find no abuse of discretion in the court's proceeding with the action.

In *MGM Landscaping Contractors, Inc. v. Berry*, 2000 Ohio App. LEXIS 1117 (9th Dist. 2000), a copy of which is attached hereto as Exhibit "B", the Ninth District Court of Appeals held that a defendant waives its right to arbitrate when it files a responsive pleading and fails to move for a stay pending arbitration before further engaging in the litigation:

> When a party does not properly raise the arbitration provision of a contract before the trial court, he is deemed to have waived arbitration.
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> *Austin v. Squire (1997), 118 Ohio App. 3d 35, 37, 691 N.E.2d 1085*, citing *Jones v. Honchell (1984), 14 Ohio App. 3d 120, 122, 470 N.E.2d 219*.

> [A] plaintiff's waiver may be effected by filing suit. When the opposite party, the potential defendant, is confronted with a filed lawsuit, the right to arbitrate can be saved by seeking enforcement of the arbitration clause. This is done under *R.C. 2711.02* by application to stay the legal proceedings pending the arbitration. **Failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver.**
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> (Footnotes omitted.) *Mills v. Jaguar-Cleveland Motors, Inc. (1980), 69 Ohio App. 2d 111, 113, 430 N.E.2d 965*.
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> In the case at bar, the contract between the parties contained an arbitration provision which was incorporated by reference to the spec book. 4 The contract was signed by the parties in April 1996; appellee MGM filed its complaint in December 1996. Berry's counterclaims against MGM and the cross-claims against appellee Sunde were filed in March 1997; both appellees filed answers to Berry's pleadings. The parties engaged in extensive discovery, including a flurry of motions to compel and motions for protective orders. The appellees moved for summary judgment in April 1998. The motion to stay and to compel arbitration was not filed until October 15, 1998. By engaging in extensive litigation, the appellees have acted in a manner inconsistent with the right to seek arbitration and, therefore, have waived that right.

See Berry, 2000 Ohio App. LEXIS 1117, at * 6-8 (emphasis added).

In *Hogan v. Cincinnati Fin. Corp.*, 2004-Ohio-3331 (11th Dist. 2004), The Cincinnati Insurance Company, the same insurance company that insures The Montefiore Home in this case, was one of the defendants. In that case the Eleventh District Court of Appeals held that a defendant waives its right to arbitration when it files an answer to a plaintiff's complaint without demanding arbitration:

> It is well-established that the right to arbitration can be waived. See, e.g., *Griffith v. Linton (1998), 130 Ohio App. 3d 746, 751, 721 N.E.2d 146*; *Siam Feather & Forest Products Co., Inc. v. Midwest Feather Co., Inc. (S.D. Ohio 1980), 503 F. Supp. 239, 242*. "A party can waive his right to arbitrate under an arbitration clause by filing a complaint." *Glenmoore Builders, Inc. v. Kennedy, 11th Dist. No. 2001-P-0007, 2001 Ohio 8777, 2001 Ohio App. LEXIS 5449, at 9*, citing *Rock, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1992), 79 Ohio App. 3d 126, 128, 606 N.E.2d 1054*. "'**When the defendant [files] its answer in that suit without demanding arbitration, it, in effect, [agrees] to the waiver**.'" *Hoffman v. Davidson (Mar. 11, 1988), 11th Dist. No. 3909, 1988 Ohio App. LEXIS 773, at 5*, quoting *Mills v. Jaguar-Cleveland Motors, Inc., (1980), 69 Ohio App. 2d 111, 113, 430 N.E.2d 965*.

* * *

> "Active participation in a lawsuit *** evidencing an acquiescence to proceeding in a judicial rather than arbitration forum has been found to support a finding of waiver." (Citations omitted.) *Griffith at 752*.

See Hogan, 2004-Ohio-3331, at ¶¶ 22, 24.

In *Kellogg v. Griffiths Health Care Group*, 2011-Ohio-1733 (3rd Dist. 2011), the Third District Court of Appeals held that a defendant waives its right to arbitrate where it fails to timely raise its right to arbitration before the trial court:

> Courts have found the right to proceed with arbitration is adversely affected when a party has acted inconsistently with the right, such as actively participating in litigation. Id. Waiver attaches where there is active participation in a lawsuit, "evincing an acquiescence to proceeding in a judicial rather than arbitration forum." *Griffith. at 752, 721 N.E.2d 146*.
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> A party to a contract to arbitrate waives its right when it files a lawsuit rather than requesting arbitration. *Mills v. Jaguar-Cleveland Motors, Inc. (1980), 69 Ohio App.2d 111, 113, 430 N.E.2d 965*. When the other party, the potential defendant, is confronted with a filed lawsuit, the right to arbitrate can be saved by seeking enforcement of the arbitration clause. Id. This may be done under *R.C. 2711.02* by application to stay the legal proceedings pending the arbitration. **"Failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver."** *Austin v. Squire (1997), 118 Ohio App.3d 35, 37, 691 N.E.2d 1085*, quoting *Mills*. See, also, *Jones v. Honchell (1984), 14 Ohio App.3d 120, 122, 14 Ohio B. 135, 470 N.E.2d 219* (when a defendant fails to raise the arbitration provision of the contract in an answer, he waives the right to submit the matter to arbitration).

See Kellogg, 2011-Ohio-1733, at ¶¶14, 17 (emphasis added).

In this case, Defendant clearly knew of its alleged right to arbitrate. It has been in possession of the Admission Agreement that contains the arbitration clause at issue since Sara Kimiagarova was admitted to The Montefiore Home on June 4, 2009, over one (1) year before this case was originally filed on June 10, 2010.

As indicated above, Defendant has also clearly acted inconsistently with any alleged right

to arbitrate. Defendant did not file its first Motion to Stay in this case until May 13, 2011, nearly **one (1) year** after this case had been originally filed. Before filing its first Motion to Stay, Defendant filed an Answer to Plaintiff's Complaint and an Answer to Plaintiff's First Amended Complaint. No motion to stay was filed in response to either complaint. No demand for arbitration was made at that time. As further discussed below, Defendant stated in both Answers, as an affirmative defense, that the Admission Agreements pertaining to Sara Kimiagarova were void and, as a result, that Plaintiff's contractual claims could not be enforced pursuant to the Admission Agreements. Defendant propounded written discovery requests. Plaintiff responded to all of these discovery requests and produced thousands of pages of records in response to Defendant's discovery requests. Defendant filed several motions. Defendant's counsel attended the Case Management Conference in the original case on behalf of the Defendant, at which deadlines were set for the completion of fact discovery, the disclosure of expert reports, and the filing of dispositive motions. Dates were also set for the settlement conference, final pre-trial, and trial of this case at the Case Management Conference. All of the original deadlines set for the completion of fact discovery, the disclosure of expert reports, and the filing of dispositive motions passed before the Defendant filed its first Motion to Stay. Defendant filed motions requesting an extension of each of these deadlines, all prior to filing its first Motion to Stay. Based upon the totality of the circumstances, the Defendant clearly acted inconsistently with any alleged right to arbitrate when it filed its **first Motion to Stay**, which Motion was denied by this Court.

Since Defendant clearly acted inconsistently with any alleged right to arbitrate when it filed its first Motion to Stay, there is no doubt that Defendant certainly acted inconsistently with any alleged right to arbitrate prior to filing its **third Motion to Stay** on November 28, 2012. Between the time when Defendant filed its first Motion to Stay and its third Motion to Stay, Defendant

continued to engage in discovery in this case. Defendant filed a number of discovery-related motions, including motions for protective orders. Defendant even appealed two of this Court's Journal Entries, which granted, in part, Plaintiff's Motion to Compel and denied Defendant's Motion for Protective Order, to the Eighth District Court of Appeals. Defendant continued to produce information and documents relevant to Sara Kimiagarova and this case. Defendant's counsel noticed and conducted the depositions of Plaintiff Nina Kimyagarova and Sara Kimiagarova's grandchildren, Irene Dubson and Yelizar Khaimov. Defendant's counsel participated in the depositions of Defendant's current and former employees who cared for Sara Kimiagarova during her residency at The Montefiore Home. Defendant produced expert reports from three (3) expert witnesses who Defendant plans to call to testify at the trial of this case. Defendant even noticed the videotaped trial deposition of one of its experts. In addition, Defendant filed trial-related motions. After Plaintiff filed a Notice of Voluntarily Dismissal in Case No. 728974 and filed her Complaint in the within refiled case, Case No. 793459, Defendant filed an Answer to Plaintiff's Complaint, again, without filing a motion to stay or demanding arbitration, thereby waiving its right to seek arbitration pursuant to a number of cases cited above. Plaintiff's Complaint was originally filed on June 10, 2010. Defendant waited more than eleven (11) months, until May 13, 2011, to file its first Motion to Stay. Defendant's third Motion to Stay was filed nearly two and a half (2 ½) years after this case was originally filed.

With respect to the extent to which the Defendant participated in the litigation, Defendant has fully participated in the litigation in this case as indicated above, including by engaging in discovery and filing an appeal relative to this Court's discovery orders. With respect to the status of discovery, written discovery is nearly complete and most, if not all, fact depositions have been conducted.

Plaintiff would clearly be prejudiced if Defendant's third Motion to Stay is granted and all of Plaintiff's claims are stayed pending arbitration, especially at this late date in the litigation of this case. This case was originally filed on June 10, 2010. Plaintiff has propounded written discovery requests. Plaintiff has filed numerous motions to compel the production of relevant information and documents. Plaintiff has reviewed thousands of pages of documents relative to this case. Plaintiff has deposed fact witnesses. Plaintiff has been deposed. Plaintiff has engaged expert witnesses. Plaintiff has produced numerous reports from her expert witnesses consistent with the Case Management Order issued by this Court in the original case. Plaintiff and her counsel are preparing this case for trial, which is scheduled to begin on July 8, 2013.

Defendant has clearly waived any alleged right to arbitration in this case. Defendant, by and through its counsel, has actively participated in this litigation by attending Case Management Conferences, filing numerous pleadings, propounding numerous written discovery requests, deposing Plaintiff and other members of Sara Kimiagarova's family, and even noticing the videotaped trial depositions of expert witnesses. Plaintiff would be prejudiced if this case was stayed pending arbitration. Accordingly, Defendant's third Motion to Stay must clearly be denied.

C. The express language of the Defendant's Admission Agreement clearly states that the Agreement, including its arbitration clause, automatically terminated on Sara Kimiagarova's death on October 3, 2011. As a result, the Admission Agreement and its arbitration clause is void and unenforceable.

Pursuant to its express terms, Defendant's Admission Agreement, including the arbitration clause contained therein, automatically terminated on October 3, 2011 upon Sara Kimiagarova's death. Since the Agreement terminated on October 3, 2011, it was not in effect on November 28, 2012, over a year later, when the Defendant filed its third Motion to Stay.

It is well recognized that "arbitration is a creature of contract." *Motor Wheel Corp. v.*

Goodyear Tire & Rubber Co., 98 Ohio App.3d 45, 52, 647 N.E.2d 844 (8th Dist. 1994). Arbitration agreements should be "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n. 12, 87 S.Ct. 1801 (1967). As a result, "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346 (1985). "When confronted with an issue of contract interpretation, the role of the court is to give effect to the intent of the parties to that agreement. The court examines the contract as a whole and presumes that the intent of the parties is reflected in the language used in the agreement." *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Utils. Comm'n of Ohio*, 129 Ohio St.3d 485, 490, 2011-Ohio-4189, 954 N.E.2d 104 (2011), citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219, 2003-Ohio-5849, 797 N.E.2d 1256 (2003). "[T]he terms of a written contract are to be ascertained from the language of the agreement, and no implication inconsistent with the express terms therein may be inferred." *Belfance v. Standard Oil*, 1990 Ohio App. LEXIS 5475, at * 8 (9th Dist. 1990). "When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Martin Marietta Magnesia Specialties, L.L.C.*, 129 Ohio St.3d at 490, citing *Westfield Ins. Co.*, 100 Ohio St.3d at 219.

"Contract provisions that are unambiguous must be construed according to the plain, express terms." *Budai*, 1997 Ohio App. LEXIS 189, at * 29, citing *USS Great Lakes Fleet, Inc. v. Spitzer Great Lakes, Ltd.*, 85 Ohio App.3d 737, 741, 621 N.E.2d 461 (9th Dist. 1993). "When a written contract is plain and unambiguous, it does not become ambiguous by reason of the fact that its operation will work a hardship on one party and accord advantage to the other." *Belfance v. Standard Oil*, 1990 Ohio App. LEXIS 5475, at * 8-9 (9th Dist. 1990).

"A court * * * is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219, 2003-Ohio-

5849, 797 N.E.2d 1256 (2003), citing *Shifrin v. Forest City Enters., Inc.*, 64 Ohio St.3d 635, 1992-Ohio-28, 597 N.E.2d 499 (1992) and *Blosser v. Enderlin*, 113 Ohio St. 121, 148 N.E. 393, paragraph one of the syllabus (1925). "Additionally, *all* terms in a contract should be given effect whenever possible." *Budai*, 1997 Ohio App. LEXIS 189, at * 28-29 (emphasis in original), citing *Wadsworth Coal Co. v. Silver Creek Min. & Ry. Co.*, 40 Ohio St. 559, paragraph one of the syllabus (1884). "The contract under consideration should be construed reasonably, so as not to arrive at absurd results. *Budai*, 1997 Ohio App. LEXIS 189, at * 28, citing *Cincinnati v. Cameron*, 33 Ohio St. 336, 364 (1878). "[W]here the written contract is standardized and between the parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party." *Westfield Ins. Co.*, 100 Ohio St.3d at 220, citing *Cent. Realty Co. v. Clutter*, 62 Ohio St.2d 411, 413, 406 N.E.2d 515 (1980).

In *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Utils. Comm'n of Ohio*, 129 Ohio St.3d 485, 2011-Ohio-4189, 954 N.E.2d 104 (2011), the Supreme Court of Ohio was asked to determine the termination date of special contracts between several corporations and their public utility company, Toledo Edison. The corporations contended that their special contracts "would terminate on the date that Toledo Edison ceased its collection of regulatory-transition charges, i.e., December 31, 2008", pursuant to the express terms of the contracts. *Id.* at 489. However, Toledo Edison terminated the contracts in February of 2008. Toledo Edison claimed that the parties had agreed to a termination date "that tied regulatory-transition charges to Toledo Edison's distribution sales", such that the contracts would terminate "when Toledo Edison's distribution sales reach a certain level." *Id.* at 490. Finding that the language of the contracts was clear and unambiguous and expressly stated that the contracts "shall terminate with the bill rendered for the electric usage through the date which [the regulatory-transition charge] ceases for the [Toledo Edison] Company", the Court held that the contracts were supposed to terminate on December 31, 2008 when Toledo

Edison stopped collecting its regulatory-transition charges. *Id.* The Court found that, pursuant to the express terms of the contracts, the corporations and Toledo Edison had agreed that the contracts would terminate on this date, not on some other date when Toledo Edison's distribution sales reached a certain level. Therefore, the express language of the termination clauses in the contracts controlled.

In this case, it is clear that the Defendant's Admission Agreement automatically terminated upon Sara Kimiagarova's death on October 3, 2011. Article III(C) of the Agreement states, in pertinent part, "This agreement shall automatically terminate upon the death of the resident." It is not in dispute that "resident" refers to Sara Kimiagarova. As a result, Defendant's Admission Agreement, including the arbitration clause contained therein, terminated on October 3, 2011 and should not be given any effect by this Court. The Admission Agreement was drafted exclusively by the Defendant. If the Defendant desired the arbitration clause to remain in effect after Sara Kimiagarova's death and the termination of other obligations reflected in the Agreement, it could have easily included a provision to that effect. The Admission Agreement terminated on October 3, 2011. Therefore, there is no basis to stay any of Plaintiff Nina Kimyagarova's claims pursuant to the Defendant's third Motion to Stay, which was filed on November 28, 2012, over one (1) year after the Agreement and arbitration clause had terminated.

Ohio Civil Rule 11 states, in pertinent part, that "[t]he signature of an attorney . . . constitutes a certificate by the attorney . . . that the attorney . . . has read the document; that to the best of the attorney's . . . knowledge, information, and belief there is good ground to support it; and that it is **not interposed for delay**." (Emphasis added.) Ohio Civil Rule 11 permits the imposition of sanctions for willful violations of this Rule: "For a willful violation of this rule, an attorney . . ., upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in

bringing any motion under this rule." Counsel for the Defendant signed Defendant's third Motion to Stay, certifying that he had read the document that he filed on behalf of the Defendant, including the Exhibits that he had attached to the Motion. Exhibit "D" of Defendant's third Motion to Stay is the Admission Agreement pertaining to Sara Kimiagarova's residency that began on June 4, 2009. Article III(C) of the Agreement states, in pertinent part, "This agreement shall automatically terminate upon the death of the resident." Defendant's counsel filed Defendant's third Motion to Stay, even though the Admission Agreement had terminated and there is no basis to stay this case. Defendant's counsel willfully violated Ohio Civil Rule 11 by failing to ensure that there was good ground to support Defendant's third Motion to Stay before signing and filing it.

Similarly, O.R.C. § 2323.51(B)(1) permits "any party adversely affected by frivolous conduct [to] file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal." O.R.C. § 2323.51(A)(2) defines several different types of conduct as constituting frivolous conduct. O.R.C. § 2323.51(A)(2)(a)(i) states that the conduct of a party or its counsel that "serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing **unnecessary delay** or a needless increase in the cost of litigation" is frivolous conduct. (Emphasis added.) O.R.C. § 2323.51(A)(2)(a)(ii) states that conduct that "is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law" also constitutes frivolous conduct.

Since the Admission Agreement automatically terminated on Sara Kimiagarova's death on October 3, 2011, and Defendant and its counsel knew that Sara Kimiagarova had died prior to the filing of Defendant's third Motion to Stay, it is clear that Defendant's Admission Agreement, including its arbitration clause, cannot be enforced and that Defendant's third Motion to Stay was

filed merely to harass Plaintiff and her counsel, needlessly increase Plaintiff's litigation costs, and unnecessarily delay this case. Due to the termination of the Admission Agreement, Defendant's third Motion to Stay is not warranted nor supported by existing statutory and case law in Ohio. Nor does Defendant provide any indication in its third Motion to Stay how its Motion is supported by an extension, modification, or reversal of existing law or the establishment of new law. In fact, Defendant outright avoids any discussion of the termination clause and its effect on the enforceability of the Admission Agreement and its arbitration clause. Defendant's attempt, by and through its counsel, to enforce a contract that is void, based upon the unequivocal language of its terms and Ohio law, is frivolous. Defendant and its counsel have engaged in frivolous conduct, not just by filing a Motion to Stay that has already twice been ruled on and denied by this Court, but by filing a Motion that is wholly unsupported by Ohio law.

Accordingly, Plaintiff respectfully requests that this Honorable Court deny Defendant's third Motion to Stay and impose reasonable sanctions on Defendant and its counsel for their willful violations of Ohio Civil Rule 11 and O.R.C. § 2323.51 in the amount of $2,500.00. The Admission Agreement, including its arbitration clause, automatically terminated upon Sara Kimiagarova's death on October 3, 2011 and should not be given any effect.

D. In its Answers to Plaintiff's Complaint and Plaintiff's First Amended Complaint in Case No. 728974 and its Answer to Plaintiff's Complaint in Case No. 793459, Defendant states that any contractual claims relative to its Admission Agreement are void. Since the Admission Agreement is void, the arbitration clause in the Admission Agreement cannot be enforced relative to any claim in this case.

On July 19, 2010, Defendant filed an Answer to Plaintiff's original Complaint, which was filed in Case No. 728974. For its fifth affirmative defense, Defendant states that "[t]he contractual claims are void, due to the doctrine of impossibility of performance."

On July 30, 2010, Defendant filed an Answer to Plaintiff's First Amended Complaint in

Case No. 728974. For its fifth affirmative defense, Defendant states that "[t]he contractual claims are void, due to the doctrine of impossibility of performance."

On November 20, 2012, Defendant filed an Answer to Plaintiff's Complaint in refiled Case No. 793459. Again, for its fifth affirmative defense, Defendant states that "[t]he contractual claims are void, due to the doctrine of impossibility of performance."

Defendant does not further describe the impossibility of performance, and it is not necessary to do so at this point in time. It is sufficient that Defendant has, on three (3) separate occasions, stated that Plaintiff's contractual claims are void due to an impossibility of performance. The only contractual agreements that the Defendant has produced in this case are the Admission Agreements pertaining to Sara Kimiagarova's four (4) respite stays at The Montefiore Home, which are attached as Exhibits "A", "B", "C", and "D" to Defendant's third Motion to Stay. As a result, Defendant's fifth affirmative defense can only be understood to mean that the Admission Agreements pertaining to Sara Kimiagarova are void. If the Admission Agreements are void, as Defendant has indicated in its Answers to Plaintiff's Complaints and Plaintiff's First Amended Complaint, then the Admission Agreements and their arbitration clauses certainly cannot be enforced against Plaintiff, relative to any claim in this case.

Accordingly, Plaintiff respectfully requests that this Honorable Court deny Defendant's third Motion to Stay. As the Defendant has repeatedly stated, in its Answer to Plaintiff's Complaints and Plaintiff's First Amended Complaint, that the Admission Agreement, including its arbitration clause, is void. In addition to denying Defendant's third Motion to Stay, Plaintiff respectfully request that this Honorable Court impose reasonable sanctions on Defendant and its counsel for their willful violations of Ohio Civil Rule 11 and O.R.C. § 2323.51, for Defendant's continuous attempts, by and through its counsel, to knowingly enforce a void contract. Defendant's counsel has no good ground to support his signing and filing of Defendant's third Motion to Stay when Defendant admits that

the underlying Admission Agreement is void. Defendant and its counsel's attempts to move this Court to stay this case and enforce arbitration pursuant to a void contract constitute frivolous conduct and should be sanctioned. It is clear that their only motive is to further delay this case. This case has already been delayed by Defendant's frivolous appeal of this Court's Orders granting Plaintiff's Motion to Compel and denying Defendant's Motion for Protective Order. To file a Motion to Stay at this late stage of the this case in a blatant attempt to delay this case is reprehensible and Defendant and its counsel should be sanctioned.

E. Pursuant to O.R.C. § 2711.23, an arbitration agreement involving a medical claim is only valid and enforceable if it is separate from any other agreement, consent, or document. Since the arbitration clause at issue is buried on Page 6 of Defendant's 9-page Admission Agreement and is not contained in a separate agreement requiring separate consent, it is invalid and unenforceable.

O.R.C. § 2711.23 states, in pertinent part (emphasis added):

> **To be valid and enforceable** any arbitration agreements pursuant to sections 2711.01 and 2711.22 of the Revised Code for controversies involving a medical, dental, chiropractic, or optometric claim that is entered into prior to a patient receiving any care, diagnosis, or treatment shall include and be subject to the following conditions:
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> * * *
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> (G) **The arbitration agreement shall be separate from any other agreement, consent, or document;**

The arbitration clause that Defendant relies upon for its third Motion to Stay is buried on Page 6 of Defendant's 9-page Admission Agreement. In addition to the arbitration clause, the Admission Agreement contains provisions relative to the resident's financial obligations, Defendant's participation in Medicare and Medicaid, disputed debts, indemnification of Defendant from injuries and damages caused by a resident's actions, termination of the contract by the Defendant and by the resident, records requests, religious restrictions on admission, and responsibility for loss of personal belongings - topics that have nothing to do with the resolution of

medical claims or arbitration. The arbitration clause is not contained in a separate agreement nor document. The arbitration clause does not require any separate consent, other than consent to the Admission Agreement as a whole. Accordingly, the arbitration clause contained in Defendant's Admission Agreement is invalid and unenforceable pursuant to O.R.C. § 2711.23(G), and this Court should deny Defendant's third Motion to Stay.

F. Nina Kimyagarova did not have any authority enter into a contract on behalf of her mother, Sara Kimiagarova, at any time, including at the time of Sara Kimiagarova's admission to The Montefiore Home on June 4, 2009. Since neither Sara Kimiagarova nor any person authorized to act on her behalf signed the Admission Agreement, it cannot be enforced against Sara Kimiagarova nor against her Estate.

In *Council of Smaller Enters. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 1998-Ohio-172, 687 N.E.2d 1352 (1998), the Supreme Court of Ohio reaffirmed the first principle to be analyzed when considering the applicability of any arbitration clause or agreement. The Court stated that "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' * * * This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievances to arbitration." *Council of Smaller Enters.*, 80 Ohio St.3d at 665, quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986), quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). The Court went on to hold that there is a presumption against arbitrability when "there is serious doubt that the party resisting arbitration has empowered the arbitrator to decide anything." *Id.* at 667-68, citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (In *First Options*, the Supreme Court of the United States held that since the Kaplans had not personally signed the document containing the alleged arbitration clause, they were not required to arbitrate the underlying dispute).

In *Maestle v. Best Buy*, 2005-Ohio-4120 (8th Dist. 2005) (emphasis added), the Eighth District Court of Appeals held:

> **When there is a question as to whether a party has agreed to an arbitration clause, there is a presumption against arbitration.** Spalsbury v. Hunter Realty, Inc., et al. (Nov. 30, 2000), Cuyahoga App. No. 76874, citing Council of Smaller Enters. v. Gates, McDonald & Co. (1997), 80 Ohio St. 3d 661. An arbitration agreement will not be enforced if the parties did not agree to the clause. Henderson vs. Lawyers Title Insurance Corp., Cuyahoga App. No. 82654, 2004-Ohio-744, citing Harmon v. Phillip Morris Inc. (1997), 120 Ohio App. 3d 187, 189.
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> The issue of whether or not a party has agreed to arbitrate is determined on the basis of ordinary contract principles. Kegg v. Mansfield (Jan. 31 2000), Stark App. No. 1999 CA 00167, citing Fox v. Merrill Lynch & Co., Inc. (1978), 453 F.Supp. 561. See, also, Council of Smaller Enters., supra; AT&T Technologies, Inc. v. Communications Workers of America (1986), 475 U.S. 643. In order to have a valid contract, there must be a "meeting of the minds" on the essential terms of the agreement, which is usually demonstrated by an offer, acceptance, and consideration. Reedy v. The Cincinnati Bengals, Inc. (2001), 143 Ohio App. 3d 516, 521. An offer is defined as "the manifestation of willingness to enter in a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Id. Further, the essential terms of the contract, usually contained in the offer, must be definite and certain. Id.
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> "Ohio law continues to hold that the parties bind themselves by the plain and ordinary language used in the contract unless those words lead to a manifest absurdity." Convenient Food Mart, Inc. v. Countrywide Petroleum Co., et al., Cuyahoga App. No. 84722, 2005-Ohio-1994. This is an objective interpretation of contractual intent based on the words the parties chose to use in the contract. Id., citing Kelly v. Medical Life Ins. Co. (1987), 31 Ohio St. 3d 130, paragraph one of the syllabus.

In *Koch v. Keystone Pointe Health & Rehab.*, 2012-Ohio-5817, at ¶ 19 (9th Dist. 2012), the Ninth District Court of Appeals recently held that "no contract existed which bound the parties to arbitrate any disputes or claims" where a nursing home resident's daughter-in-law, who did not hold a power of attorney, signed nursing home admission paperwork on behalf of her father-in-law. As a result, the arbitration agreement that she signed during the admission process was not enforceable against the father-in-law or his estate.

In this case, Sara Kimiagarova did not sign the Admission Agreement.

The arbitration clause was signed by Michelle Stomieroski on behalf of Defendant The Montefiore Home and by Nina Kimyagarova. Nina Kimyagarova is simply designated as "Responsible Party". There is no indication that Nina Kimyagarova had a power of attorney for Sara Kimiagarova at the time that the Admission Agreement was signed on June 4, 2009. No power of attorney document has been produced. At her deposition on October 10, 2012, Nina Kimyagarova testified that she did not hold power of attorney to make health care decisions for her mother. Nina Kimyagarova does not even know or understand what a power of attorney is. *See* Nina Kimyagarova Depo. 44:11-21. Nina Kimyagarova further testified that she did not understand herself to have any authority to enter into an agreement on behalf of Sara Kimiagarova at the time of her admission to The Montefiore Home on June 4, 2009. *See* Nina Kimyagarova Depo. 29:9-13.

In the present case, Decedent Sara Kimiagarova did not sign any agreement requiring her to arbitrate any claims that may arise against the Defendant. Nor did anyone with a power of attorney sign such an agreement on her behalf. As a result, it is clear that the Estate of Sara Kimiagarova is not required to arbitrate any survivorship claims that it has against the Defendant in this case. Such a conclusion is supported by the Eighth District Court of Appeals' decision in *Spalsbury v. Hunter Realty, Inc.*, 2000 Ohio App. LEXIS 5552. In *Spalsbury*, the Eighth District Court of Appeals was asked to consider whether a former employee was required to arbitrate her claims against her former employer. The employee was also a shareholder, and she had entered into a shareholders' agreement with the other shareholders of the corporation. The shareholders' agreement contained a clause requiring non-binding arbitration of disputes between the shareholders. The defendant corporation argued that the arbitration clause also required the former employee to arbitrate any disputes that she had with the corporation. However, the Eighth District Court of Appeals held that the arbitration clause in the shareholders' agreement could not be used to compel the former employee to arbitrate her claims against the corporation because the

corporation itself was not a party to the shareholders' agreement. The arbitration clause only applied to disputes between the parties who had signed the document containing the arbitration clause, i.e. disputes between the shareholders.

Not surprisingly, O.R.C. § 2711.01(A) defines a valid arbitration agreement, in pertinent part, as "any agreement in writing between two or more persons to submit to arbitration any controversy existing between them". *See also* O.R.C. § 2711.22(A). In this case, there is no agreement between Sara Kimiagarova and anyone. Sara Kimiagarova did not sign any agreement nor did anyone sign on her behalf. As a result, there is no agreement to enforce between the Estate of Sara Kimiagarova and the Defendant.

O.R.C. §1335.05 provides in part (emphasis added):

> No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, **or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.**

The Admission Agreement that contains the arbitration clause in this case was allegedly signed on June 4, 2009, although none of the signatures are dated. Defendant is seeking to enforce this document in November of 2012, so it is clear that the alleged "agreement" was not to be performed within one year from the making thereof. The alleged "agreement" is not signed by the party to be charged therewith, i.e., Sara Kimiagarova, nor was it signed by some other person thereunto by him or her lawfully authorized, as Nina Kimyagarova was not lawfully authorized to sign for Sara Kimiagarova. Therefore, there is no valid agreement, and Defendant's Motion to Stay must clearly be denied.

G. Pursuant to O.R.C. § 2711.24, an arbitration agreement is only valid and enforceable if the person executing the agreement is able to effectively communicate in spoken and written English. The record in this case is clear that Nina Kimyagarova could not effectively communicate in spoken and written English. As a result, Nina Kimyagarova cannot be bound by the terms of the Admission Agreement which she could not read or understand, and which the Defendant's employees and/or agents knew that she could not read or understand.

O.R.C. § 2711.24 states, in pertinent part (emphasis added):

> To the extent it is in ten-point type and is executed in the following form, an arbitration agreement of the type stated in section 2711.23 of the Revised Code **shall be presumed valid and enforceable in the absence of proof by a preponderance of the evidence** . . . **that the patient executing the agreement was not able to communicate effectively in spoken and written English** or any other language in which the agreement is written . . . .

Nina Kimyagarova signed the Admission Agreement because it was placed in front of her and the employee and/or agent of the Defendant who was conducting the admission process told her that she had to sign it in order to get her mother, Sara Kimiagarova, admitted to The Montefiore Home. *See* Nina Kimyagarova Depo. 26:2-10.

At her deposition on October 10, 2012, which was conducted using an English to Russsian translator, Nina Kimyagarova testified that did not read the Admission Agreement. *See* Nina Kimyagarova Depo. 25:11-17. She further testified that even if she had read the Admission Agreement, she would not have understood it because her primary language is Russian and she is not fluent in English. *See* Nina Kimyagarova Depo. 28:17-20. Although the Defendant's employees and/or agents tried to explain the Admission Agreement to Nina Kimyagarova, she could not understand it. *Id.* Nina Kimyagarova explained to the Defendant's employees and/or agents that she did not understand the Admission Agreement. *See* Nina Kimyagarova Depo. 25:21-24. Despite the fact that the Defendant employs Russian-speaking staff who might have been able to interpret the Admission Agreement and assist Nina Kimyagarova in understanding it, the Defendant did not provide or offer to provide any such interpreters to Nina Kimyagarova during the admission process

or at any other time. *See* Nina Kimyagarova Depo. 25:25-26:10, 51:14-24. No one at The Montefiore Home ever told Nina Kimyagarova that an interpreter could be provided if she needed assistance in understanding the admission paperwork. *See* Nina Kimyagarova Depo. 25:25-26:1.

Defendant's third Motion to Stay attempts to imply that Nina Kimyagarova is fluent in English and should be bound by the Admission Agreement because she is a United State citizen, she has a valid driver's license, she took her driver's license examination in English, she has a cell phone, her cell phone has an English menu, she took classes to learn English, and she has interacted with English-speaking people in the past. However, none of these characteristics are sufficient to demonstrate that Nina Kimyagarova was able to effectively communicate in both written and spoken English when she signed the Admission Agreement on June 4, 2009. Further, none of these general facts rebut her sworn testimony about her inability to read and understand English as cited above. There is no presumption that a person who is a United States citizen, who has a driver's license, who has cell phone, and who can say "Hello" to someone in English is able to effectively communicate in English and/or able to read a complicated legal document.

Nina Kimyagarova's deposition testimony confirms that she is not able to effectively communicate in written and spoken English. She testified that her command of the English language is at a first grade level, despite taking two years of English classes. *See* Nina Kimyagarova Depo. 15:6-10. She finds it is very difficult for her to understand what she reads in English. *See* Nina Kimyagarova Depo. 13:17-20. She also testified that although she has worked in places of employment where she had to communicate in English, as a matter of course, she found it very difficult to engage in commercial transactions in English in those settings. *See* Nina Kimyagarova Depo. 19:25-20:7. Her current employment involves caring only for Russian-speaking individuals. *See* Nina Kimyagarova Depo. 19:2-4. Her training for that position was provided in Russian. *See* Nina Kimyagarova Depo. 20:21-23. Nina Kimyagarova lets her husband, who has a better

command of the English language and a better understanding of written English, take care of commercial transactions, such as handling transactions and issues involving utility bills, automobile insurance, etc. *See* Nina Kimyagarova Depo. 21:14-22:4. When Nina Kimyagarova had to interact with a social worker through Passport, relative to her mother's care, the social worker translated the documents for her and an interpreter was present. *See* Nina Kimyagarova Depo. 46:6-22. Even in non-commercial settings, Nina Kimyagarova primarily communicates in Russian, not English. Her Facebook page is in Russian. *See* Nina Kimyagarova Depo. 32:4-8. She types using Russian letters, not English letters. *See* Nina Kimyagarova Depo. 32:18-21.

Perhaps most telling of Nina Kimyagarova's inability to effectively communicate in English is the fact that she had to have a Russian interpreter for her deposition in this case. When Defendant's counsel handed Nina Kimyagarova copies of the Admission Agreements at her deposition and asked her to look at those documents, she stated that she did not understand anything from them. *See* Nina Kimyagarova Depo. 24:18-23.

It is clear that Nina Kimyagarova could not effectively communicate in written and spoken English when she signed the Admission Agreement on June 4, 2009. As a result, pursuant to state law, her signature is void and the Agreement cannot be enforced. Therefore, Defendant's third Motion to Stay must be denied.

H. Pursuant to the Ohio Supreme Court's decision in *Peters v. Columbus Steel Castings, Co.*, 115 Ohio St.3d 134, 2007-Ohio-4784, 873 N.E.2d 1258 (2007), wrongful death claims brought by a decedent's next-of-kin are not subject to arbitration.

In *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4784, 873 N.E.2d 1258 (2007), the Supreme Court of Ohio considered the issue of "whether the personal representative of a decedent's estate is required to arbitrate a wrongful-death claim when the decedent had agreed to arbitrate all claims against the alleged tortfeasor." *Peters*, 115 Ohio St.3d

at 135. In considering this issue, the Court reviewed the separate nature of survival claims and wrongful death claims. The Court stated that "when an individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* leading to his or her death as well as a wrongful-death action *for the injuries suffered by the beneficiaries of the decedent* as a result of the death." *Peters*, 115 Ohio St.3d at 137 (emphasis in original); *See also* O.R.C. §§ 2125.02 and 2305.21, which provide separate causes of action for wrongful death claims and survival claims respectively. The Ohio Supreme Court recognized that although survival claims and wrongful death claims both relate to the same allegedly negligent acts of a defendant, and that such claims are often pursued by the same nominal party (i.e., the personal representative of the estate) in the same case, they are distinct claims that are brought by different parties in interest. *Peters*, 115 Ohio St.3d at 137, citing *Mahoning Valley Ry. Co. v. Van Alstine*, 77 Ohio St. 395, 414, 83 N.E. 601 (1908). As a result of the different nature of wrongful death claims from survival claims, the Court held that "a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims. The beneficiaries can agree to arbitrate these claims themselves, but they are not required to do so. Because Peter's beneficiaries did not sign the plan nor any other dispute-resolution agreement, they cannot be forced into arbitration." *Peters*, 115 Ohio St.3d at 138, citing *Thompson v. Wing*, 70 Ohio St.3d 176, 182-83, 637 N.E.2d 917 (1994). Simply put, the Court concluded that "[a]lthough we have long favored arbitration and encourage it as a cost-effective proceeding that permits parties to achieve permanent resolution of their disputes in an expedient manner, it may not be imposed on the unwilling." *Peters*, 115 Ohio St.3d at 138. The Court went on to state that "[r]equiring Peters's beneficiaries to arbitrate their wrongful-death claims without a signed arbitration agreement would be unconstitutional, inequitable, and in violation of nearly a century's worth of established precedent." *Peters*, 115 Ohio St.3d at 138-39.

The holding and reasoning in *Peters* apply to the wrongful death claims which have been

brought by Plaintiff Nina Kimyagarova on behalf of Decedent Sara Kimiagarova's next-of-kin. The wrongful death claims in this case are not subject to arbitration pursuant to the arbitration clause contained within the Admission Agreement. As a result, there is no basis for this Court to stay the wrongful death claims in this case. None of Sara Kimiagarova's next-of-kin were ever a party to the Admission Agreement, so they cannot be bound by it. Further, Nina Kimyagarova clearly signed the Agreement as a "Responsible Party", despite the fact that she was not authorized to sign a contract on her mother's behalf. It is clear that she did not sign the contract on her own behalf.

Recently, in *Skerlec v. Ganley Chevrolet, Inc.*, 2012-Ohio-5748 (8th Dist. 2012), the Eighth District Court of Appeals held that it was reversible error for a trial court to stay claims pending arbitration where some of the claims that were stayed did not fall within the arbitration agreement. In that case, the Court held that three intentional tort claims fell outside of the arbitration agreement and should not have been stayed. In this case, there is no question that Plaintiff's wrongful death claims do not fall within the scope of the Admission Agreement's arbitration clause. As a result, it would be error for this Court to require Sara Kimiagarova's next-of-kin to arbitrate their wrongful death claims.

Accordingly, Plaintiff respectfully requests that this Court deny Defendant's third Motion to Stay.

I. The arbitration clause contained within Defendant's Admission Agreement is both procedurally and substantively unconscionable and, as a result, it is not enforceable.

Defendant's terminated Admission Agreement is not enforceable because it is both procedurally unconscionable and substantively unconscionable.

"[A]n arbitration agreement is enforceable unless grounds exist at law or in equity for revoking the agreement." *Hayes*, 122 Ohio St.3d at 67, citing O.R.C. § 2711.01(A). "Unconscionability is a ground for revocation of an arbitration agreement." *Id.*, citing *Taylor Bldg.*

Corp. of Am., 117 Ohio St.3d 352. "Unconscionability includes both 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.*, quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383, 613 N.E.2d 183 (1993). "The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable." *Id.*, citing *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006-Ohio-4464, 861 N.E.2d 553 (9th Dist. 2006).

1. Procedural Unconscionability.

"Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, e.g., 'age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.'" *Small v. HCF of Perrysburg*, 159 Ohio App.3d 66, 2004-Ohio-5757, 823 N.E.2d 19 (6th Dist. 2004), quoting *Johnson v. Mobil Oil Corp.*, 415 F.Supp. 264, 268 (E.D. Mich. 1976). "Additional factors that may contribute to a finding of procedural unconscionability include the following: 'belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.'" *Hayes*, 122 Ohio St.3d at 68, citing *Taylor Bldg. Corp. of Am.*, 117 Ohio St.3d at 362.

In *Small v. HCF of Perrysburg*, 159 Ohio App.3d 66, 71-73, 2004-Ohio-5757, 823 N.E.2d 19 (6th Dist. 2004), the Sixth District Court of Appeals held that an arbitration clause that provided

for the arbitration of a nursing home resident's negligence claims was both procedurally and substantively unconscionable. The Court determined that the arbitration clause was procedural unconscionability because "[w]hen Mrs. Small signed the agreement she was under a great amount of stress. The agreement was not explained to her; she did not have an attorney present. Mrs. Small did not have any particularized legal expertise and was 69 years old on the date the agreement was signed." *Small*, 159 Ohio App.3d at 73.

Nina Kimyagarova was under a significant amount of stress when her mother was admitted to The Montefiore Home. Nina Kimyagarova took care of her mother on a daily basis. However, since Nina Kimyagarova had to go out-of-town, she wanted to make sure that her mother would be safe and properly supervised at The Montefiore Home while she was gone. *See* Nina Kimyagarova Depo. 28:3-12, 55:15-24. The admission paperwork was placed in front of Nina Kimyagarova, and she was told that she had to sign it in order to get her mother, Sara Kimiagarova, admitted to The Montefiore Home. *See* Nina Kimyagarova Depo. 26:2-10 (Oct. 10, 2012). Nina Kimyagarova was told that if she signed the paperwork that everything would be normal. *Id.* Of course, she wanted everything to be normal, and her mother to be taken care of, while she was out-of-town. Nina Kimyagarova only intended to sign paperwork that would enable her mother to be admitted to The Montefiore Home and to receive the proper care and services while she was there. *See* Nina Kimyagarova Depo. 26:20-24, 28:3-12. As a result, Nina Kimyagarova, who did not hold a power of attorney to act on Sara Kimiagarova's behalf, signed the admission paperwork over the course of a few minutes, as directed by the employee and/or agent of Defendant who conducted the admission process for Sara Kimiagarova's admission to The Montefiore Home.

In terms of business acumen, Nina Kimyagarova had no experience with litigation, arbitration, or drafting or negotiating contracts. *See* Nina Kimyagarova Depo. 21:23-25, 29:25-30:2. She was not an attorney. She did not know the difference between arbitration and litigation. She

did not know what arbitration is or how it works. No one at The Montefiore Home ever explained to Nina Kimyagarova the difference between litigation and arbitration. She did not have any formal education beyond middle school, which she received prior to her emigrating from Uzbekistan to the United States. *See* Nina Kimyagarova Depo. 9:10-14. Defendant The Montefiore Home runs a business that generates tens of millions of dollars in annual revenue. At the time Sara Kimiagarova was admitted to The Montefiore Home, Defendant employed admissions personnel whose full-time job was meeting with new residents and securing their signatures on Admission Agreements which contained arbitration clauses. It is clear that the Defendant had all of the relevant experience and business acumen.

In terms of relative bargaining power, Defendant owned and operated at least two (2) campuses at the time, including a nursing home and an assisted living facility. Sara Kimiagarova was a 85 year old woman who was unable to care for herself. Nina Kimyagarova was unable to provide care for her mother while she was out-of-town. It is clear that Defendant had all of the bargaining power.

Defendant drafted the Admission Agreement including the arbitration clause.

In terms of whether alterations to the printed terms were possible, it is clear that neither Decedent Sara Kimiagarova nor her daughter, Nina Kimyagarova, altered one word of the arbitration clause. No one ever explained to Nina Kimyagarova nor gave her or her mother, any choice relative to whether Sara Kimiagarova would want to be able to sue the owners and operators of The Montefiore Home if they provided her substandard care or whether she would want to waive her right to a jury trial and arbitrate such a claim. The arbitration clause in this case was a boilerplate contract of adhesion that was presented to Nina Kimyagarova on a take it or leave it basis. The clause was drafted by the Defendant, in its entirety, to help protect the Defendant from liability.

The terms of the Admission Agreement were never communicated nor explained to Nina Kimyagarova nor to Sara Kimiagarova. Just like Mrs. Small in the *Small* case, no one at The Montefiore Home ever adequately explained the arbitration clause to her, in a manner that she could understand it. When Nina Kimyagarova signed the Admission Agreement, she had no idea that she was signing any document that had anything to do with arbitration. No one ever told Nina Kimyagarova that the admission paperwork that she was directed to sign had anything to do with arbitration nor with litigation. No one at The Montefiore Home ever explained to Nina Kimyagarova the difference between arbitration and litigation. No one ever mentioned or explained to Nina Kimyagarova that if she signed the admission paperwork that her mother would be waiving her right to a jury trial. She had no idea that she was signing any document that would waive her mother's right to a jury trial. In fact, no one at The Montefiore Home ever mentioned arbitration to Nina Kimyagarova during the admission process or at any time during any of Sara Kimiagarova's four (4) respite stays there.

Moreover, no one ever explained to Sara Kimiagarova, nor to Nina Kimyagarova, that if Sara Kimiagarova was a victim of abuse or neglect at The Montefiore Home, and if Sara Kimiagarova or her family wanted to pursue a claim, they would not be able to subpoena witnesses, conduct discovery, propound interrogatories, propound requests for production of documents, etc., so she or her family could properly pursue the claim. As a result, it was impossible for either Sara Kimiagarova or Nina Kimyagarova to make an informed decision. It was impossible for either of them to knowingly and voluntarily give up Sara Kimiagarova's right to a jury trial and her right to conduct discovery before that jury trial. No one ever explained these concepts to Sara Kimiagarova nor to Nina Kimyagarova. Further, as noted above, Nina Kimyagarova could not effectively communicate in written or spoken English at the time of Sara Kimiagarova's admission.

Defendant The Montefiore Home, as the much stronger party in this case, knew that

Decedent Sara Kimiagarova, as the much weaker party, was unable to reasonably protect her interests by reason of her inability to understand the language of the arbitration clause, and that she would be unable to receive any benefit from the arbitration clause, which was drafted solely to limit the liability of the Defendant.

Accordingly, this Honorable Court should find that the arbitration clause contained within the Defendant's Admission Agreement is procedurally unconscionable.

2. Substantive Unconscionability.

"Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability. However, courts examining whether a particular limitations clause is substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Small*, 159 Ohio App.3d at 71.

In *Small*, the Sixth District Court of Appeals held that an arbitration clause was substantively unconscionable where the resident or representative was given no means by which to reject the arbitration clause in an admissions agreement, despite the presence of a sentence in the agreement stating that admission is not conditioned on agreement to the arbitration clause. The Court stated that "we believe that the resident or representative is, by signing the agreement that is required for admission, for all practical purposes being required to agree to the arbitration clause." *Small*, 159 Ohio App.3d at 72.

In this case, the arbitration clause was offered to Nina Kimyagarova in the Admission Agreement on a take it or leave it basis. This is a classic contract of adhesion. There was no way

for Nina Kimyagarova to indicate on the Admission Agreement that she rejected the arbitration clause. There is nothing that indicates the arbitration clause is optional. As in *Small*, Nina Kimyagarova was required to agree to the arbitration clause in order to have her mother, Sara Kimiagarova, admitted to The Montefiore Home.

Defendant's terminated Admission Agreement was a nine (9) page document. On Page 6 of the terminated Admission Agreement, following numerous other sections, was a boilerplate arbitration clause. There is nothing in the clause that says that sometimes nursing home residents are neglected and abused. There is nothing in the clause about the benefits of a jury trial. There is nothing in the clause telling new residents about the specific rules that will be applied to the arbitration of their claims. Although the clause states that the American Health Lawyers Association's Alternative Dispute Resolution Service's Rules of Procedure for Arbitration will be used, a copy of which is attached hereto as Exhibit "C", that thirty (30) page document certainly was not provided to Sara Kimiagarova nor to Nina Kimyagarova by the Defendant at any time. If the Expedited Procedures apply to the arbitration, then no discovery is afforded. If the Regular Procedures apply, a party may conduct discovery at the arbitrator's discretion. There is no consequence for ignoring discovery requests nor the orders of an arbitration panel. Although the procedures provide for subpoenas, the arbitration panel cannot enforce a subpoena. It cannot force third parties to submit to a deposition, nor can the panel hold a party in contempt. Unlike a jury trial, which may last two to three weeks in a nursing home case, a hearing under the Expedited Procedures is limited to one (1) or two (2) days. Obviously, the Plaintiff, the party with the burden of proof, is hurt by limiting the time for the presentation of her case. More time can be requested, but it will require more fees and costs. In addition, contrary to O.R.C. § 2711.23 (E) and (F), the arbitration panel consists of one person, not three persons, and arbitration expenses are not split between the parties. In fact, on Page 7 of the Admission Agreement, it states that "[t]he prevailing

party in the arbitration shall be entitled to have the other party pay its costs for the arbitration, including reasonable attorneys' fees and prejudgment interest." There is nothing in the clause telling new residents that most nursing home cases are handled on a contingent fee basis, so the resident or his or her family do not have to pay any amount in legal fees up front or until a recovery is made.

There is nothing in the clause about the exorbitant fees that are required for arbitration through the American Health Lawyers Association. According to the American Health Lawyers Association fee schedule, which the Defendant also did not provide to Sara Kimiagarova nor to Nina Kimyagarova, the claimant has to pay an administration fee of $2,750.00. However, on Page 16 of the American Health Lawyers Association's Rules of Procedure for Arbitration, a copy of which is attached hereto as Exhibit "C", "the nonrefundable Administration Fee only covers the administrative services provided by the American Health Lawyers Association Alternative Dispute Resolution Service. It does not include the compensation or expenses charged by the dispute resolver or any other charge incurred by the parties in advance or in connection with any dispute resolution." Therefore, if the arbitration clause in this case was enforced, the Estate of Sara Kimiagarova would have to pay **$2,750.00** just to file the claim and request arbitration. It is unknown what other fees, expenses, and costs, including the hourly rate of the arbitrator and fees for orders, would be incurred, as those are not disclosed by the American Health Lawyers Association. There may also be fees for objections, fees to file certain memorandum with the panel, and fees for written findings of fact and conclusions of law or reasons for the award.

The fees charged by the American Health Lawyers Association are outrageous, and they were never disclosed to Sara Kimiagarova nor to Nina Kimyagarova. Clearly, these fees would have a chilling effect on anyone contemplating a claim.

There is no question that the arbitration clause is substantively unconscionable, as well as procedurally unconscionable. Since both prongs for the test for unconscionability have been met,

Plaintiff respectfully requests that this Honorable Court deny Defendant's third Motion to Stay, as the Admission Agreement is not enforceable because it is both procedurally and substantively unconscionable.

J. The selection of the American Health Lawyers Association as the arbitral forum is an integral term of the arbitration agreement. However, the American Health Lawyers Association will not administer the arbitration of Plaintiff's "consumer health care liability claims" in this case because the parties did not agree in writing, after Sara Kimiagarova suffered injuries at The Montefiore Home on June 10, 2009 or June 12, 2009, to arbitrate any claims relative to those injuries. The unavailability of the American Health Lawyers Association renders the arbitration agreement unenforceable due to impossibility of performance.

Defendant's terminated Admission Agreement is unenforceable because of impossibility of performance of an integral term of the Agreement. "Impossibility of performance occurs where, after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties." *Ass'n of Cleveland Fire Fighters, Local 93 of the Int'l Ass'n of Fire Fighters v. Cleveland*, 2010-Ohio-5597, at ¶ 13 (8th Dist. 2010). "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged". *See* Restatement of the Law 2d, Contracts, Section 261 (1981).

Article IV(D) of the Defendant's Admission Agreement states, in pertinent part: "Any arbitration conducted pursuant to this Article IV shall be conducted at the Facility in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration." Article IV(D) also states that "any person requesting arbitration will be required to pay a filing fee to AHLA and other expenses." The terminated Admission Agreement designates the American Health Lawyers Association's Alternative Dispute Resolution

Service as the arbitral forum. Rule 1.01 of the American Health Lawyers Association's Alternative Dispute Resolution Service's Rules of Procedure for Arbitration, a copy of which is attached hereto as Exhibit "C", states, in pertinent part (emphasis added):

> **1.01 Applicability of Rules**
>
> The parties shall be bound by these Rules whenever they have agreed to arbitration by the Service or under the Rules. **The Service will administer a 'consumer health care liability claim' on or after January 1, 2004 only if (1) all of the parties have agreed in writing to arbitrate the claim after the injury has occurred** and a copy of the agreement is received by the Service at the time the parties make a request for a list of arbitrators . . . . For purposes of the Rules, a 'consumer health care liability claim' means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.

There is no dispute that the alleged injuries that Sara Kimiagarova suffered at The Montefiore Home occurred on June 10, 2009 and June 12, 2009. Defendant has provided this Court with four (4) Admission Agreements relative to Sara Kimiagarova, which were allegedly signed by Nina Kimyagarova on August 14, 2008, October 15, 2008, February 25, 2009, and June 4, 2009. *See* Exhibits "A", "B", "C", and "D" respectively of Defendant's Motion to Stay. Defendant has not produced any arbitration agreement signed on or after June 12, 2009, after Sara Kimiagarova was injured as a direct and proximate result of Defendant's negligence and/or recklessness. Defendant does not claim that any arbitration agreement was ever signed on or after June 12, 2009. Since neither Sara Kimiagarova nor any person authorized to act on her behalf signed any arbitration agreement with the Defendant after she was injured on June 12, 2009, the American Health Lawyers Association will not administer arbitration relative to any claims that arise out of Sara Kimiagarova's injuries on June 10, 2009 and June 12, 2009.

The selection of a particular forum to resolve a particular dispute is an integral term to the contract. Since the selected arbitral forum, the American Health Lawyers Association, will not

conduct the arbitration of any claims in this case because no arbitration agreement was signed after Sara Kimiagarova was injured on June 10, 2009 and June 12, 2009, the arbitration clause cannot be complied with by the parties. The fact that term of the contract is impossible to perform, renders the contract unenforceable.

Accordingly, Plaintiff respectfully requests that this Honorable Court deny Defendant's third Motion to Stay, as it is impossible for the parties to perform arbitration pursuant to the Admission Agreement due to the unavailability of the American Health Lawyers Association.

IV. CONCLUSION.

Accordingly, this Court should deny Defendant's third Motion to Stay for all of the reasons articulated herein.

Defendant's Motion to Stay must be denied, pursuant to the doctrine of collateral estoppel, which prevents the Defendant from continuously relitigating an issue that has already been resolved by this Court.

Defendant has waived any right to arbitrate any claims relative to this case because it has actively engaged in extensive discovery in this case.

Pursuant to the express language in the Admission Agreement, the Admission Agreement, including the arbitration clause at issue, automatically terminated upon Sara Kimiagarova's death on October 3, 2011.

Defendant has repeatedly admitted in its Answers to Plaintiff's Complaints and Plaintiff's First Amended Complaint that the Admission Agreement is void and unenforceable.

The Admission Agreement and its arbitration clause are invalid and unenforceable pursuant to Ohio law because the arbitration clause is not a separate agreement.

The arbitration clause is unenforceable pursuant to Ohio law because Nina Kimyagarova cannot read or understand the Admission Agreement that Defendant's employee and/or agent

directed her to sign, because she is not fluent in English.

The Admission Agreement is not enforceable because Sara Kimiagarova did not sign it and Nina Kimiagarova was not authorized to sign the agreement on her behalf.

Sara Kimiagarova's next-of-kin are not bound by the arbitration clause, pursuant to the Ohio Supreme Court's decision in *Peters*.

The arbitration clause contained within Defendant's Admission Agreement is both procedurally and substantively unconscionable.

Finally, it is impossible to perform arbitration pursuant to the Admission Agreement because the American Health Lawyers Association will not administer the arbitration of any of Plaintiff's claims in this case.

Accordingly, this Court should promptly deny Defendants' third Motion to Stay and impose the appropriate sanctions on Defendant and its counsel, pursuant to Ohio Civil Rule 11 and O.R.C. § 2323.51, for filing this untimely and frivolous Motion, which is not warranted under existing law, outright violates existing law, and cannot be supported by the evidence in this case, including the express language of the Defendant's Admission Agreement and its arbitration clause. It is apparent that Defendant's third Motion to Stay is unsupported by law and fact, and that its counsel filed the Motion merely to harass Plaintiff and her counsel, cause unnecessary delay, and needlessly increase the costs of the within litigation. Plaintiff asks for sanctions in the amount of $2,500.00.

Respectfully submitted,
THE DICKSON FIRM, L.L.C.

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Attorneys for Plaintiff Nina Kimyagarova, as the personal representative of the Estate of Sara Kimiagarova (deceased).

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copy of the foregoing, Plaintiff's Brief in Opposition to Defendants' Third Motion to Stay and Plaintiff's Motion for Sanctions, was sent by ordinary U.S. mail, this **17th day of December, 2012**, to the following:

Patrick S. Corrigan, Esq.
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Cleveland, Ohio 44113

Attorney for Defendant The Montefiore Home

By: _____

Blake A. Dickson
Mark D. Tolles, II

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