IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

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| Richard Fravel, as the Personal Representative of the Estate of Jack Fravel (deceased), | ) | Case No. 14 CV 007216 |
| | ) | Judge David E. Cain |
| Plaintiff, | ) | Plaintiff's Brief in Opposition to Defendants' Motion to Stay Proceedings and Compel Arbitration |
| vs. | ) | |
| Columbus Rehabilitation and Subacute Institute, et al., | ) | And |
| | ) | Plaintiff's Motion for Sanctions. |
| Defendants. | ) | |

Now comes Plaintiff Richard Fravel, as the Personal Representative of the Estate of Jack Fravel (deceased), by and through his attorneys Blake A. Dickson, James A. Tully, and Daniel Z. Inscore of The Dickson Firm, L.L.C., and, for his Brief in Opposition to Defendants' Motion to Stay Proceedings Pending Arbitration and Motion for Sanctions, states as follows.

On June 15, 2015, Defendants Columbus Rehabilitation and Subacute Institute, Columbus Rehabilitation Care, LLC, Columbus Rehabilitation Care, LLC d.b.a. Columbus Rehabilitation and Subacute Institute, Extendicare Health Services, Inc., Extendicare Health Facilities, Inc., and Extendicare Holdings, Inc. (hereafter collectively referred to as "Defendants") filed a Motion to Stay Proceedings Pending Arbitration, in which Defendants requested this Court to permanently stay all proceedings in this case, pending arbitration on all of Plaintiff's claims, pursuant to O.R.C. § 2711.02. Defendants rely upon an arbitration clause apparently signed by Jack Fravel's wife Nancy Fravel on May 24, 2015. This is completely frivolous motion. As the Court will see below, there are at least **seven (7)** reasons why the arbitration clause contained within Defendants' Admission Agreement is void, invalid, and unenforceable against the Estate of Jack Fravel (deceased) and Jack Fravel' next-of-kin, and why this Court must promptly deny Defendants' Motion to Stay

Proceedings Pending Arbitration:

A. 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 at this late date, having actively engaged in litigation, is simply frivolous, and should be sanctioned pursuant to Ohio Civil Rule 11.

B. The Arbitration Clause is not enforceable against Jack Fravel nor the Estate of Jack Fravel (deceased) in this case because it was never signed by Jack Fravel nor anyone with authority to sign on his behalf. The Arbitration Clause appears to be signed by Nancy Fravel. Nancy Fravel had no authority to sign a contract for her husband.

C. Pursuant to O.R.C. § 2711.23(C), an arbitration agreement involving a medical claim is only valid and enforceable if the agreement states that the decision whether or not to sign the agreement is solely a matter for the resident's determination without any influence. Defendants' arbitration clause contains no such statement and, therefore, is invalid and unenforceable as a matter of law.

D. Pursuant to O.R.C. § 2711.22(A), an arbitration agreement is not valid and enforceable until it is signed by all of the parties. The only parties listed in the alleged arbitration clause are Jack Fravel and "Columbus Subacute and Rehabilitation Institute". Since only one of the Defendants is a party to the alleged arbitration clause, the remainder of the Defendants do not have any standing to enforce the arbitration clause.

E. 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 based upon an arbitration agreement entered into by the decedent because a decedent cannot compel his or her heirs to arbitrate their wrongful death claims. As a result, Decedent Jack Fravel's next-of-kin are not subject to arbitration based upon an arbitration clause allegedly signed on behalf of Jack Fravel, and there is no basis for this Court to stay Plaintiff's wrongful death claims.

F. Defendants' arbitration clause is both procedurally and substantively unconscionable. As a result, it is unenforceable.

G. The arbitration clause at issue violates the unanimous recommendations of the American Arbitration Association, the American Bar Association, and the American Medical Association and, therefore, should not be enforced.

H. Defendants seek to permanently stay proceedings pending arbitration. A permanent stay is a dispositive motion. The deadline for dispositive motions passed on April 16, 2015. This motion is untimely and must be denied.

Accordingly, Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion to Stay Proceedings Pending Arbitration and given that Defendants' motion is clearly baseless and was filed just to waste Plaintiff's counsel's time, Plaintiff asks for reasonable and appropriate sanctions for Defendants' untimely and frivolous motion.

## I. STATEMENT OF THE FACTS AND OF THE CASE.

On March 26, 2013, Decedent Jack Fravel suffered an aneurysm at his home. He was admitted to Mount Carmel West Hospital and then transferred to the Ohio State University Wexner Medical Center for surgery for his aneurysm.

On May 23, 2013, Decedent Jack Fravel was admitted to the Columbus Rehab and Subacute Institute nursing home, which is owned and operated by the Defendants, for short-term rehabilitation following surgery. Upon admission to the Columbus Rehab and Subacute Institute nursing home, it was noted that Decedent Jack Fravel's skin was intact and that he did not have any pressure ulcers, but that he was at moderate risk for the development of pressure ulcers because of his decreased mobility and activity.

On May 28, 2013, a nurse noted that there was a blister on Decedent Jack Fravel's **right buttock**. However, no new treatments were ordered until four (4) days later on June 1, 2013.

On May 30, 2013, it was noted that Decedent Jack Fravel did not have any pressure ulcers. Two assessments were conducted to determine Decedent Jack Fravel's risk for the development of pressure ulcer. One assessment indicated that Decedent Jack Fravel's risk had increased and he was

now at high risk for the development of pressure ulcers. The second assessment, which relied on information from Decedent Jack Fravel's admission a week earlier and not his current condition, indicated that Decedent Jack Fravel was still at moderate risk for the development of pressure ulcers.

The next day, on May 31, 2013, at approximately 3:00 p.m., Decedent Jack Fravel was transferred to the Mount Carmel West Hospital due to difficulty breathing. While at the hospital, a nurse informed Decedent Jack Fravel's wife that he had a pressure ulcer on his buttocks. Decedent Jack Fravel left the hospital at 8:50 p.m. and returned to the Columbus Rehab and Subacute Institute nursing home. Decedent Jack Fravel's wife informed the staff at the Columbus Rehab and Subacute Institute nursing home that the hospital staff had discovered a pressure ulcer on Decedent Jack Fravel's buttocks.

On June 1, 2013, it was noted that Decedent Jack Fravel had a suspected deep tissue injury on his **left buttock**, which measured 6.5 cm x 4.5 cm x 0.0 cm, had an open area, and had a small amount of bloody drainage. It was further noted that there was a Stage II pressure ulcer, which measured 2.0 cm x 2.0 cm, underneath this deep tissue injury.

In addition, it was noted that Decedent Jack Fravel had a suspected deep tissue injury on his **right buttock**, which measured 3.0 cm x 2.2 cm, had an open area, and had a small amount of bloody drainage. It was further noted that there was a Stage II pressure ulcer, which measured 2.0 cm x 1.0 cm, underneath this deep tissue injury.

On June 10, 2013, it was noted that Decedent Jack Fravel now had a Stage II pressure ulcer on his **left buttock**, which measured 4.5 cm x 3.0 cm x 0.0 cm and had a small amount of bloody drainage. It was also noted that Decedent Jack Fravel now had a Stage II pressure ulcer on his **right buttock**, which measured 4.5 cm x 3.0 cm x. 0.0 cm and had a small amount of bloody drainage. It was further indicated that these wounds were not present on Decedent Jack Fravel's admission

to the Columbus Rehab and Subacute Institute nursing home.

On June 17, 2013, it was noted that the Stage II pressure ulcer on Decedent Jack Fravel's **left buttock** measured 1.5 cm x 1.0 cm x 0.0 cm, and the Stage II pressure ulcer on his **right buttock** measured 3.5 cm x 2.0 cm x 0.0 cm. Both pressure ulcers still had a small amount of bloody drainage.

On June 21, 2013, a shower aide informed a nurse that Decedent Jack Fravel had a black area on his right foot. Upon assessment, it was noted that there were three areas on his **right foot**: an area on the outside of his foot that measured 5.5 cm x 4.0 cm and was black in color; an abrasion on his fourth toe that measured 0.6 cm x 0.8 cm and was red in color; and an area on his fifth toe that measured 0.5 cm x 0.7 cm and was black in color.

On June 23, 2013, while Decedent Jack Fravel was being repositioned, a nurse noted that he was bleeding from his foley catheter. He was subsequently admitted to Mount Carmel West Hospital for urinary issues. The foley catheter was removed and replaced with a condom catheter. Decedent Jack Fravel was discharged to the Columbus Rehab and Subacute Institute nursing home.

On June 24, 2013, it was noted that the Stage II pressure ulcers on Decedent Jack Fravel's left and right buttocks remain unchanged. The pressure ulcer on his **left buttock** measured 1.5 cm x 1.0 cm x 0.0 cm, and the pressure ulcer on his **right buttock** measured 3.5 cm x 2.0 cm x 0.0 cm. Both pressure ulcers continued to discharge a small amount of bloody fluid.

On June 26, 2013, it was noted that the deep tissue injury on Decedent Jack Fravel's right foot measured 4.8 cm x 3.8 cm x 0.0 cm and was black in color; the abrasion to his fourth toe measured 0.5 cm x 0.3 cm x 0.0 cm with red tissue; and the deep tissue injury to his fifth toe measured 0.3 cm x 0.2 cm x 0.0 cm and was black in color.

By July 3, 2013, the two pressure ulcers on Decedent Jack Fravel's buttocks had gotten

worse and combined to form a single, larger, unstageable, **sacral pressure ulcer**, which measured 7.5 cm x 6.0 cm x 0.0 cm, had a moderate amount of bloody drainage, and the tissue was black, red, and yellow in color. It was also noted that the black area on Decedent Jack Fravel's **right foot** measured 4.8 cm x 3.5 cm x 0.0 cm, and that the abrasion to his fourth toe measured 0.4 cm x 0.3 cm with red tissue. It was noted that the area on his fifth toe had healed.

On July 8, 2013, a nurse practitioner observed that Decedent Jack Fravel had an unstageable area on his **coccyx**, which measured 7.5 cm x 6.0 cm, had necrotic tissue, and had a foul odor. He also noted that Decedent Jack Fravel had a necrotic area on the lateral aspect of his **right foot** near his fifth toe, which measured 5.0 cm x 4.0 cm.

On July 10, 2013, a nurse noted that Decedent Jack Fravel had an unstageable area on his **coccyx**, which measured 7.5 cm x 6.0 cm, had black, red, and yellow tissue, had a moderate amount of bloody drainage, and had a foul odor. It was also noted that Decedent Jack Fravel had a black area on the lateral aspect of his **right foot**, which measured 4.6 cm x 3.4 cm x 0.0 cm, and an abrasion on his fourth toe, which measured 0.2 cm x 0.2 cm. That same day, another nurse charted that Decedent Jack Fravel **did not have any pressure ulcers** and had been incontinent of bowel over the last four (4) days.

On July 10, 2013, Decedent Jack Fravel went to a follow-up appointment with his neurologist, relative to his aneurysm. Due to the neurologist's concern that Decedent Jack Fravel had an infection, he sent Decedent Jack Fravel to the Emergency Department at the Ohio State University Wexner Medical Center for further evaluation.

At the Ohio State University Wexner Medical Center, Decedent Jack Fravel was diagnosed with sacral osteomyelitis, sepsis, and Stage IV pressure ulcers.

On July 11, 2013, he underwent surgical debridement of the Stage IV pressure ulcer on his

coccyx.

On July 17, 2013, Decedent Jack Fravel was discharged from the Ohio State University Wexner Medical Center and transferred to Select Specialty Hospital for further treatment for the Stage IV pressure ulcer on his coccyx.

On August 30, 2013, it was determined that Jack Fravel needed a colostomy in order to help his Stage IV coccyx pressure ulcer heal.

On September 30, 2013, the colostomy procedure was performed.

Decedent Jack Fravel was subsequently admitted to the Ohio State University Wexner Medical Center from October 17, 2013 through October 23, 2013 due to complications related to his colostomy, which required an exploratory laparotomy and a revision of the colostomy.

From November 2, 2013 through November 5, 2013, Decedent Jack Fravel was admitted to the Ohio State University Wexner Medical Center for seizures that were related to his infection.

On January 1, 2014, Jack Fravel died as a direct and proximate result of Defendants' negligence, recklessness, willful and wanton conduct, and/or actual malice. Jack Fravel's death certificate indicates that sepsis contributed to his death.

On **April 30, 2014**, Plaintiff's counsel sent a letter to Columbus Rehabilitation and Subacute Institute requesting "complete and accurate copies of **any and all records** in your possession, relative, in any way, to **Jack Fravel."** *See* Letter from Irene Jernejcic to Columbus Rehabilitation and Subacute Institute, a copy of which is attached hereto as Exhibit "A". This letter explained that the subject nursing home was obligated under state and federal law to provide those records within two working days. *Id.*

On June 11, 2014, Plaintiff received 989 pages of Jack Fravel's medical records and bills from the Columbus Rehabilitation and Subacute Institute. **These records included no admission**

**agreement, no arbitration clause, and no power of attorney agreement relative to Jack Fravel and/or Nancy Fravel.**

On July 10, 2014, Plaintiff Richard Fravel, as the Personal Representative of the Estate of Jack Fravel (deceased), filed a Complaint against the Defendants, relative to the injuries and damages that Decedent Jack Fravel suffered during his residency at the Columbus Rehab and Subacute Institute nursing home and for his wrongful death.

On August 11, 2015, Defendants' Columbus Rehabilitation and Subacute Institute, Columbus Rehabilitation Care, LLC, Columbus Rehabilitation Care, LLC d.b.a. Columbus Rehabilitation and Subacute Institute, Extendicare Health Services, Inc., Extendicare Health Facilities, Inc., Extendicare Holdings, Inc., Northern Health Facilities, Inc. and Defendants misnamed as Columbus Rehab & Subacute, Columbus Rehabilitation & Subacute, Columbus Rehab and Subacute Inc., Columbus Rehab. Care, L.L.C., Extendicare Health Services, and Extendicare Health Facility Holdings, Inc. **filed an Answer**.

On December 12, 2014, Plaintiff's counsel propounded Plaintiff's First Request for Production of Documents to each of the Defendants, by and through their counsel, both electronically and by ordinary U.S. Mail. Pursuant to Civ.R. 33(A)(3) and 34(B)(1), Defendants' Answers to Plaintiff's First Set of Interrogatories and Defendants' Responses to Plaintiff's First Request for Production of Documents were due on **January 9, 2015**. However, Defendants did not provide any responses to Plaintiff's First Set of Interrogatories and First Request for Production of Documents on or before January 9, 2015**. Request No. 1 sought "complete and accurate copies of any and all document, which are relative to Jack Fravel and/or the within litigation, in any way..."**

On January 28, 2015, Plaintiff's counsel sent another letter to Defendants' counsel, asking

Defendants to provide their Responses to Plaintiff's First Request for Production of Documents. *See* Letter from Blake A. Dickson, Esq. to G. Brenda Coey, Esq. dated January 28, 2015, a copy of which is attached hereto as Exhibit "B".

On February 5, 2015, Defendants' counsel sent an e-mail to Plaintiff's counsel, in which she indicated that she was gathering responsive information and would be sending Defendants' Responses to Plaintiff's First Request for Production of Documents by the middle of the following week, which was **February 11, 2015**. *See* E-mail from G. Brenda Coey, Esq. to Mark D. Tolles, II, Esq. dated February 5, 2015, at 4:05 p.m., a copy of which is attached hereto as Exhibit "C".

On February 9, 2015, Defendants' counsel provided Responses to Plaintiff's First Request for Production of Documents on behalf of some, but not all, of the Defendants. Specifically, Defendants' counsel provided Responses from Defendants Columbus Rehabilitation and Subacute Institute, Columbus Rehab & Subacute, Columbus Rehabilitation & Subacute, Columbus Rehab and Subacute Inc., Columbus Rehab. Care, L.L.C., Extendicare Health Services, Extendicare Health Facilities, Inc., Extendicare Health Facility Holdings, Inc., and Extendicare Holdings, Inc. However, **none of these Defendants provided a single document or bit of information** in their Responses to Plaintiff's First Request for Production of Documents. Instead, they referred to the Responses of Defendants Columbus Rehabilitation Care, LLC, Columbus Rehabilitation Care, LLC d.b.a. Columbus Rehabilitation and Subacute Institute, Northern Health Facilities, Inc., and Extendicare Health Services, Inc., **which had not yet been produced to Plaintiff's counsel**, despite the fact that their Responses were due **nearly two (2) months earlier.**

On March 6, 2015, Plaintiff filed a Motion to Compel Defendants Columbus Rehabilitation Care, LLC, Columbus Rehabilitation Care, LLC d.b.a. Columbus Rehabilitation and Subacute Institute, Northern Health Facilities, Inc., and Extendicare Health Services, Inc. to Provide Complete

and Accurate Responses to Plaintiff's First Request for Production of Documents and a Motion for Sanctions.

On March 13, 2015, Defendants Columbus Rehabilitation Care, LLC, Columbus Rehabilitation Care, LLC d.b.a. Columbus Rehabilitation and Subacute Institute, Northern Health Facilities, Inc., and Extendicare Health Services, Inc. provided their Responses to Plaintiff's First Request for Production of Documents. **These records did not include any admission agreement, nor any arbitration clause, nor any power of attorney agreement relative to Jack Fravel and/or Nancy Fravel. Defendants did not produce a single document in response to Request for Production No. 1, which requested all documents relative to Jack Fravel.** Instead, Defendants objected insisting that they had already produced such documents or the Request was overly burdensome.

On April 6, 2015, Plaintiff's counsel sent a letter to Defendants' counsel regarding Defendants' Responses to Plaintiff's First Request for Production of Documents. *See* Letter from Blake A. Dickson, Esq. to G. Brenda Coey, Esq. dated April 6, 2015, a copy of which is attached hereto as Exhibit "D".

On April 15, 2015, Plaintiff's counsel sent another letter to Defendants' counsel, requesting Defendants to supplement their Responses to Plaintiff's First Request for Production of Documents. *See* Letter from Mark D. Tolles, II, Esq. to G. Brenda Coey, Esq. dated April 15, 2015, a copy of which is attached hereto as Exhibit "E".

On April 30, 2015, Defendants filed a Motion for Extension of Discovery Cut-Off Deadline, in which Defendants asked this Court to extend the discovery cutoff to allow Defendants to take depositions that they previously requested as well as Plaintiff's responses to written discovery requests that they previously propounded. Defendants indicated that such an extension would not

interfere with the jury trial of this case, which is scheduled to begin on July 21, 2015.

On May 1, 2015, this Court issued an Order granting Defendants' Motion for Extension of Discovery Cut-Off Deadline and extending the discovery cut-off to June 15, 2015 "for the purpose of allowing Plaintiff to respond to Defendants' written discovery and to schedule depositions that had been previously requested by Defendants."

On May 1, 2015, Defendants' counsel sent a letter in response to Plaintiff's counsel's April 6, 2015 and April 15, 2015 letters, in which Defendants' counsel indicated that she would not produce the requested patient care policies. *See* Letter from G. Brenda Coey, Esq. to Blake A. Dickson, Esq., et al. dated May 1, 2015, a copy of which is attached hereto as Exhibit "F".

On June 4, 2015, Plaintiff's counsel sent a letter to Defendants' counsel regarding the scheduling of depositions in this case, as well as the outstanding discovery that the Defendants have not yet produced in this case. *See* Letter from Blake A. Dickson, Esq. to G. Brenda Coey, Esq. dated June 4, 2015, a copy of which is attached hereto as Exhibit "G".

On June 9, 2015, Plaintiff moved for an extension of the Discovery Cutoff Date.

**On June 15, 2015, Defendants' counsel moved to stay proceedings pending arbitration. Attached to this motion was an arbitration clause, which was never produced to Plaintiff's counsel by Defendants.**

The Final Pretrial in this case is scheduled to take place on Thursday, July 9, 2015, at 8:45 a.m.

The Jury Trial of this case is scheduled to begin on Tuesday, July 21, 2015.

## II. LAW AND ARGUMENT.

Defendants, by and through their counsel, have moved this Court to permanently stay all proceedings in this case pending arbitration of all of Plaintiff's claims in this case, pursuant to

O.R.C. § 2711.02. Defendants rely upon the arbitration clause attached to their Motion to Stay, that was allegedly signed by Nancy Fravel on May 24, 2013. However, Defendants' Motion to Stay Proceedings Pending Arbitration is without merit and should be promptly denied by this Court.

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:

> 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."

The arbitration clause produced by Defendants, is void, invalid, and unenforceable against the Estate of Jack Fravel (deceased) and Jack Fravel's next-of-kin for the following **eight (8)** reasons:

A. 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.

B. The Arbitration Clause is not enforceable against Jack Fravel nor the Estate of Jack Fravel (deceased) in this case because it was never signed by Jack Fravel nor anyone with authority to sign on his behalf. The Arbitration Clause appears to be signed by Nancy Fravel. Nancy Fravel had no authority to sign a contract for her husband.

C. Pursuant to O.R.C. § 2711.23(C), an arbitration agreement involving a medical claim is only valid and enforceable if the agreement states that the decision whether or not to sign the agreement is solely a matter for the resident's determination without any influence. Defendants' arbitration clause contains no such statement and, therefore, is invalid and unenforceable as a matter of law.

D. Pursuant to O.R.C. § 2711.22(A), an arbitration agreement is not valid and enforceable until it is signed by all of the parties. The only parties listed in the alleged arbitration clause are Jack Fravel and "Columbus Subacute and Rehabilitation Institute". Since only one of the Defendants is a party to the alleged arbitration clause, the remainder of the Defendants do not have any standing to enforce the arbitration clause.

E. 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 based upon an arbitration agreement entered into by the decedent because a decedent cannot compel his or her heirs to arbitrate their wrongful death claims. As a result, Decedent Jack Fravel's next-of-kin are not subject to arbitration based upon an arbitration clause signed on behalf of Jack Fravel, and there is no basis for this Court to stay Plaintiff's wrongful death claims.

F. Defendants' arbitration clause is both procedurally and substantively unconscionable. As a result, it is unenforceable.

G. The arbitration clause at issue violates the unanimous recommendations of the American Arbitration Association, the American Bar Association, and the American Medical Association and, therefore, should not be enforced.

H. Defendants seek to permanently stay proceedings pending arbitration. A permanent stay is a dispositive motion. The deadline for dispositive motions passed on April 16, 2015. This motion is untimely and must be denied.

For all of these reasons, as further discussed below, Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion to Stay Proceedings Pending Arbitration, as the arbitration clause at issue is clearly void, invalid, and unenforceable based upon Defendants' own admissions in this case, Defendants' conduct throughout this litigation, and as a matter of law. Plaintiff further resepsectuflly requests that this Honorable Court sanction Defendants for their

frivolous motion practice and wasting the time of this Court and Plaintiff's counsel.

**A. 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.**

In *Hogan v. Cincinnati Fin. Corp.*, 2004-Ohio-3331, at ¶¶ 22-25 (11th Dist. 2004), the Eleventh District Court of Appeals held:

> 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*. * * *

According to the Tenth District Court of Appeals in *Gordon v. OM Financial Life Ins. Co.*, 2009-Ohio-814, 08AP-480 , ¶14 (10th Dist. 2009) there is a two-prong test:

> A party asserting waiver of arbitration must demonstrate that the party waiving the right knew of the existing right of arbitration, and that it acted inconsistently with that right. *Blackburn*, at ¶17, citing *Griffith v. Linton* (1998), 130 Ohio App.3d 746. * * * **Additionally, the failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver.** *Mills v. Jaguar-Cleveland Motors, Inc.* (1980), 69 Ohio App.2d 111, 113. (Emphasis added).

For the first prong, Defendants clearly knew of their alleged right to arbitration. They have been in possession of the arbitration clause since Jack Fravel was first admitted to the Columbus Rehabilitation and Subacute Institute nursing home on May 24, 2013.

The Tenth District Court of Appeals has identified four factors that support the second prong, acts inconsistent with intent to arbitrate:

> (1) whether the party seeking arbitration invoked the court's jurisdiction by filing a complaint or claim without first requesting a stay; (2) the delay, if any, by the party seeking arbitration to request a stay; (3) the extent to which the party seeking arbitration has participated in the litigation; and (4) whether prior inconsistent acts by the party seeking arbitration would prejudice the non-moving party.

*Dispatch Printing Co. v. Recovery Ltd. Partnership*, 10th Dist. No. 10AP-353, 2011-Ohio-80, ¶21 (10th Dist. 2011)(internal citations omitted). "Failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver." *Id.* at 20, quoting *Mills v. Jaguar-Cleveland Motors, Inc.*, 69 Ohio App.2d 111, 113 (8th Dist. 1980).

Defendants in this case filed their Answer and failed to move for a stay. This alone constitutes a waiver of the right to arbitrate.

Defendants delayed filing a Motion to Stay eleven (11) months after Plaintiff's complaint was filed, and over ten (10) months after filing their answer, even though they had been in possession of Jack Fravel's arbitration clause for well over a year. Moreover, Defendants waited until a month before the Jury Trial of this case to move for a stay of proceedings.

Defendants have actively participated in this litigation. They have propounded their own written discovery requuests. They have moved to continue the discovery deadline. Further, Defendants never produced the arbitration clause to Plaintiff's counsel even though Plaintiff clearly requested all such documents.

As discussed above, Defendants clearly knew of their alleged right to arbitration and have been in possession of the arbitration clause since the day after Jack Fravel's admission to the Columbus Rehabilitation and Subacute Institute nursing home on May 24, 2013. As discussed above, Defendants have also clearly acted inconsistently with any alleged right to arbitration. Defendants have already filed an Answer to Plaintiff's Complaint and failed to move for a stay of proceedings. Defendants waited eleven (11) months to file a Motion to Stay and assert their alleged

right to arbitration. The fact that Defendants' eventually filed a Motion to Stay, a month before trial, is not enough to overcome all of Defendants' actions that are inconsistent with arbitration. Based upon the totality of the circumstances, Defendants clearly acted inconsistently with any alleged right to arbitrate.

Defendants have clearly waived their right to arbitration. Accordingly, this Court should promptly deny Defendants' Motion to Stay Proceedings Pending Arbitration and sanction Defendants for their frivolous motion practice.

**B. The Arbitration Clause is not enforceable against Jack Fravel or the Estate of Jack Fravel (deceased) in this case because it was never signed by Jack Fravel nor anyone with authority to sign on his behalf. The Arbitration Clause appears to be signed by Nancy Fravel. Nancy Fravel had no authority to sign a contract for her husband.**

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 Doe v. Vineyard Columbus, 2014-Ohio-2617, ¶¶ 15-16 (10th Dist. 2015) (emphasis added), the Tenth District Court of Appeals held:

> **The court must first determine whether the parties agreed to submit a matter to arbitration**, a question typically raising a question of law for the court to decide. Id. Arbitration is a matter of contract and a party cannot be required to submit a dispute to arbitration when it has not agreed to do so. *Academy of Med. of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, ¶ 11. Thus, a court must " 'look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.' " *Columbus Steel Castings v. Real Time Staffing Servs.*, 10th Dist. No. 10AP-1127, 2011-Ohio-3708, ¶ 13, quoting *White v. Equity, Inc.*, 191 Ohio App.3d 141, 2010-Ohio-4743, (10th Dist.) ¶ 19, quoting *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).
>
> A valid and enforceable contract requires an offer by one party and an acceptance of the offer by another party. *Huffman v. Kazak Bros., Inc.*, 11th Dist. No. 2000-L-15, 2002-Ohio-1683, citing *Camastro v. Motel 6 Operating, L.P.*, 11th Dist. No. 2000-T-0053 (Apr. 27, 2001). There must be a meeting of the minds to create a proper offer and acceptance. Id. "In order for a meeting of the minds to occur, both parties to an agreement must mutually assent to the substance of the exchange." *Miller v. Lindsay-Green, Inc.*, 10th Dist. No. 04AP-848, 2005-Ohio-6366, ¶ 63. Thus, the parties must have a "'distinct and common intention which is communicated by each party to the other.'" *Huffman* quoting *McCarthy, Lebit, Crystal & Haiman Co., L.PA. v. First Union Mgt., Inc.*, 87 Ohio App.3d 613 (8th Dist.1993). Therefore, " '[i]f the minds of the parties have not met, no contract is formed.' " Id.

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, Jack Fravel did not sign the arbitration clause.

The arbitration clause was signed by Jennifer Matteson on behalf of Defendant Columbus Subacute and Rehabilitation Institute and by Jack Fravel's wife Nancy Fravel. Nancy Fravel signed on a line entitled "Signature of Legal Representative for Healthcare Decisions". However, there is no evidence whatsoever that Nancy Fravel was such a legal representative. There is no indication that Nancy Fravel had a power of attorney for Jack Fravel at the time that the arbitration clause was signed on May 24, 2014. No power of attorney document has been produced. Plaintiff knows of no such document. Nancy Fravel did not have authority to bind Jack Fravel to an arbitration clause.

In the present case, Decedent Jack Fravel did not sign any agreement requiring him to arbitrate any claims that may arise against Defendant Columbus Rehabilitation and Subacute Institute. Nor did anyone with a power of attorney sign such an agreement on his behalf. As a result, it is clear that the Estate of Jack Fravel is not required to arbitrate any survivorship claims that it has against the Defendant in this case.

There is no magic line that Defendants can write into an arbitration clause to create authority in a non-agent. Defendants, in their brief, point out that on the signature page there is a line in the arbitration clause that states "the representative certifies that the Center may reasonably rely upon the validity and authority of the Representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the Resident." As discussed above Nancy Fravel lacked express actual authority to sign an arbitration clause on Jack Fravel's behalf.

Implied authority is merely the authority to perform acts which are reasonably necessary to execute one's express actual authority. *Damon's Missouri, Inc. v. Davis*, 63 Ohio St. 3d 605, 607, (1992) citing *Spengler v. Sonnenberg*, 88 Ohio St. 192, 200-201, 102 N.E. 737, 739 (1913). Here, because Nancy Fravel lacked actual express authority, she lacked any attendant implied authority.

Nancy Fravel did not have apparent authority to sign an arbitration clause on Jack Fravel's

behalf. *Lang v. Beachwood Pointe Care Center*, 2014-Ohio-1238 (8th Dist. 2014). In *Lang*, a step-daughter signed an arbitration clause was signed for her step-mother, a nursing home resident. However, the step-daughter did not have a power of attorney agreement relative to her step-mother. The defendants in that case argued that the step-daughter had "apparent authority" to sign on her step-mother's behalf.

The Eighth District Court of Appeals articulated the two-part, conjunctive test for apparent authority:

> Apparent authority for an agent's act will be found when (1) the **principal** held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted the agent to act as having such authority, and (2) the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817

*Id.* at ¶ 4 (emphasis added). The Eighth District found no evidence that the principal, the nursing home resident, held out her step-daughter as possessing authority to act on her behalf or that the nursing home had any good faith reason to believe that she had such authority. *Id.* at ¶¶ 5-7.

As in *Lang*, Jack Fravel did not do anything to indicate that his wife had authority to act on his behalf. And Defendant Columbus Rehabilitation and Subacute Institute has offered no reason why they had a good faith reason to believe Nancy Fravel had such authority. Here, Defendants fail on both prongs of the apparent authority test.

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 Jack Fravel and anyone. Jack Fravel did not sign any agreement nor did anyone sign on his behalf. As a result, there is no agreement to enforce between the Estate of Jack Fravel

and the Defendant.

Ohio's Statute of Frauds, 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 arbitration clause in this case was allegedly signed on May 24, 2013. Defendant is seeking to enforce this document in June of 2015, 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., Jack Fravel, nor was it signed by some other person thereunto by him lawfully authorized, as Nancy Fravel was not lawfully authorized to sign for Jack Fravel. Therefore, there is no valid agreement, and Defendant's Motion to Stay must clearly be denied.

Without a power of attorney agreement Nancy Fravel's lack of authority is obvious. Defendants should be sanctioned for filing this frivolous untimely motion to stay, when it is based on an obviously void and unenforceable document.

**C. Pursuant to O.R.C. § 2711.23(C), an arbitration agreement involving a medical claim is only valid and enforceable if the agreement states that the decision whether or not to sign the agreement is solely a matter for the resident's determination without any influence. Defendants' arbitration clause contains no such statement and, therefore, is invalid and unenforceable as a matter of law.**

O.R.C. § 2711.23(C) states:

> **To be valid and enforceable** any arbitration agreements * * * for controversies involving a medical, dental, chiropractic, or optometric claim that is entered into prior to a patient receiving care, diagnosis, or treatment shall include or be subject

to the following conditions:

* * *

(C) **The agreement shall provide that the decision whether or not to sign the agreement is solely a matter for the patient's determination without any influence;**

In contradiction of O.R.C. § 2711.23(C), the arbitration clause does not state, in any place, that the decision whether or not to sign the agreement is solely a matter for Jack Fravel's determination without any influence. Jack Fravel did not sign the clause in any capacity.

Accordingly, pursuant to O.R.C. § 2711.23(C), Defendants' arbitration clause is invalid and unenforceable as a matter of law. Therefore, this Court should promptly deny Defendants' Motion to Stay Proceedings Pending Arbitration.

**D. The only proper party to the alleged arbitration clause is Columbus Rehabilitation and Subacute Institute. Therefore, pursuant to O.R.C. § 2711.01(A) and O.R.C. § 2711.22(A), there is no enforceable arbitration clause between Jack Fravel and Defendants Extendicare Health Services, Extendicare Health Services, Inc., Extendicare Health Facilities, Inc., Extendicare Health Facility Holdings, Inc., Extendicare Holdings, Inc., and Northern Health Facilities, Inc.**

O.R.C. § 2711.01(A) defines a valid arbitration clause, in pertinent part, as "any agreement in writing between two or more persons to submit to arbitration any controversy existing between them". O.R.C. § 2711.22(A) provides that an arbitration clause becomes "enforceable once the contract is signed by all parties."

In this case, there is no agreement in writing between **Defendants Extendicare Health Services, Extendicare Health Services, Inc., Extendicare Health Facilities, Inc., Extendicare Health Facility Holdings, Inc., Extendicare Holdings, Inc., and Northern Health Facilities, Inc. and anyone.** None of these Defendants are parties to the alleged arbitration clause.

Accordingly, this Court must deny Defendants' Motion to Stay Proceedings Pending Arbitration as to these Defendants as they are not parties to any arbitration clause so there is no basis to stay the case against them.

### E. Pursuant to the Ohio Supreme Court's decision in *Peters v. Columbus Steel Castings, Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, 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-4787, 873 N.E.2d 1258 (2007), the Ohio Supreme Court 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* applies to the wrongful death claims which have been brought by Plaintiff Richard Fravel on behalf of Decedent Jack Fravel's next-of-kin. The wrongful death claims in this case are not subject to arbitration pursuant to the arbitration clause. As a result, there is absolutely no basis for this Court to stay the wrongful death claims in this case. None of Jack Fravel's next-of-kin were ever a party to the arbitration clause, so they cannot be bound by it. Jack Fravel's wife Nancy Fravel was induced to sign the arbitration clause but she is not a party to it. It is clear that the arbitration clause, in no way, binds Jack Fravel nor any of Jack Fravel's next-of-kin.

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.

Similarly, in *McFarren v. Emeritus at Canton*, 2013-Ohio-3900 (5th Dist. 2013), the Fifth District Court of Appeals held that arbitration agreements are not enforceable against a nursing home resident's next-of-kin, relative to their wrongful death claims, where the next-of kin did not sign an agreement agreeing to arbitrate their wrongful death claims. The Fifth District Court of Appeals reversed the trial court's decision that had improperly granted the defendant-appellee's

motion to stay proceedings pending arbitration in that case. *Id*. at ¶ 31.

In this case, there is no question that Plaintiff's wrongful death claims do not fall within the scope of the arbitration clause. None of Jack Fravel's next-of-kin were parties to the arbitration clause. None of Jack Fravel's next-of-kin's names appear anywhere in the arbitration clause. As a result, it would be error for this Court to require Jack Fravel's next-of-kin to arbitrate their wrongful death claims. Further, it would be error for this Court to stay Jack Fravel's next of kin's wrongful death claims.

Accordingly, this Court should promptly deny Defendants' Motion to Stay Proceedings Pending Arbitration.

### F. The arbitration clause contained within Defendant's arbitration clause is both procedurally and substantively unconscionable and, therefore, it is unenforceable.

Defendants' arbitration clause contained therein, 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 v. Oakridge Home*, 122 Ohio St.3d 63, 67, 2009-Ohio-2054, 908 N.E.2d 408 (2009), citing O.R.C. § 2711.01(A). "Unconscionability is a ground for revocation of an arbitration agreement." *Id.*, citing *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12 (2008). "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 *Manley v. Personacare of Ohio*, 2007-Ohio-343, ¶ 31 (11th Dist. 2007), the Eleventh District Court of Appeals held that an arbitration agreement, signed by a nursing home resident during admission, was procedurally unconscionable. In *Manley*, the resident signed a "resident admission agreement" as well as an "alternative dispute resolution agreement between resident and facility". *Id*. at ¶ 3. The Eleventh District Court of Appeals held that the arbitration agreement was procedurally unconscionable. *Id*. at ¶ 31. The Eleventh District Court of Appeals noted that the resident, Patricia Manley, had left the hospital a week prior to her admission, went directly from the hospital to the nursing home, she did not have a friend or family member with her during her admission, she was sixty-six (66) years old, she was college educated but had no legal experience,

and she did not have an attorney present when she entered into the arbitration agreement. *Id*. at ¶¶ 21-23. The Eleventh District Court of Appeals also considered Patricia Manley's cognitive impairments when finding the arbitration clause procedurally unconscionable. The Court noted that Patricia Manley was competent, however, she suffered from a "very mild cognitive impairment." *Id*. at ¶ 24. It was also noted that she had two different medical conditions, either of which could cause her confusion. *Id*. Patricia Manley also had numerous physical ailments. *Id*. at ¶ 25. After considering these factors, the Eleventh District Court of Appeals stated:

> The fact that a resident is signing an arbitration agreement contemporaneously with being admitted into a nursing home is troubling. By definition, an individual being admitted into a nursing home has a physical or mental detriment that requires them to need the assistance of a nursing home. Further, the reality is that, for many individuals, their admission to a nursing home is the final step in the road of life. As such, this is an extremely stressful time for elderly persons of diminished health. In most circumstances, it will be difficult to conclude that such an individual has equal bargaining power with a corporation that, through corporate counsel, drafted the form contract at issue.

*Id*. at ¶ 29. Accordingly, the Eleventh District Court of Appeals held that the arbitration clause entered into between the resident and the nursing home was procedurally unconscionable.

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.

The circumstances surrounding Nancy Fravel's signing of the arbitration clause could not have been more procedurally unconscionable. Nancy Fravel was under a significant amount of

stress when her husband was admitted to the subject nursing home. Jack Fravel had just suffered a ruptured aneurysm and brain surgery. He was non-verbal and had highly limited mobility. There is no evidence that Jack Fravel read any part of the arbitration clause. There is no evidence that Nancy Fravel read any part of the arbitration clause nor that anyone explained any part of the arbitration clause to them.

It is clear that the Defendant had all of the relevant experience and business acumen. Defendants' arbitration clause refers the arbitration to DJS Administrative Services, a company that only performs mediation and arbitration services for Extendicare and Kindred, two very large nursing home chains. The arbitration itself is governed by the Extendicare Health Services, Inc., Alternative Dispute Resolution Rules of Procedure, which are not attached to the agreement. *See* attached hereto a copy of Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure, downloaded from djsadministrativeservices.com on June 25, 2015, as Exhibit "H".

In terms of relative bargaining power, Defendants own and operate at least 251 senior care centers with a capacity for approximately 27,600 residents. *See* Extendicare website, http://www.extendicare.com/profile.aspx. Many campuses include a nursing home and an assisted living facility. Jack Fravel was a 79 year old man who was unable to care for himself. Nancy Fravel was stressed, worried about her husband, unable to provide care for her husband until he had completed some therapy. It is clear that Defendant had all of the bargaining power.

Defendants drafted the arbitration clause.

In terms of whether alterations to the printed terms were possible, it is clear that neither Decedent Jack Fravel nor his wife, Nancy Fravel, altered one word of the arbitration clause. The arbitration clause in this case is a boilerplate contract of adhesion that was presented to Nancy Fravel 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.

Defendants, as the much stronger parties in this case, knew that Decedent Jack Fravel and his wife Nancy Fravel, as the much weaker parties, were unable to reasonably protect their interests by reason of their inability to understand the language of the arbitration clause, and that they 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 Defendants' arbitration clause 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.

Additionally, in *Fortune v. Castle Nursing Homes, Inc.*, 164 Ohio App.3d 689, 696, 2005-

Ohio-6195, 843 N.E. 2d 1216 (5th Dist. 2005), the Fifth District Court of Appeals held that an arbitration agreement entered into between a resident and a nursing home was substantively unconscionable. In this case, the Fifth District Court of Appeals noted that the arbitration agreement required the patient to waive his or her right to a jury trial. *Id*. at 692. The Court also noted that the arbitration clause was written in the same size font as the rest of the agreement. *Id*. The Fifth District Court of Appeals also provided an example of a non-oppressive, conscionable arbitration agreement in a medical setting. *Id*. at 696. The Court's example included that it be a stand-alone, one-page contract containing an explanation of its purpose that encouraged the patient to ask questions. *Id*.

In *Manley*, 2007-Ohio-343 at ¶ 53, Judge Mary Colleen O'Toole discussed the substantive unconscionability of nursing home arbitration clauses in her dissenting opinion. In her opinion, Judge Mary Colleen O'Toole stated that:

> The location is non-neutral. The arbitration provisions are buried near the end of the extremely long admission contract, and are presented to the resident at the time of admission. Thus a resident is required to make his or her decision regarding this vital issue at a time when, typically, they are sick and in need of care.
>
> * * *
>
> This contract gives potential residents a choice between being out on the street with no medical care, or accepting the first available bed.
>
> * * *
>
> The arbitration provision is not in compliance with industry standards. Contract provisions of the type at issue are disfavored by the American Arbitration Association, the American Bar Association, and the American Medical Association. Binding arbitration should not be used between patients and commercial healthcare providers unless the parties agree to it *after* the dispute arises. This is the only way a consumer/patient entering a nursing or healthcare facility in an ailing and diminished capacity can stand on equal footing with a large corporate entity. This would promote meaningful dispute resolution and allow both sides to enter into this agreement voluntarily and knowingly. The law favors arbitration: it abhors contracts of adhesion.
>
> The third factor of substantive unconscionability deals with the ability to properly determine future liability. It is clear that neither party to this contract could

> accurately predict the extent of future liability. The negligence had not occurred at the time of the signing of the contract. It was impossible to determine if Ms. Manley, at the time of admission, could be waiving her right to a wrongful death lawsuit. Certainly when she went into the nursing home she was anticipating her release. *Id*. at ¶¶ 59-62.

Here, this is a classic contract of adhesion. Defendants' have not produced to Plaintiff's counsel the entire Admission Agreement, in which their arbitration clause was presumably contained. On that basis alone the Court should deny Defendants' Motion to Stay. The Defendants cannot hide the Admission Agreement and still move to stay the case. The Admission Agreement could contain a termination clause. There is nothing in the arbitration 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. 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. A jury trial may last two to three weeks in a nursing home case. The arbitrations are capped at five (5) days. *See* Exhibit "H", Section 4.03. Obviously, the Plaintiff, the party with the burden of proof, is hurt by any time limitation when presenting a case.

In addition, each party must pay for their own attorney fees and the costs of preparing their case. 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 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 Motion to Stay Proceedings Pending Arbitration, as the arbitration clause is not enforceable as it is egregiously procedurally and substantively unconscionable.

### G. The AMA, the ABA and the AAA have unanimously come out against pre-dispute arbitration clauses involving residents.

As the Court reviews the unconscionability of the arbitration clause at issue in this case, Plaintiff urges the Court to also consider that the American Medical Association, the leading national organization of doctors and other health care providers, the American Bar Association, the leading national organization of attorneys, and the American Arbitration Association, the leading national organization of arbitrators, have all come out against arbitration clauses like the one at issue in this case.

In 1997, the American Arbitration Association, the American Bar Association and the American Medical Association, the leading associations involved in alternative dispute resolution, law, and medicine, collaborated to form a Commission on Health Care Dispute Resolution ("the Commission"). The Commission's goal was to issue, by the Summer of 1998, a Final Report on the appropriate use of alternative dispute resolution (ADR) in resolving disputes in the private managed health care environment. Their Final Report discusses the activities of the Commission from its formation in September 1997 through the date of its report, and sets forth its unanimous recommendations. The Commission issued its Final Report on July 27, 1998, a copy of which is attached hereto as Exhibit "I". That report concluded on Page 15, in Principle 3 of a section entitled, "C. A Due Process Protocol for Resolution of Health Care Disputes." that: "**The agreement to use ADR should be knowing and voluntary**. **Consent to use an ADR process should not be a requirement for receiving emergency care or treatment. In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so <u>after a dispute arises</u>**." (Emphasis added.)

The arbitration clause at issue in the within case clearly violates the guidelines set forth above. It should not be enforced. It cannot be over-emphasized that the American Arbitration

Association, the American Bar Association and the American Medical Association, the leading associations involved in alternative dispute resolution, law, and medicine, have come together and issued a joint report which argues against the enforcement of arbitration clauses like the one at issue in this case.

The arbitration clause in this case was signed just after Jack Fravel's admission and before he or his family had a claim and could evaluate how to pursue that claim. The arbitration clause was not entered into knowingly, nor was it entered into voluntarily. According to the Commission's Final Report, the arbitration clause is unconscionable and should not be enforced.

**H. Defendants seek to permanently stay proceedings pending arbitration. A permanent stay is a dispositive motion. The deadline for dispositive motions passed on April 16, 2015. This motion is untimely and must be denied.**

Defendants' Motion to Stay was filed two months after the dispositive motion deadline. As a result, it is not timely and should be denied.

## IV. CONCLUSION.

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

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

The arbitration clause is void and unenforceable because neither Jack Fravel nor anyone with authority to act on his behalf signed the arbitration agreement therefore it is not enforceable against his Estate.

The arbitration clause is invalid and unenforceable pursuant to Ohio law because it does not contain statutorily required language.

Defendants Extendicare Health Services, Extendicare Health Services, Inc., Extendicare Health Facilities, Inc., Extendicare Health Facility Holdings, Inc., Extendicare Holdings, Inc., and

Northern Health Facilities, Inc. are not parties to the agreement.

Jack Fravel'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.

Further, Defendants seek to permanently stay proceedings pending arbitration. A permanent stay is a dispositive motion. The deadline for dispositive motions passed on April 16, 2015. This motion is untimely and must be denied.

Accordingly, this Court should promptly deny Defendants' 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. It is apparent that Defendant's Motion to Stay is unsupported by law and fact, and that its counsel filed the Motion merely to harass Plaintiff and his counsel, cause unnecessary delay, and needlessly increase the costs of the within litigation. Plaintiff asks for sanctions in the amount of $10,000.00.

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

By: /s Blake A. Dickson

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Attorneys for Plaintiff Richard Fravel, as the Personal Representative of the Estate of Jack Fravel (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 Stay Proceedings Pending Arbitration and Plaintiff's Motion for Sanctions was filed via the Court's electronic filing system, **this 29th day of June, 2015,** and served through the Court's electronic filing system to the following:

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By: /s Blake A. Dickson
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