IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Lettie Glass, as the Personal Representative of the Estate of Doris Glass (deceased),	)	Case No. 14 CV 008021
	)	Judge Stephen L. McIntosh
Plaintiff,	)	
vs.	)	Plaintiff's Motion to Strike Defendants' Motion to Stay Proceedings and Compel Arbitration
Kindred Transitional Care & Rehab - Winchester Place, et al.,	)	Or, In the Alternative,
Defendants.	)	Plaintiff's Brief in Opposition to Defendants' Motion to Stay Proceedings and Compel Arbitration
	)	And
	)	Plaintiff's Motion for Sanctions.

Now comes Plaintiff Lettie Glass, as the Personal Representative of the Estate of Doris Glass (deceased), by and through her attorneys Blake A. Dickson and Daniel Z. Inscore of The Dickson Firm, L.L.C., and, for her Motion to Strike Defendants Motion to Compel Arbitration, or, in the alternative Brief in Opposition to Defendants' Motion to Stay Proceedings Pending Arbitration and her Motion for Sanctions, states as follows.

On August 5, 2015, Defendants Kindred Transitional Care & Rehab-Winchester Place, Kindred Healthcare Operating, Inc., Kindred Nursing Centers East, L.L.C. d.b.a. Kindred Transitional Care and Rehabilitation-Winchester Place, and Kindred Healthcare, Inc. (hereafter collectively referred to as "Defendants") filed a Motion to Stay Proceedings Pending Arbitration, in which Defendants asked this Court to permanently stay all proceedings in this case, pending arbitration on all of Plaintiff's claims, pursuant to R.C. § 2711.02.

This is a completely frivolous motion. The only reason that Defendants' counsel filed this

motion was to try and delay this case. Defendants' counsel absolutely expects this Motion to be denied. Thereafter, Defendants' counsel plans to appeal that denial. Defendants' counsel absolutely expects the Appellate Court to affirm this Court's denial of the Motion to Stay. The sole purpose of filing this Motion at this point in the litigation is to delay the case. That is an improper purpose and as such Defendants' Motion to Stay should be stricken as improper and Defendants and their counsel should be sanctioned for their misconduct.

Delay hurts the Plaintiff. Witnesses disappear. They move. Their memories fade. Evidence is destroyed. And a delay challenges the resolve of Decedent's family.

As the Court will see below, there are at least **eight (8)** reasons why the arbitration clause contained within Defendants' Admission Agreement is void, invalid, and unenforceable.

A. Defendants have clearly waived any alleged right to arbitration by actively participating in litigation, including by extensively engaging in discovery. Defendants' attempt, by and through their counsel, to have this case stayed, pending binding arbitration, having actively engaged in litigation for eleven (11) months, is so frivolous and indefensible that Defendants and their counsel should be sanctioned pursuant to Ohio Civil Rule 11.

B. The Arbitration Clause is not enforceable against Doris Glass nor the Estate of Doris Glass (deceased) because it was never signed by Doris Glass nor anyone with authority to sign on her behalf. The Arbitration Clause signed by Lettie Glass is not enforceable because Lettie Glass had no authority to sign on behalf of Doris Glass.

C. Pursuant to 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. The only proper party to the alleged arbitration clause is "0572 - Kindred Transitional Care And Rehabilitation - Winchester Place". Therefore, pursuant to R.C. § 2711.01(A) and R.C. § 2711.22(A), there is no enforceable arbitration clause between Doris Glass and Defendants Kindred Nursing Centers East, L.L.C., Kindred Healthcare Operating, Inc. and

Kindred Healthcare, Inc. So there is no basis to stay the case against these Defendants.

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 are not subject to arbitration based upon an arbitration agreement entered into by the decedent, because a decedent cannot bind his or her heirs. The survivorship claims are not subject to arbitration because neither Doris Glass nor anyone with authority to sign on her behalf ever signed the arbitration clause. The wrongful death claims are not subject to arbitration because no one signed an arbitration clause who had authority to bind Doris Glass' next of kin. Defendants' Motion to Stay is frivolous.

F. Pursuant to R.C. § 2711.23(G), 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 three (3) page arbitration clause that Defendants are relying upon is buried within Defendants' (at least) twenty-seven (28) page Admission Agreement and is not a separate agreement, it is invalid and unenforceable as a matter of law.

G. The subject arbitration clause is both procedurally and substantively unconscionable and, therefore, it is unenforceable.

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

Accordingly, Plaintiff respectfully requests that this Honorable Court strike Defendants' Motion to Stay Proceedings Pending Arbitration and given that Defendants' motion was clearly filed for the sole purpose of delay Plaintiff asks for sanctions against the Defendants and their counsel.

I. STATEMENT OF THE FACTS AND OF THE CASE.

On July 1, 2013, Doris Glass was admitted to Kindred Transitional Care & Rehabilitation - Winchester Place nursing home ("the subject nursing home"). At that time Doris Glass could ambulate and transfer independently and she could bathe and dress herself. Doris Glass was assessed as a high risk for falls and fractures because she had a significant history of falls with fractures. She also had dementia. Doris Glass was not given an alarm.

On August 3, 2013, Doris Glass, unsupervised, left her bed and went to use the restroom without using her walker. She had diarrhea, fell and broke her femur. Doris Glass was found on her knees on the floor of her bathroom. She complained of right knee pain. An x-ray was ordered, but it did not reveal her broken femu.

Nursing notes on August 4, 7, 10, and 11 all show Doris Glass' knee is swollen and painful. For thirteen (13) days Doris Glass' swollen leg and femur were medicated for pain only.

From the date of her fall on August 3, 2013 through August 16, 2013, the day she left the subject nursing home, Decedent Doris Glass received tramadol, a narcotic-like painkiller and Tylenol at least twenty-four (24) times for pain in her right leg.

On August 16, 2013, Doris Glass was transferred to Highbanks Care Center. There, due to her complaints of pain, she received another x-ray.

On August 21, 2013, Doris Glass was admitted to Mount Carmel St. Anne's for a fractured femur. Decedent Doris Glass' hospital records indicate that she had fallen and complained of pain for the past three (3) weeks. X-rays at the hospital showed some early healing with sclerosis.

On August 22, 2013, Decedent Doris Glass underwent an open reduction internal fixation of the femur using a distal femur locking plate system. According to the surgeon's operative report, the operation required that Decedent Doris Glass' lower thigh be opened and her lower femur exposed. A metal plate, with eight (8) holes in it was then placed along her femur and secured by drilling screws into the bone. The incision was closed with twenty-three (23) staples.

Following her surgery Decedent Doris Glass' Medication Administration Records from High Banks Care Center showed she received regular doses of hydrocodone-acetaminophen, commonly known as Vicodin, a narcotic pain-killer, for leg pain through March 2014, seven (7) months after her surgery.

On July 9, 2014, Doris Glass died.

On August 1, 2014 Plaintiff Lettie Glass, as the Personal Representative of Doris Glass (deceased) filed a complaint in the Franklin County Court of Common Pleas against Defendants.

On September 4, 2014, Defendants filed an Answer in which they demanded trial by jury.

On September 12, 2014, Defendants propounded their First Set of Interrogatories and First Request for Production of Documents to Plaintiff.

On December 19, 2014, Defendants filed their Initial Disclosure of Witnesses for Trial.

On January 12, 2015, Defendants moved for a protective order relative to Plaintiff's 30(B)(5) deposition notice.

On January 23, 2015, Defendants' counsel's office sent Plaintiff's counsel a letter requesting additional medical records.

On February 24, 2015, Defendants defended the depositions of Christopher Hudson, LNHA, Stephanie Lowes, RN, Patricia Essick, RN, Ruth Johnson, RN, and Marsha McLaughlin, RN.

On March 10, 2015, April 9, 2014, and July 14, 2015 counsel for both parties participated in Status Conferences with the Court.

On March 30, 2015, Defendants' counsel sent Plaintiff's counsel a letter requesting supplementation of Plaintiff's responses to Defendants' written discovery requests.

On April 8, 2015, Defendants' counsel sent Plaintiff's counsel a letter requesting dates for depositions.

On April 8, 2015, Defendants filed a bench brief relative to Plaintiff's 30(B)(5) deposition notice.

On June 3, 2015, Defendants moved for a protective order relative to the depositions of Defendants' former employees.

On June 15, 2015, Defendants defended the depositions of Karen Lucka, RN, Misti Steiger, RN, and Stacy Stephens, RN.

On July 1 and July 7, 2015 Defendants Kindred Transitional Care & Rehab-Winchester Place, Kindred Healthcare Operating, Inc., Kindred Nursing Centers East, L.L.C. d.b.a. Kindred Transitional Care and Rehabilitation-Winchester Place, and Kindred Healthcare, Inc. were deposed pursuant to Ohio Civil Rule 30(B)(5).

On July 14, 2015, Defendants deposed Doris Glass' daughter-in-law, Plaintiff Lettie Glass, and Doris Glass' son, Herbert Glass.

The Final Pretrial in this case is scheduled to take place on Monday, October 26, 2015, at 9:00 a.m.

The Jury Trial of this case is scheduled to begin on Wednesday, November 11, 2015.

II. LAW AND ARGUMENT.

Defendants, by and through their counsel, have moved this Court to permanently stay all proceedings in this case pending binding arbitration of all of Plaintiff's claims in this case, pursuant to R.C. § 2711.02. Defendants rely on the arbitration clause attached to their Motion to Stay, that was allegedly signed by Lettie Glass on July 1, 2013. However, Defendants' Motion to Stay Proceedings Pending Arbitration is completely without merit and should be promptly denied by this Court.

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". 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.

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 Doris Glass (deceased) and Doris Glass's next-of-kin for the following **eight (8)** reasons:

A. Defendants have clearly waived any alleged right to arbitration by actively participating in litigation, including by extensively engaging in discovery, attending pretrials and discovery conferences. Defendants' attempt, by and through their counsel, to have this case stayed, pending binding arbitration, having actively engaged in litigation for eleven (11) months, is so frivolous and indefensible that Defendants and their counsel should be sanctioned pursuant to Ohio Civil Rule 11.

B. The Arbitration Clause is not enforceable against Doris Glass nor the Estate of Doris Glass (deceased) because it was never signed by Doris Glass nor anyone with authority to sign on her behalf. The Arbitration Clause signed by Lettie Glass is not enforceable because Lettie Glass had no authority to sign on behalf of Doris Glass.

C. Pursuant to 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. The only proper party to the alleged arbitration clause is "0572 - Kindred Transitional Care And Rehabilitation - Winchester Place". Therefore, pursuant to R.C. § 2711.01(A) and R.C. § 2711.22(A), there is no enforceable arbitration clause between Doris Glass and Defendants Kindred Nursing Centers East, L.L.C., Kindred Healthcare Operating, Inc. and Kindred Healthcare, Inc. So there is no basis to stay the case against these Defendants.

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 are not subject to arbitration based upon an arbitration agreement entered into by the decedent, because a decedent cannot bind his or her heirs. The survivorship claims are not subject to arbitration because neither Doris Glass nor anyone with authority to sign on her behalf ever signed the arbitration clause. The wrongful death claims are not subject to arbitration because no one signed an arbitration clause who had authority to bind Doris Glass' next of kin. Defendants' Motion to Stay is frivolous.

F. Pursuant to R.C. § 2711.23(G), 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 three (3) page arbitration clause that Defendants are relying upon is buried within Defendants' (at least) twenty-seven (28) page Admission Agreement and is not a separate agreement, it is invalid and unenforceable as a matter of law.

G. The subject arbitration clause is both procedurally and substantively unconscionable and, therefore, it is unenforceable.

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

For all of these reasons, as further discussed below, Plaintiff respectfully requests that this Honorable Court strike 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 respectfully requests that this Honorable Court sanction Defendants and their counsel for filing this frivolous motion for the sole purpose of delaying this case.

A. Defendant has waived any alleged right to arbitration by actively participating in this case, including by extensively engaging in discovery and attending pretrials and discovery conferences. 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 for eleven (11) months, 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 Doris Glass was first admitted to the subject nursing home on July 1, 2013. Further, they raised the right to arbitrate as an affirmative defense in their Answer to Plaintiff's Complaint.

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).

In *Fravel v. Columbus Rehabilitation and Subacute Institute, et al.*, Franklin County Court of Common Pleas, Case No. 14 CV 007216, the Honorable Judge David E. Cain ruled that:

> the Court can only find that Defendants acted inconsistently with their right to arbitrate this matter. Defendants stated that they had the right to arbitrate this matter in their Answer and then sat on that right for ten months. Defendants materially participated in discovery to the extent of exchanging discovery requests, as well as scheduling and conducting depositions. Defendants further responded to a motion filed by Plaintiff concerning discovery and never once raised the issue of arbitration. Everything combines to show Defendants acted inconsistently with their right to arbitrate and as such, their motion must be denied.

Plaintiff's counsel represents the plaintiff in *Fravel* against another large nursing home chain, which is represented by Defendants' counsel's firm in this case.

As in *Fravel,* Defendants in this case filed their Answer, in which they indicated they were aware of the right to arbitrate. They did not move to stay the case in response to Plaintiff's Complaint. This alone constitutes a waiver of the right to arbitrate under *Mills, supra*.

In their Answer, Defendants demanded a jury.

As in *Fravel,* Defendants participated in litigation for 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 Doris Glass' 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 requests, even requesting supplementation of Plaintiff's responses. Defendants have participated in several status/discovery conference with Court without ever mentioning arbitration. Further, in spite of Plaintiff's request for all documents in Defendants possession

relative to Decedent Doris Glass, Defendants did not produce the subject arbitration clause until the April 9, 2015 discovery conference. Just as when Lettie Glass signed it, the clause was buried among a stack of other admission-related documentation.

Defendants have deposed Plaintiff Lettie Glass and her husband.

In *Fravel*, Plaintiff's counsel also filed a motion for sanctions with respect to Defendants' counsel's firm's growing trend of filing frivolous motions purely for the purpose of delay. The Court stated:

> Essentially, Plaintiff argues that Defendants' late filing of their request for arbitration is solely a tactic to delay this matter and therefore, Defendants should be sanctioned. While the Court finds Plaintiff's request to have merit, it will not grant it at this time. The Court will, however, keep the issue of sanctions under advisement and will be happy to revisit it after the parties' primary claims have been resolved.

While Plaintiff's counsel appreciates that courts are reluctant to use their broad discovery discretion to issue sanctions against counsel, when Defendants' counsel continues to file frivolous motions for the sole purpose of delaying cases and keeping them from going to trial, the Court should address Defendants' improper conduct.

As discussed above, Defendants clearly knew of their alleged right to arbitration and have been in possession of the arbitration clause since the day of Doris Glass's admission to the subject nursing home on July 1, 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, demanded a jury trial, 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. Defendants clearly acted inconsistently with any alleged right to arbitrate. Defendants have clearly waived their right to arbitration. Accordingly, this Court should promptly strike

Defendants' Motion to Stay Proceedings Pending Arbitration and sanction Defendants and their counsel.

B. The Arbitration Clause is not enforceable against Doris Glass or the Estate of Doris Glass (deceased) in this case because it was never signed by Doris Glass nor anyone with authority to sign on her behalf. The Arbitration Clause signed by Lettie Glass is not enforceable because, Lettie Glass had no authority to sign for Doris Glass.

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 valid 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 *Templeman v. Kindred Healthcare, Inc., et al.*, 2013-Ohio-3738, ¶ 25 (8th Dist 2013), the Eighth District Court of Appeals held that a valid ADR clause did not exist where the "legal representative" did not have a valid healthcare power of attorney. The Court noted at ¶ 24:

> As evidence by the ADR form and the 'Kindred Alternative Dispute Resolution Rules of Procedure,' the Kindred Defendants were conversant with both the usages and the nature of the business of providing rehabilitative nursing healthcare and

> compelling alternative dispute resolutions. The Kindred defendants must have been aware, therefore, that pursuant to R.C. 1337.12 and R.C. 1337.13, a power of attorney for healthcare is a specialized document.

The Kindred defendants in *Templeman*, represented by Defendants' counsel in this case, chose to rely on a "durable power of attorney", that was invalid because it was not properly executed by the decedent and it did not indicate the agent's authority to make healthcare decisions. *Id.* at ¶ 25.

In this case, Doris Glass did not sign the arbitration clause. Lettie Glass, did not have authority to sign any of Doris Glass' admission paperwork. As in *Templeman*, Lettie Glass had only a "durable power of attorney", which is invalid as a power of attorney for healthcare decisions. Typewritten at the top of Doris Glass' Power of Attorney its states: "THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTHCARE DECISIONS FOR YOU." Handwritten beneath that it states: "Includes Medical Decisions if Doris is unable." Under Ohio law, the power of attorney is invalid as a healthcare power of attorney. Defendants have not made any showing that Doris Glass could not make decisions when she was admitted to the subject nursing home.

R.C. 1337.12 (A)(1)(a) states that a durable power of attorney for health care must "be signed at the end of the instrument by the principal and shall state the date of its execution. Doris Glass' power of attorney does not state its date of execution.

R.C. 1337.12 requires that a durable power of attorney for health care "shall be witnessed by at least two individuals * * * who shall subscribe the witness' signature after the signature of the principal and, by doing so, attest to the witness' belief that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence." or "be acknowledged before a notary public, who shall make the certification described in section 147.53 of the Revised Code and also

shall attest that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence." Doris Glass' power of attorney does not meet either requirement.

In the present case, Decedent Doris Glass did not sign any agreement. Doris Glass' power of attorney agreement is not a valid health care power of attorney. Lettie Glass did not have the authority to sign Doris Glass' admission paperwork on her behalf. As a result, it is clear that the Estate of Doris Glass is not required to arbitrate any survivorship claims that it has against any Defendant in this case. Defendants motion to compel arbitration should be stricken.

C. Pursuant to 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.

R.C. § 2711.23(C) states (emphasis added):

> **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 the mandatory language in 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 Doris Glass' determination without any influence.

Accordingly, pursuant to 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 "0572 - Kindred Transitional Care And Rehabilitation - Winchester Place". Therefore, pursuant to R.C. § 2711.01(A) and R.C. § 2711.22(A), there is no enforceable arbitration clause between Doris Glass and Defendants Kindred Nursing Centers East, L.L.C., Kindred Healthcare Operating, Inc. and Kindred Healthcare, Inc.

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". *See also* R.C. § 2711.22(A).

In this case, there is no agreement in writing between Doris Glass and any of the Defendants. None of the Defendants are parties to the alleged arbitration clause. In the second paragraph, the arbitration clause expressly states that it was "made and entered into this day of July 1, 2013 by and between 0572 - Kindred Transitional Care and Rehabilitation-Winchester Place, ("Facility") Doris Glass, ("Resident"), and _____________ ("Legal Representative"). *See* Defendants' Exhibit "A". 0572 - Kindred Transitional Care and Rehabilitation Center - Winchester Place is not a legal entity. It cannot enter into contracts. Defendants Kindred Nursing Centers East, L.L.C., Kindred Healthcare Operations, Inc., and Kindred Healthcare, Inc. are not parties to the arbitration clause. The only parties designated are "0572 - Kindred Transitional Care and Rehabilitation Center - Winchester Place" and Doris Glass. Jessica Crites signed the contract for the facility. Doris Glass did not sign. There is a blank for a representative to be identified. None is identified. Pursuant to R.C. § 2711.01(A), there is no valid written arbitration clause to enforce between Doris Glass and the Defendants. No such document exists. There is no agreement in writing between **Defendants Kindred Nursing Centers East, L.L.C., Kindred Healthcare Operating, Inc., and Kindred**

Healthcare, 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 the Defendants are not parties to any arbitration clause so there is no basis to stay the case against them.

E. Pursuant to R.C. § 2711.23(G), 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 three (3) page arbitration clause that Defendants are relying upon is buried within Defendants' (at least) twenty-eight (28) page Admission Agreement and is not a separate agreement, it is invalid and unenforceable as a matter of law.

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;**

However, as is evident from the "Admission Checklist" the arbitration clause is merely a three-page attachment, titled "Attachment K", to the much larger admission agreement. See Portions of Admission Agreement produced by Defendants, attached as Exhibit "A". The admission agreement, including the arbitration clause were provided to Plaintiff's counsel at a discovery conference in this case on April 9, 2015. **Not all of the attachments and other documents referred to in the admission checklist were provided to Plaintiff's counsel on April 9, 2015, as part of the "business file."**

However, Defendants did produce: Sections 1-6 of the admission agreement (9 pages), "Attachment A - Consent to Admission and Treatment" (1 page), "Attachment C - Bed Hold Policy" (1 page), "Attachment F - Management of Resident's Personal Funds" (4 pages), "Attachment G - Skilled Nursing Facility Determination on Admission" (3 pages), "Attachment H - Medicare Secondary Payor (MSP) Screening" (4 pages), "Attachment J - Pharmacy Assignment of Benefits and Payment Agreement" (one page), "Attachment K - Voluntary Alternative Dispute Resolution Agreement (as applicable)" (3 pages), and "Attachment M - Tobacco Free Policy" (1 page).

Defendants did not produce:"Attachment B - Federal and State Resident Rights", "Attachment D - Notice of Privacy Practices", "Attachment E - Privacy Act Notification Statement", "Attachment I - Option Covered Items and Services", and "Attachment L - Additional Regulations as Required by State Law".

The Admission agreement and all of its attachments, including the subject arbitration clause, comprise one document. The arbitration clause is not a separate agreement, but is simply an attachment to the Admission Agreement. Since the arbitration clause is not separate from the Admission Agreement, it is invalid and unenforceable, pursuant to R.C. § 2711.23(G), as a matter of law.

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

In addition, this Court should strike the Defendants' Motion because they have refused to produce the entire admission agreement. The admission agreement could contain a termination clause which indicated that the agreement terminated as of the time that Doris Glass left the nursing home or as of the time that she died. The Defendants should not be permitted to move to stay this case based on an agreement and then withhold part of the agreement.

F. 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), no one had the authority to bind Doris Glass' next of kin and agree to arbitrate their wrongful death claims.

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* 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 such claims are both 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 for 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 Lettie Glass on behalf of Decedent Doris Glass' 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 Doris Glass' next-of-kin were ever a party to the arbitration clause, so they are not bound by it. Doris Glass' daughter-in-law 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 Doris Glass nor any of Doris Glass' 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 Doris Glass's next-of-kin were parties to the arbitration clause. None of Doris Glass's next-of-kin's names appear anywhere in the arbitration clause. As a result, it would be error for this Court to require Doris Glass's next-of-kin to arbitrate their wrongful death claims. Further, it would be error for this Court to stay Doris Glass' next of kin's wrongful death claims.

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

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

The subject arbitration clause 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 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 gone 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 the signing of the arbitration clause could not have been more procedurally unconscionable. Lettie Glass was under a significant amount of stress when her mother-in-law was admitted to the subject nursing home. There is no evidence that Lettie Glass read any part of the arbitration clause. Lettie Glass testified at her deposition that she did not read the entire admission agreement. Deposition of Lettie Glass, 75:6-9. The clause was clearly not explained to Lettie Glass properly:

73
24 Q. Do you remember having any conversation
74
1 with her about what this document was about before
2 you signed it?
3 A. Every one of these documents we did rather
4 quickly, it seems like. She did go over, though,
5 briefly, what all these meant. Whether they all sunk
6 in or not at the time, I can't swear, but she did
7 explain what it was I was signing.
8 Q. And what was your understanding as to what
9 you were signing, this Exhibit G?
10 A. From what I understood, as long as Doris
11 was in the nursing home, if something were to happen,
12 rather than to go seek service outside to help, we
13 would do it internally as an arbitration.
14 Q. Did you have an understanding as to
15 whether this would still apply when and if she was
16 discharged from Winchester Place?
17 A. From what I understood, this ended when
18 she left there. That only applied to the time that
19 she was there within their facility.

It is clear that the Defendants have all of the relevant experience and business acumen. Further, in support of a point made earlier, Lettie Glass was under the impression that the arbitration clause only applied while Doris Glass was a resident. Since the Defendants have refused to produce the entire admission agreement we cannot know if there was a termination clause.

Defendants' arbitration clause refers any arbitration to DJS Administrative Services, a company that only performs mediation and arbitration services for Kindred and Extendicare, two

very large nursing home chains. The arbitration itself is governed by the Kindred Healthcare Alternative Dispute Resolution Rules of Procedure, which are not attached to the agreement. *See* attached hereto a copy of Kindred Healthcare Alternative Dispute Resolution Rules of Procedure, downloaded from djsadministrativeservices.com on August 18, 2015, as Exhibit "B". So the Defendants selected the company who will conduct the arbitration and they made all of the rules that will apply to the arbitration.

In terms of relative bargaining power, Defendants are powerful and sophisticated:

> Kindred Healthcare, Inc. is a healthcare services company that through its subsidiaries operates hospitals, nursing centers, home health, hospice and non-medical home care locations and a contract rehabilitation services business across the United States. At June 30, 2015, Kindred through its subsidiaries had approximately 103,700 employees providing healthcare services in 2,730 locations in 47 states, including 96 transitional care hospitals, 16 inpatient rehabilitation hospitals, 90 nursing centers, 21 sub-acute units, 656 Kindred at Home home health, hospice and non-medical home care sites of service, 99 inpatient rehabilitation units (hospital-based) and a contract rehabilitation services business, RehabCare, which served 1,752 non-affiliated sites of service. Our company stock is traded on the New York Stock Exchange under the ticker symbol KND.

See Kindred Website, http://www.kindredhealthcare.com/our-company/company-overview/. Doris Glass was an 85 year old woman who was unable to care for herself. It is clear that Defendants had all of the bargaining power.

Defendants drafted the arbitration clause and the Arbitration Rules. Defendants have their own arbitration company.

In terms of whether alterations to the printed terms were possible, it is clear that neither Decedent Doris Glass nor Lettie Glass, altered one word of the arbitration clause. The arbitration clause in this case is a boilerplate contract of adhesion that was presented to Doris Glass on a take it or leave it basis. The clause was drafted by the Defendant, in its entirety, to help protect the Defendants from liability.

Defendants, as the much stronger parties in this case, knew that Decedent Doris Glass and her daughter-in-law Lettie Glass, 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 Defendants.

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 contained. On that basis alone the Court should deny Defendants' Motion to Stay. 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 "B", 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 strike Defendants' Motion to Stay Proceedings Pending Arbitration, as the arbitration clause is not enforceable as it is egregiously procedurally and substantively unconscionable.

H. 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 "C". 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 at Doris Glass' admission, before she and her 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.

IV. CONCLUSION.

Accordingly, Plaintiff respectfully requests that this Honorable Court strike Defendant's Motion to Stay for all of the reasons articulated herein.

Defendants have waived any right to arbitrate any claims relative to this case because they have actively engaged in litigation in this case including almost completing their discovery.

The arbitration clause is void and unenforceable because neither Doris Glass nor anyone with authority to act on her behalf signed the arbitration clause, therefore it is not enforceable against her Estate.

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

None of the Defendants are parties to the agreement.

Doris Glass'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.

Accordingly, this Court should promptly strike Defendants' Motion to Stay and impose the appropriate sanctions on Defendants and their counsel, pursuant to Ohio Civil Rule 11 and R.C. § 2323.51, for filing this 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 Defendants' Motion to Stay is unsupported by law and fact, and that Defendants' counsel filed the Motion merely to delay this case and avoid trial. 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 Lettie Glass, as the Personal Representative of the Estate of Doris Glass (deceased).

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Plaintiff's Motion to Strike or in the Alternative Plaintiff's Motion to Deny Defendant's Motion to Stay Proceedings Pending Arbitration and Plaintiff's Motion for Sanctions, was filed, **this 18th day of August 2015**, and sent via the Court's electronic filing system to the following:

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