IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LOUISE CANTIE, as the personal representative of the Estate of JAMES CANTIE (deceased)	)	CASE NO. 12 CV 791812
	)	JUDGE TIMOTHY MCCORMICK
Plaintiff,	)	PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, MOTION TO STAY PROCEEDINGS AND COMPEL/ENFORCE ARBITRATION.
HILLSIDE PLAZA, et al.	)	
Defendants.	)	

Now comes Plaintiff Louise Cantie, as the personal representative of the Estate of James Cantie (deceased), by and through her counsel, Ellen Hobbs Hirshman and Meghan P. Connolly of The Dickson Firm, LLC, and hereby submits her Brief in Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, Motion to Stay Proceedings and Compel/Enforce Arbitration (hereinafter referred to as "Defendants' Motion to Dismiss or Stay"). Plaintiff respectfully requests that this Court issue on Order denying Defendants' Motion to Dismiss or Stay.

I. INTRODUCTION.

Defendants Hillside Plaza, Euclid Hill Health Investors, Inc., DMD Management, Inc., and Legacy Health Services (hereinafter "Defendants"), by and through their counsel, have moved this Court to dismiss Plaintiff's Complaint pursuant to Civ.R. 12(B)1, or in the alternative, to stay all proceedings in this case pending arbitration of all of Plaintiff's claims, pursuant to O.R.C. § 2711.02. Defendant relies upon the arbitration clause contained in the Admission Agreement that Defendant Hillside Plaza, by and through its employees and/or agents, directed Decedent James Cantie's son,

Mark Cantie, to sign prior to James Cantie's admission to Hillside Plaza on August 30, 2011. In their Motion, Defendants provide cursory arguments, at best, for why the within case should be dismissed or stayed pending arbitration. Defendants have the burden of proving that there is an issue, which arises from Defendant Hillside Plaza's Admission Agreement, that is referable to arbitration. Because Defendants have clearly failed to show that there is any issue referable to arbitration in this case, Defendants' Motion to Dismiss or Stay 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 Hillside Plaza's Admission Agreement, including the arbitration clause contained therein, is invalid and unenforceable against the Estate of James Cantie (deceased) and James Cantie's heirs for the following reasons:

1. The express language of Defendant Hillside Plaza's Admission Agreement clearly states that the agreement, including its arbitration clause, automatically terminated on James Cantie's death on October 6, 2011. As a result, the Admission Agreement, including its arbitration clause is void and unenforceable.

2. Pursuant to 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. Because the arbitration clause at issue is buried on Page 9 of Defendant Hillside Plaza's 12 page Admission Agreement, it is not contained in a separate agreement, it is not contained in a separate document, it does not require separate consent, and therefore it is invalid and unenforceable.

3. Defendants have 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, Defendants have waived any alleged right to pursue the resolution of Plaintiff's claims in an arbitral forum.

4. Even if the Admission Agreement were enforceable, which it is not for the above mentioned reasons, the Admission Agreement would only have the capacity to bind James Cantie and his Estate, not James Cantie's next-of-kin. 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 James Cantie's next-of-kin are not subject to arbitration based upon an arbitration agreement entered into by the Decedent (or his attorney-in-fact). In addition, because it would constitute reversible error to require James Cantie's next-of-kin to arbitrate their wrongful death claims, it would also be improper for this Court to stay their wrongful death claims while any other claims are pending arbitration.

5. The only proper party to the alleged "agreement" is Defendant Hillside Plaza. Therefore, it does not apply to Defendants Euclid Hill Health Investors, Inc., DMD Management, Inc., and Legacy Health Services.

6. Because Decedent James Cantie's right to trial by jury is unwaivable, the subject arbitration clause is void as a matter of law.

7. The subject arbitration clause is unenforceable as there was no meeting of the minds and no consideration.

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

For all of the above reasons, this Court should promptly deny Defendants' Motion to Dismiss or Stay. Defendants' Motion is not warranted under existing law, it outright violates existing law, and cannot be supported by the evidence in this case, including the express language of Defendant Hillside Plaza's Admission Agreement and its arbitration clause.

II. STATEMENT OF THE FACTS AND OF THE CASE.

Prior to his admission at Defendants' nursing home, James Cantie lived with his son, Mark Cantie, and daughter, Louise Cantie. On August 22, 2011, James Cantie was admitted to Euclid Hospital for treatment of a urinary tract infection. From Euclid Hospital, James Cantie was expected to spend a short stay at Hillside Plaza nursing home, not to exceed thirty (30) days, and then return home to live with his family. *See* Affidavit of Mark Cantie at ¶ 7 (attached hereto as Exhibit "A").

Before admitting James Cantie, Defendant Hillside Plaza, by and through its employees and/or agents, required James Cantie's son, Mark Cantie, to sign an Admission Agreement, a copy of which is attached hereto as Exhibit "B", as well as other admission paperwork. The admission paperwork was placed in front of Mark Cantie, and he was told that he had to sign it in order to get his father, James Cantie, admitted to Hillside Plaza nursing home. *Id.* at ¶ 20. Mark Cantie was told that he had to sign the admission paperwork as a formality in order for James Cantie to be admitted. *Id.* at ¶ 21; *see* Deposition of Mark Cantie at 33:7-11 (attached hereto as Exhibit "C"). Mark Cantie simply signed the admission paperwork at the direction of the employee and/or agent of the Defendant who conducted the admission process for James Cantie's admission to Hillside Plaza nursing home.

When Mark Cantie signed the admission paperwork, he was concerned about his Dad receiving the care he needed so that he could return home. *See* Affidavit of Mark Cantie at ¶ 23. He wanted him to be in a place where James Cantie could be cared for, and where his health would improve, so that James Cantie could return home with his family. *Id*. at ¶ 27. Mark Cantie did not read the Admission Agreement. *Id.*at ¶ 29. Mark Cantie simply understood that the Admission Agreement would permit his Dad to be admitted to Hillside Plaza. *Id.* at ¶ 15; Deposition of Mark

Cantie at 33:7-11. No one at Hillside Plaza nursing home ever told Mark Cantie that the admission paperwork that he was directed to sign by an employee and/or agent of the Defendant had anything to do with arbitration or litigation. *See* Affidavit of Mark Cantie at ¶¶ 3, 6, 16, 30 and 34. He did not know that the Admission Agreement contained any terms or provisions regarding the resolution of any disputes with Hillside Plaza nursing home, including any disputes that might arise from its negligent care of James Cantie. *Id.* Even if Mark Cantie had read the Admission Agreement, he would not have understood the arbitration clause, because he does not know what arbitration is. *Id.* at 11-13.

Defendant Hillside Plaza's Admission Agreement is a twelve (12) page document. On Page 9 of the Admission Agreement, following sections relating to services, financial obligation, termination of the Agreement, and a "miscellaneous" section, is an arbitration clause. The admission paperwork, including the Admission Agreement, was drafted by Defendant and provided to Mark Cantie by and through Defendant Hillside Plaza's employees and/or agents. *Id.* at ¶¶ 14, 18.

Mark Cantie is not an attorney, nor does he have any legal expertise. *Id.* at ¶ 33; *See* Deposition of Mark Cantie at 8:7 (attached hereto as Exhibit "D"). He has had very limited training and education beyond high school. *Id.* at ¶ 9. Mark Cantie is lacking experience with litigation or arbitration. *Id.* at ¶ 11. He does not really know what arbitration is or how it works. *Id.* at ¶ 12. No one at Hillside Plaza nursing home ever explained to Mark Cantie the difference between litigation and arbitration. *Id.* at ¶ 5. No one ever mentioned nor explained to Mark Cantie that if he signed the Admission Agreement, that his father would be waiving his right to a jury trial if he received substandard care at Hillside Plaza nursing home and ever decided to sue the owners and operators of Hillside Plaza nursing home for such negligence. *Id.* at ¶ 34. No one ever explained to Mark

Cantie or gave him or his father, any choice relative to whether James Cantie would want to be able to sue the owners and operators of Hillside Plaza nursing home if they ever provided him substandard care or whether he would want to waive his right to a jury trial and arbitrate such a claim. *Id.* at ¶ 6. Mark Cantie never bargained with anyone over the arbitration provision in Defendant Hillside Plaza's Admission Agreement. *Id.* at ¶ 35. He did not even know that such a provision existed. *Id.* at ¶ 10.

No one at Hillside Plaza nursing home ever mentioned arbitration to Mark Cantie during the admission process. *Id.* at ¶ 3. When Mark Cantie signed the Admission Agreement, he had no idea that he was signing any document that had anything to do with arbitration. *Id.* at ¶ 10. He had no idea that he was signing any document that would waive his father's right to a jury trial.

When Mark Cantie signed the admission paperwork on behalf of his father, including the Defendant's Admission Agreement, he was never told that he could have an attorney present. *Id.* at ¶ 32. Nor was he ever told that he could have an attorney review the paperwork before he signed it. *Id.* Mark Cantie did not have an attorney present when he signed the admission paperwork. *Id.* at ¶ 31.

On October 6, 2011, James Cantie died as a direct and proximate cause of the Defendants' negligence and/or recklessness.

On September 20, 2013, Plaintiff Louise Cantie, as the personal representative of the Estate of James Cantie, filed her Complaint.

On November 20, 2012, Defendants filed their first Motion to Dismiss in this case, frivolously alleging that Plaintiff's Affidavit of Merit failed to meet the requirements of Civ.R. 10(D)(2). **Defendants did not file a Motion to Dismiss or Motion to Stay the case to demand**

arbitration at that time.

On November 21, 2012, Defendants filed Answers to Plaintiff's Complaint. **Defendant did not file a Motion to Dismiss or Motion to Stay the case and demand arbitration at that time.**

On December 13, 2012, Defendants filed a Motion for Leave to File Amended Answers, along with Amended Answers. Defendants' Amended Answers asserted Arbitration as an affirmative defense. The Court granted Defendants' Motion and permitted Defendants to file the Amended Answers. **Again, Defendants did not file a Motion to Dismiss or Motion to Stay the case and demand arbitration at that time.**

On December 10, 2013, Defendants responded to Plaintiff's First Request for Admissions. *See* Letter from Bret C. Perry, Esq. to Meghan P. Connolly, Esq. dated December 10, 2012 (attached hereto as Exhibit "E"). On December 26, 2013, Defendants' counsel informed Plaintiff that although Defendants' responses to Plaintiff's First Request for Production of Documents and First Set of Interrogatories were late, Defendants were attempting to identify materials and respond to Plaintiff's requests. *See* Letter from Bret C. Perry, Esq. to Meghan P. Connolly, Esq dated December 26, 2012 (attached hereto as Exhibit "F").

On January 3, 2013, this Court held a Case Management Conference with counsel. Three attorneys were present to represent the Defendants, and Ellen Hobbs Hirshman was present for the Plaintiff. During this Case Management Conference, the Defendants' recent amendment to their Answers was discussed, and this Court explicitly inquired of counsel for Defendants whether the Defendants would seek enforcement of any alleged arbitration agreement in this case. Specifically, the Court addressed whether the Court and the parties should commit to a briefing schedule regarding arbitration and its surrounding issues, or a discovery schedule that would move the case

forward toward litigation at trial. When Defendants' counsel unambiguously indicated that a discovery schedule should be set, this Court set deadlines 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. **Defendants indicated to this Court and to Plaintiff's counsel that they would not be demanding arbitration of this case. Defendants did not file a Motion to Dismiss or Motion to Stay the case and demand arbitration at that time, and indicated that no such motion would be filed.**

On January 8, 2013, counsel for Defendants participated in a discovery telephone conference with Plaintiff's counsel. On January 9, 2013, Defendants filed a Motion to Permit Defendants until February 1, 2013, to Respond to Plaintiff's Discovery Requests, which was granted by this Court on January 30, 2013. On January 31, 2013, Defendants filed a Notice of Submission of Discovery Responses to Plaintiff. Defendants produced thousands of pages of documents in response to Plaintiff's discovery requests. **At no time during the pendency of Plaintiff's discovery requests did Defendants file a Motion to Dismiss or Motion to Stay the case and demand arbitration.**

On January 14, 2013, Defendants propounded Interrogatories, Requests for Production of Documents, and a First and Second Set of Requests for Admissions to Plaintiff. *See* E-Mail from Jason A. Paskan, Esq. to Meghan P. Connolly, Esq. dated January 14, 2013 at 5:14 p.m. (attached hereto as Exhibit "G"). Due to the seventy-six (76) improper and harassing Requests for Admissions propounded by Defendants, Plaintiff had to file a Motion for Protective Order. Defendants opposed Plaintiff's Motion for Protective Order as opposed to withdrawing the Requests. The Court granted Plaintiff's Motion for Protective Order on February 15, 2013. Otherwise, Plaintiff responded to all of Defendants' discovery requests and produced thousands of pages of records in response on

February 11, 2013. *See* E-Mail from Meghan P. Connolly, Esq. to Bret C. Perry, Esq dated February 11, 2013 at 6:22 p.m. (attached hereto as Exhibit "H"). **At no time during the pendency of Defendants' discovery requests did Defendants file a Motion to Dismiss or Motion to Stay the case and demand arbitration.**

On February 19, 2013, Defendants Noticed the Depositions of Louise Cantie and Mark Cantie, to take place on February 27, 2013. *See* Letter from Bret C. Perry, Esq. to Ellen Hobbs Hirshman, Esq. dated February 19, 2013 (attached hereto as Exhibit "I").

On February 20, 2013, counsel for Defendants **hosted a ninety (90) minute in person discovery conference** with Plaintiff's counsel, at their office. Extensive discovery issues were discussed in depth. *See* Letter from Ellen Hobbs Hirshman, Esq. to Bret C. Perry, Esq. and Jason A. Paskan, Esq. dated February 20, 2013 (attached hereto as Exhibit "J"). Counsel had a positive discussion about establishing an improved, and more professional, rapport as discovery moved forward.

Defendants continued to produce information and documents responsive to Plaintiff's discovery requests. On February 25, 2013, counsel for Defendants updated Plaintiff's counsel on various discovery issues and produced documents Plaintiff had requested. *See* Letter from Bret C. Perry, Esq. to Ellen Hobbs Hirshman, Esq. dated February 25, 2013 (attached hereto as Exhibit "K").

On February 27, 2013, Defendants' counsel conducted the depositions of Plaintiff Louise Cantie, and Mark Cantie.

Defendants' counsel had agreed to participate in the depositions of Defendants' current and former employees who cared for James Cantie during his residency at Hillside Plaza nursing home in April, 2013. However, on March 8, 2013, after filing their present Motion to Dismiss or Stay on

March 4, 2013, Attorney Paskan suggested that counsel forgo the scheduling of further depositions. Counsel for Defendants stated that "if the Court denies either Motion, my client intends to immediately appeal the Court's Decision." *See* Letter from Jason A. Paskan, Esq. to Ellen Hobbs Hirshman, Esq. dated March 8, 2013 (attached hereto as Exhibit "L").

Even so, on March 15, 2013, Defendants produced additional policies and procedures from Hillside Plaza in response to Plaintiff's discovery requests. *See* Letter from Jason A. Paskan, Esq. to Ellen Hobbs Hirshman, Esq. dated March 15, 2013 (attached hereto as Exhibit "M").

III. LAW AND ARGUMENT.

Defendants filed a Motion to Dismiss or Stay the within case pursuant to Civ.R. 12(B)1 or O.R.C. § 2711.02 , requesting this Court to dismiss this case or stay all proceedings in this case on all of Plaintiff's claims pending arbitration. Defendants' Motion to Stay has no support in law or fact.[1]

A. The express language of Defendant Hillside Plaza's Admission Agreement clearly states that the Agreement, including its arbitration clause, automatically terminated on James Cantie's death on October 6, 2011. As a result, the Admission Agreement and its arbitration clause is void and unenforceable.

Pursuant to its express terms, Defendant Hillside Plaza's Admission Agreement, including the arbitration clause contained therein, automatically terminated on October 6, 2011 upon James

[1] Defendants rely on *Heller v. Pre-Paid Legal Services, Inc.*, for the proposition that dismissal of a case is proper when a court finds an enforceable arbitration agreement. However, in *Tedeschi v. Atrium Centers, LLC, et al.*, the Eighth District Court of Appeals held that "the trial court also did not err in refusing to dismiss the case because the proper action to take when faced with a desire to arbitrate by one of the parties is to stay the case, not dismiss it." *Tedeschi v. Atrium Centers, LLC, et al.,* 2012-Ohio-2929, 2012 Ohio App. LEXIS 2560 (8th Dist. 2012) at ¶ 18 citing *Gibbons-Grabel Co. v Gilbane Bldg. Co.,* 34 Ohio App.3d 170, 517 N.E.2d 559 (8th Dist. 1986).

Cantie's death. Since the Agreement terminated on October 6, 2011, it is not enforceable in March, 2013.

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 Hillside Plaza's Admission Agreement automatically terminated upon James Cantie's death on October 6, 2011. Article III(B) of the Agreement states, in pertinent part, "This agreement shall automatically terminate upon the death of the resident." It is indisputable that the "resident" refers to James Cantie, and that James Cantie died on October 6, 2011. As a result, Defendant's Admission Agreement, including the arbitration clause contained therein, terminated on October 6, 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 James Cantie's death and the termination of other obligations reflected in the Agreement, it could have easily included a provision to that effect.

However, it did not. The only reasonable conclusion, which is supported by the express terms of the Agreement, is that the Admission Agreement terminated on October 6, 2011. Therefore, there is no basis to dismiss or stay any of Plaintiff Louise Cantie's claims pursuant to the Defendants' Motion to Dismiss or Stay, which was filed on March 4, 2013, over one (1) year after the Admission Agreement and arbitration clause had terminated.

Since the Admission Agreement automatically terminated on James Cantie's death on October 6, 2011, and Defendants and their counsel knew that James Cantie had died prior to the filing of Defendant's Motion to Dismiss or Stay, it is clear that Defendant Hillside Plaza's Admission Agreement, including its arbitration clause, cannot be enforced and that Defendants' Motion to Dismiss or Stay was filed merely to burden Plaintiff and her counsel, needlessly increase Plaintiff's litigation costs, and unnecessarily delay this case. Due to the termination of the Admission Agreement, Defendants' Motion to Dismiss or Stay is not warranted or supported by existing statutory and case law in Ohio, in any manner. Nor do Defendants provide any indication in their Motion to Dismiss or Stay how its Motion is supported by an extension, modification, or reversal of existing law or the establishment of new law. In fact, Defendants outright avoid any discussion of the termination clause in the Admission Agreement and its effect on the enforceability of the Admission Agreement and its arbitration clause. Defendants' 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. Defendants and their counsel have engaged in frivolous conduct by filing yet another Motion to Dismiss that is wholly unsupported by Ohio law. The Admission Agreement, including its arbitration clause, automatically terminated upon James Cantie's death on October 6, 2011 and should not be given any effect.

B. Pursuant to ORC § 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 9 of Defendant Hillside Plaza's 12 page Admission Agreement, it is not contained in a separate agreement, it is not separate from any other document, it does not require separate consent, and 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:
>
> * * *
>
> (G) **The arbitration agreement shall be separate from any other agreement, consent, or document;**

The arbitration clause that Defendants rely upon for their Motion to Dismiss or Stay is buried on Page 9 of Defendant Hillside Plaza's 12 page Admission Agreement. In addition to the arbitration clause, the Admission Agreement contains provisions relative to the services provided by the facility, the resident's financial obligations, Defendant Hillside Plaza's participation in Medicare and Medicaid, disputed debts, termination of the contract by the Defendant and by the resident - topics that have nothing to do with the resolution of medical claims or arbitration. The arbitration clause is not contained in a separate agreement or document. The arbitration clause does not require any separate consent. The arbitration clause does not require any consent other than consent to the Admission Agreement at large. 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 Defendants' Motion to Dismiss or Stay.

C. Defendants have waived any alleged right to arbitrate any claims in this case by acting inconsistently with any alleged right to arbitrate by actively participating in this case.

As stated above, Defendants have no right to arbitrate any of the present claims. However, even if Defendants had such a right, having actively participated in this lawsuit, Defendants have acquiesced to proceeding in the present judicial forum rather than an arbitration forum. Defendants' active participation in this case supports this Court's finding that the Defendants have 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).

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 "N", 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.**
>
> (Footnotes omitted.) *Mills v. Jaguar-Cleveland Motors, Inc. (1980), 69 Ohio App. 2d 111, 113, 430 N.E.2d 965*.
>
> 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 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*.
>
> * * *
>
> 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, Defendants clearly knew of their alleged right to arbitrate. Defendant Hillside

Plaza authored the Admission Agreement that contains the arbitration clause. Defendant Hillside Plaza has been in possession of the Admission Agreement that contains the arbitration clause at issue since James Cantie was admitted to Hillside Plaza nursing home on August 30, 2011.

As indicated above, Defendants have also clearly acted inconsistently with any alleged right to arbitrate. Defendants did not file seek to enforce an alleged right to arbitration in this case until March 4, 2013, nearly six (6) months after this case was filed. Before filing their Motion to Dismiss or Stay, Defendants filed Answers to Plaintiff's Complaint and Amended Answers to Plaintiff's Complaint. No motion to stay was filed at either time. No demand for arbitration was made at either time. Defendants filed a Motion to Dismiss this case, frivolously alleging that Plaintiff's Affidavit of Merit failed to meet the requirements of Civ.R. 10(D), and failed to raise any argument that this case should be arbitrated. Defendants responded to Plaintiff's discovery requests. Defendants 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.

Defendants' counsel attended the Case Management Conference of January 3, 2013 on behalf of the Defendants, at which time this Court granted Defendants' Motion to File an Amended Answer for the purposes of including arbitration as an affirmative defense. In light of this amendment, the Court inquired of Defendants' counsel whether a briefing schedule regarding arbitration of this case should be set, or whether a discovery schedule should be set. When Defendants' counsel unambiguously indicated that a discovery schedule should be set, this Court set deadlines 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. Based upon the totality of the circumstances, the Defendants have clearly acted inconsistently with any alleged

right to arbitrate since this case was filed. And Defendants actively waived their right to arbitrate at the Case Management Conference on January 3, 2013, in person, before this Court.

Defendants' counsel noticed and conducted the depositions of Plaintiff Louise Cantie and James Cantie's son, Mark Cantie. Defendants' counsel agreed to participate in the depositions of Defendants' current and former employees who cared for James Cantie during his residency at Hillside Plaza nursing home, in April, 2013.

With respect to the delay by the party seeking arbitration in requesting a stay of proceedings or an order compelling arbitration, Plaintiff's Complaint was originally filed on September 20, 2012. Defendants waited almost six (6) months, until March 4, 2013, to file this Motion to Dismiss or Stay. With respect to the extent to which the Defendants participated in the litigation, Defendants have fully participated in the litigation in this case as indicated above, including by extensively engaging in discovery. With respect to the status of discovery, written discovery is nearly complete and fact depositions are in full swing.

Further, Plaintiff would be prejudiced if Defendants' Motion to Dismiss or 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 September 20, 2012. Plaintiff and her counsel are preparing this case for trial, which is scheduled to begin on September 18, 2013. Plaintiff has propounded written discovery requests. Plaintiff has responded to Defendants' discovery requests. Plaintiff had to oppose Defendants' Motion to Dismiss based on her affidavit of merit. Plaintiff had to seek protection from this Court through a Motion for Protective Order from Defendants inappropriate Requests for Admissions. Plaintiff has filed a motion to compel the production of relevant information and documents. Plaintiff has reviewed thousands of pages of documents

relative to this case. Plaintiff has undergone preparations for deposition of Defendants' fact witnesses. Plaintiff's witnesses have been deposed. Plaintiff has engaged expert witnesses. In addition, as noted below, it would be reversible error to stay some of Plaintiff's claims, as they are not subject to the arbitration clause in the Admission Agreement, even if this Court finds that the Agreement is otherwise valid and enforceable (e.g., Plaintiff's wrongful death claims).

Defendants have clearly waived any alleged right to arbitration in this case. Defendants, by and through their counsel, have actively participated in this litigation by attending a Case Management Conference, filing numerous pleadings, propounding numerous written discovery requests, responding to numerous written discovery request, hosting a 90-minute discovery conference with Plaintiff's counsel, and deposing Plaintiff and other members of James Cantie's family. Moreover, Defendants, by and through their counsel, expressly selected the present judicial forum over arbitration at the Case Management Conference of January 3, 2013, in the presence of this Court. Plaintiff would be prejudiced if this case was stayed pending arbitration. Accordingly, Defendants' Motion to Dismiss or Stay must clearly be denied.

Defendants continue to act inconsistently with their alleged right to arbitrate even after filing their Motion to Dismiss or Stay. Defendants have continued to produce information and documents responsive to Plaintiff's discovery requests as recent as March 15, 2013. It is clear that Defendants' present Motion to Dismiss or stay is submitted for the purposes of delaying litigation of this case.

D. 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, even if the arbitration agreement is otherwise valid and enforceable against the decedent (or his or her lawful attorney-in-fact) who entered into it. As a result, the wrongful death claims brought by Decedent James Cantie's next-of-kin are not subject to arbitration, even if this Court finds that the Admission Agreement is valid and enforceable against Decedent James Cantie, through his estate.

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 or 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 Louise Cantie on behalf of Decedent James Cantie's next-of-kin. Even if the Admission Agreement, and the arbitration clause contained within it, had not automatically terminated upon Decedent James Cantie's death, the wrongful death claims in this case are not subject to arbitration pursuant to that Agreement. As a result, there is no basis for this Court to stay the wrongful death claims in this case.

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,

even if this Court finds that the Admission Agreement is valid and enforceable relative to Plaintiff's survivorship claims, it would be error for this Court to require James Cantie's next-of-kin to arbitrate their wrongful death claims, and it would also be reversible error for this Court to stay James Cantie's next-of-kin's wrongful death claims pending arbitration on Plaintiff's other claims.

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

E. The only proper party to the alleged "agreement" is Defendant Hillside Plaza. Therefore, it does not apply to Defendants Euclid Hill Health Investors, Inc., DMD Management, Inc., and Legacy Health Services.

Only one Defendant in this case is a party to the Admission Agreement. In the first paragraph, the Admission Agreement expressly states that the "Agreement is made and entered into this day of 8/30/2011 by and among/between Hillside Plaza ("Facility"), James Cantie, ("Resident") and Mark Cantie, RP ("Representative"). On the last page of the Admission Agreement, Kelly Foor executed the Admission Agreement as a representative of "Hillside Plaza" only. Euclid Hill Health Investors, Inc., DMD Management, Inc., and Legacy Health Services, are not parties to the Admission Agreement. There is no argument that any part of this case should be stayed as to these Defendants. Therefore, Defendants' Motion to Dismiss or Stay must clearly be denied.

F. Because Decedent James Cantie's right to trial by jury is unwaivable, the arbitration clause is void as a matter of law.

Attached hereto as Exhibit "O" is a letter dated April 2, 2008, from attorney Winston M. Ford, General Counsel of the Ohio Department of Health, explaining the position of the Ohio Department of Health regarding binding arbitration. On page 1, the letter references the Ohio Department of Health's decision to "cite facilities with a licensure deficiency if they enter into

binding arbitration agreements with residents . . ." As the letter indicates O.R.C. §3721.13(A)(15) states that a resident has the right to exercise all "civil rights", which rights the resident may not waive, as provided by O.R.C. §3721.13(C).

O.R.C. 3721.13(A)(15) guarantees to all Nursing Home residents:

> (15) The right to exercise all civil rights, unless the resident has been adjudicated incompetent pursuant to Chapter 2111. of the Revised Code and has not been restored to legal capacity, as well as the right to the cooperation of the home's administrator in making arrangements for the exercise of the right to vote;

O.R.C. 3721.13(C) provides (emphasis added);

> **(C) Any attempted waiver of the rights listed in division (A) of this section is void.**

As stated by the General Counsel for the Ohio Department of Health in his letter dated April 2, 2008, a Nursing Home resident's civil rights certainly include the rights set forth in O.R.C. 3721.17. O.R.C. 3721.17(I) provides (emphasis added);

> (I)(1)(a) Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated **has a cause of action against any person or home committing the violation**.

O.R.C. 3721.10 to O.R.C. 3721.17 set forth the rights guaranteed to nursing home residents. Plaintiffs are alleging in this case that the Defendants violated Decedent James Cantie's rights as set forth in O.R.C. 3721.10 to 3721.17. The arbitration clause in this case is an attempt on the part of the nursing home to induce Decedent James Cantie to waive his right to pursue a cause of action against the Defendants. Pursuant to O.R.C. §3721.13(C), **"Any attempted waiver of the rights listed in division (A) of this section is void."** (emphasis added) Therefore, because the arbitration clause in this case attempts to induce Decedent James Cantie to waive one of his rights, as listed in Section (A) of O.R.C. §3721.13, the clause is void as a matter of law and Defendants' Motion to

Dismiss or Stay should be denied.

The letter from the General Counsel for the Ohio Department of Health expresses the concern of the Ohio Department of Health that clauses like the one at issue in this case are designed to limit the liability of the facility and limit the facility's responsibility to provide adequate and appropriate medical treatment and nursing care. On page 2 of his letter, Mr. Ford expresses the Ohio Department of Health's concern that the placement of a nursing home resident in a long term care facility is a "hectic, stressful, and overwhelming experience," and, as a result, "residents and their loved ones may not have the time to participate in protracted negotiations regarding the terms of admission agreements."

The letter expresses the concern of the Ohio Department of Health that the agreements are frequently contracts of adhesion, which are presented on a take it or leave it basis. That is exactly what happened in this case. Neither Mark Cantie nor James Cantie made a single change to the arbitration clause. Mark Cantie signed what he thought was a residency agreement so that his Dad could be admitted to the nursing home and receive the care that he needed.

The Ohio Department of Health is concerned that these agreements are often lengthy and complicated. The Ohio Department of Health has concluded that, "Clearly, the use of binding arbitration provisions and other statutory waiver clauses in resident admission agreements benefits facilities at the expense of the residents that they are supposed protect." All of these concerns are relevant to the arbitration clause in this case, which begins on page 9 of Defendant Hillside Plaza's 12 page Admission Agreement.

The Ohio Supreme Court has only addressed the enforceability of arbitration clauses contained in nursing home admission agreements in one case, *Hayes v. The Oakridge Home*, (2009)

122 Ohio St. 3d 63, 2009 Ohio 2054, 908 N.E. 2d 408. The Ohio Supreme Court overruled the decision of the Eighth Appellate District Court of Appeals in that decision, and enforced the arbitration clause in that case. However, the Ohio Supreme Court did not change the law in the area. Instead, the Ohio Supreme Court in *Hayes* confirmed that arbitration clauses, like the one in this case, can be found to be unenforceable, if they are procedurally and substantively unconscionable. The arbitration clause in this case is both procedurally and substantively unconscionable, as will be discussed in detail below. In the *Hayes* case, Justice Pfeiffer said in his dissent;

> I dissent for several reasons. First, I would hold that any nursing-home preadmission arbitration agreement is unconscionable as a matter of public policy. Alternatively, I would hold that the specific agreements in this case were unconscionable as a matter of public policy. More narrowly, I would hold that the arbitration agreements in this case were both substantively and procedurally unconscionable.

Hayes v. The Oakridge Home, (2009) 122 Ohio St. 3d 63, 72, 2009 Ohio 2054, 908 N.E. 2d 408, 417. Justice Pfeiffer went on to say in his dissent (emphasis added);

> In its analysis of the details of this particular matter, the majority ignores the big picture. This is an important case. This court should declare all nursing home preadmission arbitration agreements unenforceable as a matter of public policy. **Arbitration clauses that limit elderly or special-needs patients' access to the courts for claims of negligence or abuse in their care should simply not be honored or enforced by the courts of this state.** The General Assembly has enunciated a public policy in favor of special protection of nursing-home residents through its passage of the Ohio Nursing Home Patients' Bill of Rights, SUPREME COURT OF OHIO *R.C. 3721.10 et seq.* "[W]here there is a strong public policy against a particular practice, a contract or clause inimical to that policy will likely be declared unconscionable and unenforceable unless the policy is clearly outweighed by some legitimate interest in favor of the individual benefitted by the provision." 8 Williston on Contracts (4th Ed.1998) 43, Section 18:7.

Hayes, 122 Ohio St. 3d at 72, 2009 Ohio 2054, 908 N.E. 2d at 417. There is no legitimate interest that outweighs the public policy in favor of protecting nursing home residents. Nursing Homes

attempt to impose these clauses on their residents to protect themselves from liability. Justice Pfeiffer went on to say (emphasis added);

> A public policy against preadmission arbitration agreements is reflected in the Ohio Nursing Home Patients' Bill of Rights. Further, **this court should recognize a public policy against preadmission arbitration agreements based upon the practical inappropriateness of such agreements for nursing-home residents**.
>
> **By enacting the Ohio Nursing Home Patients' Bill of Rights, *R.C. 3721.10 et seq.*, the General Assembly has demonstrated particular interest in ensuring the rights of nursing-home patients and has provided statutory remedies for those patients whose rights are violated**. *R.C. 3721.13(A)* specifically enumerates 32 important rights, including the right "to a safe and clean living environment" (*R.C. 3721.13(A)(1)*), the right "to be free from physical, verbal, mental, and emotional abuse and to be treated at all times with courtesy, respect, and full recognition of dignity and individuality" (*R.C. 3721.13(A)(2)*), "the right to adequate and appropriate medical treatment and nursing care and to other ancillary services that comprise necessary and appropriate care consistent with the program for which the resident contracted" (*R.C. 3721.13(A)(3)*), the right "to have all reasonable requests and inquiries responded to promptly" (*R.C. 3721.13(A)(4)*), the right "to have clothes and bed sheets changed as the need arises, to ensure the resident's comfort or sanitation," (*R.C. 3721.13(A)(5)*), and the right "to voice grievances and recommend changes in policies and services to the home's staff, to employees of the department of health, or to other persons not associated with the operation of the home, of the resident's choice, free from restraint, interference, coercion, discrimination, or reprisal." (*R.C. 3721.13(A)(31)*).
>
> *R.C. 3721.17* contains the enforcement provision of the Ohio Nursing Home Patients' Bill of Rights. Pursuant to *R.C. 3721.17(I)(1)(a)*, "[a]ny resident whose rights under *sections 3721.10 to 3721.17 of the Revised Code* are violated has a cause of action against any person or home committing the violation." The use of injunctive relief to achieve a proper level of care is clearly contemplated by the General Assembly. The General Assembly calls for the award of attorney fees when residents resort to injunctive relief. In cases "in which only injunctive relief is granted, [the court] may award to the prevailing party reasonable attorney's fees limited to the work reasonably performed." *R.C. 3721.17(I)(2)(c)*.
>
> *R.C. 3721.17* also allows residents to employ other methods to ensure their rights. Those include reporting violations of the Ohio Nursing Home Patients' Bill of Rights to the grievance committee established at the home pursuant to *R.C. 3721.12(A)(2)*. The statute requires that a combination of residents, sponsors, or outside representatives outnumber nursing home staff two to one on such committees. Another statutory option for residents is to pursue a claim through the

Department of Health. *R.C. 3721.031*.

> The General Assembly has given nursing-home residents rights and a multitude of ways to preserve those rights. **An agreement to arbitrate all disputes flies in the face of the statutory protections of nursing-home residents and should be found unconscionable as a matter of public policy.**

Hayes, 122 Ohio St. 3d 63, at 74-75, 2009 Ohio 2054, 908 N.E. 2d at 417-418. Justice Pfeiffer goes on to say (emphasis added);

> The tactics employed by Oakridge and countenanced by the majority in this case are appalling. This court today provides a roadmap for nursing-home facilities to avoid the responsibilities of the Ohio Nursing Home Patients' Bill of Rights.
>
> Is it really acceptable to shove an arbitration agreement under the nose of a 95-year-woman, newly arrived at the nursing home, as she goes through the signing frenzy of the admission process? **Does the majority really believe that Florence Hayes knowingly and voluntarily gave up her statutory rights through a negotiation process?**
>
> The majority suggests that the Constitution demands today's result and that it is this court's duty to defend the right to private contract. The majority writes: "Our citizens do not lose their constitutional rights and liberties simply because they age." Yes, somewhere in the penumbra of the penumbra of the right to contract, if you squint just so, you can make out what the majority identifies today: the right of the elderly to be "taken in" by nursing homes. This court's corollary right for nursing homes is the right to say, "You signed it. Live with it! Ohio Nursing Home Patients' Bill of Rights? You waived it! Your fundamental constitutional rights? You waived them too! And don't forget to remind your son that we need next month's check for $ 5,500 by the first."

Hayes, 122 Ohio St. 3d at 79, 2009 Ohio 2054, 908 N.E. 2d at 422-423.

James Cantie's right to sue the nursing home for its violation of his statutory rights cannot be waived. As a result, the arbitration clause in this case is void as a matter of law and Defendants' Motion should clearly be denied.

G. The subject arbitration clause is unenforceable as there was no meeting of the minds and no consideration.

In *Maestle v. Best Buy*, CA 79827 (August 11, 2005), the Eighth Appellate District Court of Appeals held (emphasis added):

> Nevertheless, courts may not force parties to arbitrate disputes if the parties have not entered into a valid agreement to do so. See Boedeker v. Rogers (1999), 136 Ohio App. 3d 425, 429; Painesville Twp. Local School District v. Natl. Energy Mgt. Inst. (1996), 113 Ohio App. 3d 687, at 695. As the Supreme Court of the United States has stressed, "arbitration is simply a matter of contract between the parties; it is a way to resolve disputes - but only those disputes - that the parties have agreed to submit to arbitration." First Options of Chicago, Inc. v. Kaplan (1995), 514 U.S. 938, 943.

The Court went on to hold:

> **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.
>
> 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.
>
> "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.

Neither James Cantie nor Mark Cantie ever intended to give away James Cantie's right to a trial by jury, relative to some claim that did not even exist when the admission agreement was signed. James Cantie needed someone to care for him until he was able to go home, and Mark Cantie signed on his behalf in order for his Dad to be admitted to the nursing home. If the consequences of signing the arbitration clause were clearly explained to Mark Cantie, he never would have signed it. No reasonable person would have agreed to this clause.

Further, if the subject arbitration clause is enforced, it would absolutely lead to manifest absurdity. It would lead to the deprivation of James Cantie's right to a trial by jury, in exchange for nothing. The right to vote and the right to trial by jury are the two most sacred rights that any citizen in this country has. James Cantie's right to a trial by jury should not be taken away because Mark Cantie signed admission documents simply so that James Cantie could be admitted to a nursing home.

Further, no consideration is present for the arbitration clause.

As cited above, an enforceable contract requires consideration. A contract without consideration is unenforceable. Further, a promise to do something that the law already requires, does not furnish consideration. *International Shoe Company v. Carmichael*, (1959), 114 So.2d 436 (Fla. 1st DCA 1959). Thus, because the nursing home is already obligated, under Federal and State law, to provide quality care, it fails to provide any consideration for the arbitration clause.

The Defendants gave Decedent James Cantie nothing in exchange for asking him to give up his very valuable right to a trial by jury.

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

Defendant Hillside Plaza'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.

Mark Cantie was under a significant amount of stress when his father was admitted to Hillside Plaza nursing home. Mark Cantie took care of his father on a daily basis. However, Mark Cantie understood that his father needed short term care at Hillside Plaza, which he understood as less than 30 (thirty) days of rehabilitative care before James Cantie could then return home. *See* Affidavit of Mark Cantie at ¶ 7. The admission paperwork was placed in front of Mark Cantie, and he was told that he had to sign it in order to get his father, James Cantie, admitted to Hillside Plaza nursing home. *Id*. at ¶¶ 20-21. Mark Cantie only intended to sign paperwork that would enable his father to be admitted to Hillside Plaza nursing home and to receive the proper care and services

while he was there. *Id*. at ¶ 2. As a result, Mark Cantie signed the admission paperwork as directed by the employee and/or agent of Defendant who conducted the admission process for James Cantie's admission to Hillside Plaza nursing home. *Id*. at ¶ 22.

In terms of business acumen, Mark Cantie was lacking in experience with litigation, arbitration, or drafting or negotiating contracts. *Id.* at ¶¶ 37-38. He was not an attorney and had no legal expertise. *Id*. at ¶ 33. He did not know the difference between arbitration and litigation. *Id*. at ¶ 13. He did not know what arbitration is or how it works. *Id*. at ¶ 12. No one at Hillside Plaza nursing home ever explained to Mark Cantie the difference between litigation and arbitration. *Id.* at ¶ 5. Mark Cantie is not an attorney, nor does he have any leal expertise. *Id*. at ¶ 33. He has had limited training and education beyond high school. *Id*. at ¶ 9. Defendant Hillside Plaza nursing home and its affiliate Legacy Health Services run a business that operates over twenty (20) nursing homes and have done so for over thirty (30) years. Defendant Hillside Plaza is well versed in the business and law applicable to nursing homes in Ohio. At the time James Cantie was admitted to Hillside Plaza nursing home, Defendant Hillside Plaza employed admissions personnel whose job was meeting with new residents and securing their signatures on Admission Agreements which contained arbitration clauses. It is clear that the Defendant Hillside Plaza had all of the relevant experience and business acumen.

In terms of relative bargaining power, Defendant Hillside Plaza owned and operated a nursing home. James Cantie was a 80 year old man who was unable to care for himself. Mark Cantie was unable to provide the rehabilitative care that his father needed and wanted his father to be admitted to the nursing home so that he could become well enough to come home. It is clear that Defendant had all of the bargaining power.

Defendant drafted the Admission Agreement and the arbitration clause.

In terms of whether alterations to the printed terms were possible, it is clear that neither Decedent James Cantie nor his son Mark Cantie, altered one word of the arbitration clause. *Id*. at ¶ 19. No one ever explained to Mark Cantie or gave his father any choice relative to whether James Cantie would want to be able to sue the owners and operators of Hillside Plaza nursing home if they provided him substandard care or whether he would want to waive his right to a jury trial and arbitrate such a claim. *Id*. at ¶ 6. The arbitration clause in this case was a boilerplate contract of adhesion that was presented to Mark Cantie 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 Mark Cantie nor to James Cantie. Just like Mrs. Small in the *Small* case, no one at Hillside Plaza nursing home ever adequately explained the arbitration clause to him, in a manner that he could understand it. When Mark Cantie signed the Admission Agreement, he had no idea that he was signing any document that had anything to do with arbitration. *Id*. at ¶ 10. No one ever told Mark Cantie that the admission paperwork that he was directed to sign had anything to do with arbitration nor with litigation. *Id*. at ¶ 30. No one at Hillside Plaza nursing home ever explained to Mark Cantie the difference between arbitration and litigation. *Id*. at ¶ 5. No one ever mentioned or explained to Mark Cantie that if he signed the admission paperwork that his father would be waiving her right to a jury trial. *Id*. at ¶ 34. He had no idea that he was signing any document that would waive his father's right to a jury trial. *Id*. at ¶ 10. In fact, no one at Hillside Plaza nursing home ever mentioned arbitration to Mark Cantie during the admission process. *Id*. at ¶ 3.

Moreover, no one ever explained to James Cantie, nor to Mark Cantie, that if James Cantie

was a victim of abuse or neglect at Hillside Plaza nursing home, and if James Cantie or his 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 he or his family could properly pursue the claim. As a result, it was impossible for either James Cantie or Mark Cantie to make an informed decision. It was impossible for either of them to knowingly and voluntarily give up James Cantie's right to a jury trial and his right to conduct discovery before that jury trial. No one ever explained these concepts to James Cantie nor to Mark Cantie.

Defendant Hillside Plaza nursing home, as the much stronger party in this case, knew that Decedent James Cantie, as the much weaker party in a vulnerable position, 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 handed to Mark Cantie in the Admission Agreement on a take it or leave it basis. This is a classic contract of adhesion. There was no way for Mark Cantie to indicate on the Admission Agreement that he rejected the arbitration clause. There is nothing that indicates the arbitration clause is optional. As in *Small*, Mark Cantie was required to agree to the arbitration clause in order to have his father, James Cantie, admitted to Hillside Plaza nursing home.

Defendant Hillside Plaza's terminated Admission Agreement is a twelve (12) page document. On Page 9 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 National Arbitration and Mediation ("NAM") Code of Procedure will be used, a copy of which is attached hereto as Exhibit "P", that twenty-six (26) page document that incorporates a seven (7) page Fee and Cost Schedule, a copy of which is attached hereto as Exhibit "Q", certainly was not provided to James Cantie nor

to Mark Cantie by the Defendant at any time. Under these rules, discovery is conducted on a voluntary basis only. If a discovery agreement cannot be reached, discovery is conducted at the arbitrator's discretion. There is no consequence for ignoring discovery requests or the orders of an arbitration panel. Additionally, although the procedures provide that the Federal Rules of Evidence are used as guidelines, the arbitrator has full discretion to determine what is relevant to the case. Further, without the subpoena power of the Court, 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 NAM procedure is limited to sixteen (16) hours. Under the code, this sixteen (16) hours includes all of the arbitrators time during conference, pre-hearing conference, travel time, study and review of written submissions and documents, research, and award preparation time. Any time beyond sixteen (16) hours is considered additional time which is billed at $580.00 per hour. Thus, Plaintiff's time to present her case at a NAM arbitration hearing could be limited to less than one (1) day, before additional time must be purchased. Obviously, the Plaintiff, the party with the burden of proof, is hurt by limiting the time for the presentation of her case.

In addition, contrary to O.R.C. § 2711.23 (E) and (F), the arbitration panel consists of one person, not three persons. In matters in which the Claimant seeks more than $1 million, the NAM Administrator has the sole discretion to determine whether three (3) Arbitrators should hear the case, which is contrary to Ohio law.

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 National Arbitration and Mediation.

According to the NAM fee schedule, which Defendant Hillside Plaza also did not provide to James Cantie nor to Mark Cantie, the claimant has to pay an administration fee of $7,550.00. Therefore, if the arbitration clause in this case was enforced, the Estate of James Cantie would have to pay **$7,550.00** just to file the claim and request arbitration. The fees for the Arbitration Hearing, as mentioned above, includes all of the arbitrator's pre-hearing time, including travel time, and costs an additional **$9,280.00** for the first sixteen (16) hours only. Additional time is charged at **$580.00** per hour. 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 NAM are outrageous, and they were never disclosed to James Cantie nor to Mark Cantie. Clearly, these fees would have a chilling effect on anyone contemplating a claim.

Additionally, under the NAM code of procedure, the Arbitrator shall determine the location of the hearing. "The Arbitrator may travel to any place necessary in order to conduct hearings, receive witness testimony, and inspect goods, property or documents." *See* NAM Code of Procedure at P. 10. Unlike under the Ohio Rules of Civil Procedure where the Plaintiff must bring her claim in a proper jurisdiction, the Arbitrator could hold arbitration anywhere.

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 Defendants' Motion to Dismiss or Stay, as the Admission Agreement is not enforceable because it is both procedurally and substantively unconscionable.

I. The trial court authority Defendants rely on to support their Motion to Dismiss or Stay is easily distinguished from this case.

Defendants have attached four (4) trial court orders regarding arbitration as persuasive authority. However, Defendants' reliance on these cases is misplaced.

In *Deprato v. Emeritus Corp., et al* (attached to Defendants Motion to Dismiss or Stay as Exhibit "B-1", the Honorable Judge Hunter authored a Judgment Entry merely summarizing the plaintiff and defendants' mutual agreement that a valid arbitration agreement is binding and enforceable as to all of the plaintiff's claims. In fact, the parties in that case apparently agreed to arbitrate all of the plaintiff's claims pursuant to the specific terms set forth in that Order. The Honorable Judge Hunter did no more than finalize the parties' agreement in her Journal Entry. Clearly, no agreement to arbitrate all of Plaintiff's claims exists in this case. This case cannot be compared to a case in which the plaintiff and the defendant reached an agreement to arbitrate all claims.

Similarly, in *Hedgespeth v. Country Lawn Center for Rehabilitiaotn and Nursing Care, et al.* (attached to Defendants' Motion to Dismiss or Stay as Exhibit "B-2"), it is clear from the Honorable Frank G. Forchione's Judgment Entry that the "plaintiff ha[d] not filed a response" to the defendant's motion to stay the case pending arbitration. Additionally, it is clear that the Honorable Judge Forchione found that the subject arbitration agreement was valid and enforceable. In this case, Plaintiff opposes Defendants' Motion, and the arbitration clause is invalid and unenforceable for the many reasons set forth above. This case cannot be compared to a case where the plaintiff presented no opposition, and where the arbitration agreement was found to be valid and enforceable.

Defendants also cite to *McFarren v. Emeritus at Canton, et al* (attached to Defendants'

Motion to Dismiss or Stay as Exhibit "B-3"), but do not provide the Court with any analysis as to why this case should be considered similar to *McFarren*, where the Court granted Defendants' Motion to Compel/Enforce Arbitration. Defendants have failed to show any facts from that case or any analogy whatsoever, without which this Order fails to provide any persuasive authority. Again, the Court clearly found a valid and enforceable arbitration agreement. Here, the arbitration clause is invalid and unenforceable for the many reasons set forth above.

In *Jackson v. Suburban Pavillion, et al.* (attached to Defendants' Motion to Dismiss or Stay as Exhibit "B-4"), the Honorable Nancy R. McDonnell stayed the case pending arbitration. However, Defendants have again failed to demonstrate any factual similarity to this case. Additionally, the plaintiff did not oppose the defendants' motion to stay in that case. This order provides no persuasive authority under these circumstances, as Plaintiff opposes Defendants' Motion to Dismiss or Stay, and the arbitration clause at issue is invalid and unenforceable for the many reasons set forth above.

IV. CONCLUSION.

It is clear from the above discussion that Defendants are precluded from moving this Court to dismiss Plaitniff's claims or stay proceedings in this case because the Admission Agreement, including the arbitration clause at issue, automatically terminated upon James Cantie's death on October 6, 2011.

Further, as the arbitration agreement is not a separate agreement or document requiring separate consent, in violation of O.R.C. § 2711.23, it is void and unenforceable.

Additionally, Defendants have extensively engaged in litigation in this case, including their in depth participation in discovery in this case and their express statement to this Court that

arbitration would not be sought, thereby waiving any alleged right to arbitration.

James Cantie's next-of-kin are not bound by the Admission Agreement, and cannot be required to submit their wrongful death claims to arbitration, pursuant to the Ohio Supreme Court's decision in *Peters*.

The only party to the Admission Agreement and its arbitration clause is Defendant Hillside Plaza. Therefore, it does not apply to the other Defendants in this case.

James Cantie's right to trial by jury was unwaivable, therefore the subject arbitration clause is unenforceable as a matter of law.

The Admission Agreement and its arbitration clause are unsupported by consideration, and there was no meeting of the minds.

Notwithstanding the above reasons, which are more than sufficient for this Court to deny Defendants' Motion to Dismiss or Stay, this Court should also deny Defendant's Motion because the arbitration clause contained within the Defendant's Admission Agreement is both procedurally and substantively unconscionable.

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

By: _____

Ellen Hobbs Hirshman (0004914)
Meghan P. Connolly (0089682)
Enterprise Place, Suite 420
3401 Enterprise Parkway
Beachwood, Ohio 44122
Telephone (216) 595-6500
Facsimile (216) 595-6501
E-mail EllenHirshman@TheDicksonFirm.com
E-mail MConnolly@TheDicksonFirm.com

Attorneys for Plaintiff Louise Cantie, as the personal representative of the Estate of James Cantie (deceased).

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss for lack of Subject Matter Jurisdiction or, in the Alternative, Motion to Stay Proceedings and Compel/Enforce Arbitration, was sent by Electronic Mail, **this 22nd day of March, 2013**, to the following:

Bret C. Perry, Esq.
Donald J. Richardson, Esq.
Jennifer R. Becker, Esq.
Jason A. Paskan, Esq.
BONEZZI SWITZER MURPHY POLITO & HUPP CO. LPA
1300 East 9th Street, Suite 1950
Cleveland, Ohio 44114

Attorneys for Defendants Hillside Plaza, Euclid Hill Health Investors, Inc., Euclid Health Investors, DMD Management, Inc., and DMD Management, Inc., dba Legacy Health Services.

By: _____

Ellen Hobbs Hirshman (0004914)
Meghan P. Connolly (0089682)

Attorneys for Plaintiff Louise Cantie, as the personal representative of the Estate of James Cantie (deceased).