IN THE COURT OF COMMON PLEAS
COLUMBIANA COUNTY, OHIO

David Gamble, as the Personal Representative of the Estate of Janet Gamble (deceased)	)	Case No. 2018 CV 0100
	)	Judge Scott A. Washam
Plaintiff	)	Plaintiff's Motion to Strike Defendants' Motion to Stay Proceedings; and
vs.	)	Plaintiff's Motion for Sanctions;
Valley Oaks Care Center, et al.	)	or, in the alternative,
Defendants.	)	Plaintiff's Brief in Opposition to Defendants' Motion to Stay Proceedings and Compel/Enforce Arbitration.

Now comes Plaintiff David Gamble, as the Personal Representative of the Estate of Janet Gamble (deceased), by and through his attorneys, Blake A. Dickson, Danielle M. Chaffin and Tristan R. Serri of The Dickson Firm, L.L.C., and, respectfully requests that this Honorable Court strike the Motion to Stay Proceedings and Compel/Enforce Arbitration filed by the Defendants in this case, and sanction the Defendants and their counsel for pursuing this clearly frivolous Motion to Stay for the sole purpose of delaying this case.

If this Court is not willing to strike the motion and sanction the Defendants and their counsel, Plaintiff respectfully requests that the Court deny this baseless Motion to Stay.

I. Introduction.

Janet Gamble was a resident of Defendants' nursing home. She was severely neglected. As a result she developed bed sores. She was neglected further and her bed sores got worse. Her bed sores became infected. The Defendants continued to neglect Janet Gamble and she ultimately became septic. Janet Gamble died on February 27, 2017, as a result of Defendants' negligence.

On February 27, 2018, Plaintiff filed his Complaint against Defendants, the owners and the

operators of the Valley Oaks Care Center nursing home, for personal injury, wrongful death, medical negligence, ordinary negligence, and violations of Ohio's Nursing Home Resident's Bill of Rights.

On July 20, 2018, Defendants filed a Motion to Stay and Compel/Enforce Arbitration based on an arbitration clause which is part of an Admissions Agreement. **The entire Admissions Agreement, of which the arbitration clause is a part, terminated upon Janet Gamble's death, one (1) year prior to Plaintiff filing his Complaint in this case.**

Page 8, Section IV, Paragraph C of the Admission Agreement states, "This Agreement shall automatically terminate upon the death of the Resident." (Emphasis added). A copy of the Admissions Agreement is attached hereto as Exhibit "A".

The arbitration clause, and the Admission Agreement, terminated upon Janet Gamble's death on February 27, 2017.

This case was filed on February 27, 2018, one year after the Admissions Agreement terminated.

The Admission Agreement also states, "This Agreement may be terminated by the Resident and/or Representative at any time".

On September 8, 2018, Plaintiff's counsel wrote a letter to Defendants' counsel on behalf of the Gamble family terminating the Admissions Agreement. A copy of that letter is attached hereto as Exhibit "B".

The Defendants drafted the admission agreement. They could have drafted it to say whatever they wanted it to say. They drafted the agreement to say that it terminated upon the death of the resident and that the resident or their representative could terminate the agreement at any time. The agreement is terminated. Defendants' Motion to Stay and Compel/Enforce Arbitration is without

merit and should be stricken.

Defendants refused to cooperate, in any way, with discovery in this case. Plaintiff's counsel had to file a Motion to Compel. This Court granted that motion. Plaintiff then conducted a Civil Rule 30(B)(5) deposition. At the Civil Rule 30(B)(5) deposition, the corporate Defendants acknowledged that the Admissions Agreement not only automatically terminated upon Janet Gamble's death, but that the resident, or their representative, could terminate the Admission Agreement, which includes the arbitration clause, at any time. After Plaintiff's counsel finished with his questions of the Civil Rule 30(B)(5) deponent, Defendants' counsel left the room and again met with the witness. Defendants' counsel and the witness then returned and Defendants' counsel then asked the witness, the representative of his own clients, extremely leading questions in an attempt to lead the witness to testify that the termination language in the agreement did not apply to the entire Agreement, but only to the billing and care sections. However, when the Court reads the Admissions Agreement, it will clearly see that the termination language applies to the entire Agreement. The Civil Rule 30(B)(5) representative of the Defendants clearly testified to that before she again met with Defendants' counsel and was then questioned by Defendants' counsel.

Defendants contradicted their own Motion to Stay during the Civil Rule 30(B)(5) deposition. In their Motion to Stay, Defendants argued that Plaintiff's wrongful death claims are also subject to arbitration, because John Gamble, Janet Gamble's next of kin, signed the Admissions Agreement in his personal capacity. However, the Defendants, during the Civil Rule 30(B)(5) deposition, specifically testified that John Gamble did not sign any agreement personally, only on behalf of Janet Gamble. Because John Gamble did not sign the Admission Agreement personally, there is no question that his claims for wrongful death claims are not subject to arbitration. Further, when John

Gamble signed the Admissions Agreement, Janet Gamble was alive. As a result there were no wrongful death claims at that time.

Plaintiff is respectfully requesting that this Honorable Court strike Defendants' Motion to Stay. As further explained below, if this Court denies Defendants' Motion to Stay, Defendants will be entitled to immediately appeal this Court's decision, pursuant to Ohio R.C. §2711.02(C). That appeal will take approximately eighteen (18) months. Therefore, even if this Court denies Defendants' frivolous Motion to Stay, Defendants will have achieved their goal of an extended delay of this case. Defendants in nursing home cases have started to move for a stay of the case pending binding arbitration in almost every case, regardless of the facts, regardless of the merits of their argument. This is an abuse of the system and it must be stopped. The only way to stop this practice is for Courts to strike these frivolous motions and sanction the lawyers and the parties who file them. Families whose loved one has been killed by the neglect of a nursing home should not have to endure an eighteen (18) month delay in their pursuit of justice and accountability.

While a resident of Defendants' nursing home, Janet Gamble was neglected to the point that she developed multiple infected bed sores. Her bed sores went untreated. As a result, she developed severe sepsis and died just hours after she finally arrived at the hospital. Janet Gamble's family was never informed of the severity of her wounds or that she had an infection. When Janet Gamble got to the hospital the nurses at the hospital immediately removed an improperly inserted catheter. Janet Gamble had a very severe infection and she died the night she went to hospital. This is clearly a meritorious wrongful death case. The Gamble family should be able to pursue this case on its merits. They should not be forced to endure an eighteen (18) month delay when the Admission Agreement in this case along with the arbitration clause terminated a long time ago.

Any delay in pursuit of this case will negatively effect Plaintiff's ability to seek justice. As this Court is well aware, delays in civil cases always hurt the plaintiff, as the plaintiff has the burden of proof. Witnesses move away or become difficult to locate. Memories fade. Nursing homes can be sold, which routinely results in the loss of key documents. The more time that passes, the harder it is for Plaintiff to pursue his case.

Defendants' actions are in direct violation of Civil Rule 11, which states that "The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." There is no question that Defendants and their counsel do not have a good faith basis to believe there is good ground to support their Motion. This Motion is being pursued solely to achieve an extended delay.

Plaintiff's counsel has made a concerted effort to persuade Defendants' counsel to withdraw their Motion to Stay. Plaintiff's counsel sent multiple letters to Defendants' counsel. Plaintiff's counsel exchanged multiple e-mails with Defendants' counsel. Yet Defendants' counsel refused to withdraw the Motion to Stay. As a result, Plaintiff respectfully requests that this Honorable Court strike Defendants' Motion to Stay, to avoid an unnecessary, extended delay in this case. In addition, Plaintiff respectfully requests that this Honorable Court sanction Defendants and their counsel in the amount of $500.00. The only way to deter improper conduct is by sanctioning it. If the only thing that happens is that Defendants' frivolous Motion is stricken, there will be no reason for these Defendants and their lawyers not to attempt this strategy of delay in the next case. This Honorable Court should not have to waste its time hearing Defendants' Motion to Stay, and the multiple Motions that Plaintiff has had to file as a result of Defendants' Motion to Stay. The only way to

deter such conduct is to sanction Defendants and their counsel for pursuing their frivolous Motion to Stay.

There are numerous reasons why the arbitration clause within the Admissions Agreement in this case is void and unenforceable under Ohio law, which reasons will be explained in detail below.

Multiple Defendants are not parties to the arbitration clause, so they have no basis to seek to enforce or compel arbitration.

O.R.C. § 2711.23 contains numerous requirements that an arbitration clause relative to medical treatment and diagnosis must meet in order to be valid and enforceable. The arbitration clause in this case fails to meet five (5) separate and distinct requirements. Therefore, the arbitration clause is invalid and unenforceable as a matter of law.

The arbitration clause is also unenforceable because it is procedurally and substantially unconscionable.

Defendant's Motion should be stricken for all of these reasons.

If this Court is not willing to strike Defendants' Motion to Stay, Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion to Stay and Compel/Enforce Arbitration.

II. Statement of the Facts.

On November 5, 2016, Janet Gamble was admitted to the Valley Oaks Care Center nursing home. Janet Gamble suffered from dementia and it was noted that she needed extensive assistance from two (2) staff members to reposition herself within her bed and for transfers. Janet Gamble was also noted to be incontinent of urine and bowel. She was at risk for the development of bed sores. She did not have any bed sores upon admission to the nursing home.

Less than three (3) months later, on January 22, 2017, Janet Gamble was admitted to East

Liverpool City Hospital, where she was diagnosed with sepsis, a UTI, pneumonia and severe protein-calorie malnutrition. She was discharged six (6) days later and re-admitted to Valley Oaks Care Center.

On January 28, 2017, a nurse at Valley Oaks Care Center noted that Ms. Gamble had a 4.5 cm x 3.0 cm blister to her left heel, a 6.0 x 4.0 cm blister to her right heel, and a 1.4 cm x 1.0 bed sore on her coccyx. No comprehensive assessments were completed of her bed sores at that time, so the specific characteristics of her bed sores are unknown. No pictures were taken of any of her bed sores at the nursing home.

The blisters on Janet Gamble's heels continued to worsen and she was noted to have an additional bed sore.

The Valley Oaks Care Center did not contact Janet Gamble's doctor and notify him about the new bed sore in violation of state and federal law.

The Valley Oaks Care Center did not contact Janet Gamble's family and notify them about the new bed sore in violation of state and federal law.

The Valley Oaks Care Center did not conduct a comprehensive assessment of the new wound.

On February 7, 2017, it was noted that the bed sore which was discovered five days prior, was now a Stage III pressure ulcer, meaning that the wound was open and muscle and tendon were exposed.

New wounds were documented two days later, on February 9, 2017. Janet Gamble had developed a bed sore that measured 6.0 cm x 5.7 cm on her left buttock, with two open areas, with the largest measuring 1.0 cm x. 2.4 cm, with bloody, yellow drainage and a beefy red center. Janet

Gamble's right buttocks had two distinct bed sores measuring 3.0 x 2.0 cm and 2.0 cm x 2.0 cm. There were bed sores on Janet Gamble's toes.

None of these areas had previously been identified or assessed by the staff at the subject facility.

The Valley Oaks Care Center did not contact Janet Gamble's doctor and notify him about these bed sores in violation of state and federal law.

The Valley Oaks Care Center did not contact Janet Gamble's family and notify them about these bed sores in violation of state and federal law.

On February 11, 2017, a nurse noted that Ms. Gamble had a temperature of 102.5 degrees and labored breathing. Her physician was called and she was sent to East Liverpool City Hospital for evaluation. Janet Gamble was **not** sent to the hospital because of her multiple bed sores.

At the hospital, Janet Gamble was diagnosed with severe sepsis and acute aspiration pneumonia. Janet Gamble was discharged back to the Valley Oaks Care Center on February 16, 2017.

On February 27, 2017, Janet Gamble was again admitted to East Liverpool City Hospital. Upon admission, she was diagnosed with septic shock, a UTI, and was noted to have numerous pressure ulcers. A full assessment noted that Ms. Gamble's urine was "thick milky w/ foul odor". At the hospital a nurse promptly removed a catheter from Ms. Gamble that had been improperly inserted. Once again, Janet Gamble was not sent to the hospital because of her bed sores.

Janet Gamble died on February 27, 2017, the same day she was admitted to the hospital. Her death certificate lists her cause of death as medullary failure, due to cardiac arrest, due to severe sepsis.

The Ohio Department of Health surveyed the Valley Oaks Care Center relative to the care that Janet Gamble received there. The Ohio Department of Health cited the Valley Oaks Care Center relative to the improper care provided to Janet Gamble at the Valley Oaks Care Center nursing home.

III. Law and Argument.

Defendants' Motion to Stay Proceedings and Compel/Enforce Arbitration should be stricken and Defendants, and their counsel, should be sanctioned for filing a Motion to Stay based on an Admissions Agreement which terminated upon Janet Gamble's death on February 27, 2017, well over one (1) year ago.

A. The entire Admissions Agreement, including the arbitration clause, terminated one year prior to Plaintiff filing his Complaint.

Defendants' Motion to Stay and Compel/Enforce Arbitration is based entirely on an arbitration clause which is part of an Admissions Agreement, that terminated on February 27, 2017, long before this case was even filed.

Page 8, Section IV, Paragraph C of the Admission Agreement states as follows:

> C. Termination by Resident. This Agreement may be terminated by the Resident and/or by Representative at any time; however, Facility requests that the Resident and/or Representative provide it with at least thirty (30) days' advance notice so that it can conduct proper discharge planning. This Agreement shall automatically terminate upon the death of the Resident.

As the Court can see, the last sentence clearly states, "**This Agreement shall automatically terminate upon the death of the Resident**." (Emphasis added).

Janet Gamble died on February 27, 2017.

The entire Admissions Agreement *automatically* terminated on that date.

The Admissions Agreement may also be terminated "**by the Resident and/or Representative at any time**". (Emphasis added). On September 8, 2018, Plaintiff's counsel wrote a letter to Defendants' counsel on behalf of the Gamble family terminating the Admissions Agreement. A copy of that letter is attached hereto as Exhibit "B".

The Admissions Agreement, which includes the arbitration clause, has unquestionably terminated.

During the Civil Rule 30(B)(5) deposition of the Defendants, Stephanie Wolfe, the representative who the Defendants prepared and produced to testify on their behalf, who is employed at the subject facility as a social services director, testified both individually and on behalf of the Defendants. Ms. Wolfe participated in Janet Gamble's admission to the subject facility. When asked about the termination clause in the Admissions Agreement, Ms. Wolfe testified as follows:

Q. Okay. Did you explain to the Gambles that this agreement may be terminated by the resident or the resident's representative at any time?
A. Can you repeat that, please?
Q. Sure. Did you explain to the Gambles during Janet Gamble's admission that this agreement can be terminated by the resident at any time?
A. Yes.
MR. RUBIN: Object.
Q. Okay. Did you explain to the Gambles that this agreement automatically terminates when the resident dies?
A. Yes.

(Page 31:11 to 31:23)

Ms. Wolfe confirmed that she explained to the Gambles that they had the ability to terminate the Admissions Agreement at any point. She also confirmed that she told the

Gambles that the Admissions Agreement would automatically terminate upon Janet Gamble's death.

Defendants Valley Oaks Care Center, Selfridge Leasing, LLC, Eli M. Gunzberg Irrevocable Trust, and Frank Gunzberg 2015 Succession Trust are bound by the witness' testimony.

Janet Gamble died. The Admissions Agreement terminated. The arbitration clause, which is a part of the Admissions Agreement is terminated. T**here is no contract to enforce. Defendants' Motion to Stay is baseless.**

Defendants will undoubtedly attempt to argue that the termination clause did not apply to the arbitration clause. During the Civil Rule 30(B)(5) deposition, the witness attempted to testify that the termination clause only applied to the facility's obligation to care for the resident and the resident's responsibility to pay for services, and does not apply to the arbitration clause. The witness changed her testimony after consulting with Defendants' counsel off of the record. However, the witness was unable to identify any part of the termination clause that states that it is limited to only care and billing. The witness confirmed that Section IV, Paragraph C, entitled "Termination by Resident", does not say that it is limited to care and/or billing. In fact, that section of the Admissions Agreement does not mention care and/or billing at all.

The Agreement clearly states, "**This Agreement** may be terminated..." and "This Agreement shall automatically terminate upon the death of the Resident." (Emphasis added). It was clearly written so that the **entire** Admissions Agreement terminated under certain circumstances. The Agreement did not limit the termination clause to certain sections of the Agreement, nor certain obligations of the parties.

Defendants claim that the termination clause only applied to the Defendants' obligation to

perform services, and the resident's obligation to pay. If this were actually the case, the termination clause would have limited its application to Sections II and III of the Admissions Agreement, not the entire Agreement. The Defendants' obligations to provide, room, board, housekeeping, nursing services etc. are all outlined within Section II of the Admissions Agreement. The resident's obligations to pay for those services are outlined in Section III of the Admissions Agreement. If the intent was to limit the termination clause to these two sections, Defendants should have drafted the termination clause to say that it only applied to those two sections. However, they chose not to do so. They chose to draft the termination clause so that it applied to the entire Admissions Agreement, which includes Section V - the arbitration clause.

A contract must be strictly construed against the party who drafted it. *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208, 211 (1988), citing *Faruque v. Provident Life & Acc. Ins. Co.* (1987), 31 Ohio St. 3d 34, 31 OBR 83, 508 N.E. 2d 949, syllabus and *Thompson v. Preferred Risk Mut. Ins. Co.* (1987), 32 Ohio St. 3d 340, 342, 513 N.E. 2d 733, 736.

During the Civil Rule 30(B)(5) deposition, Ms. Wolfe testified that in the entire time she has worked for Defendants, she has never had a resident refuse to sign the arbitration clause. She also testified that she has never had a resident alter the terms of the Admissions Agreement. There is no question that this is a contract of adhesion, that was presented to the Gamble family on a take it or leave it basis. As such, the contract must be strictly construed against the Defendants.

Defendants drafted the Admissions Agreement. Defendants could have drafted the Admissions Agreement and the arbitration clause to say anything they chose. The Admission Agreement clearly states that "The Agreement shall automatically terminate upon the death of the Resident." The termination clause refers to the entire Agreement, including Section V, entitled

Resolution of Disputes/Arbitration; not just certain sections or obligations.

C. The arbitration clause is void, as it violates O.R.C § 2711.23.

In addition to having terminated over one (1) year ago, the arbitration clause in this case is absolutely void under Ohio law.

R.C. § 2711.23 states, in pertinent part:

> **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:
>
> (A) The agreement shall provide that the care, diagnosis, or treatment will be provided whether or not the patient signs the agreement to arbitrate;
>
> (B) The agreement shall provide that the patient, or the patient's spouse, or the personal representative of the patient's estate in the event of the patient's death or incapacity, shall have a right to withdraw the patient's consent to arbitrate the patient's claim by notifying the health care provider or hospital in writing within thirty days after the patient's signing of the agreement. Nothing in this division shall be construed to mean that the spouse of a competent patient can withdraw over the objection of the patient the consent of the patient to arbitrate;
>
> (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;
>
> (D) The agreement shall, if appropriate, provide that its terms constitute a waiver of any right to a trial in court, or a waiver of any right to a trial by jury;
>
> (E) The agreement shall provide that the arbitration expenses shall be divided equally between the parties to the agreement;
>
> (F) Any arbitration panel shall consist of three persons, no more than one of whom shall be a physician or the representative of a hospital;
>
> (G) The arbitration agreement shall be separate from any other agreement, consent, or document;
>
> (H) The agreement shall not be submitted to a patient for approval when the

patient's condition prevents the patient from making a rational decision whether or not to agree;

(I) Filing of a medical, dental, chiropractic, or optometric claim within the thirty days provided for withdrawal of a patient from the arbitration agreement shall be deemed a withdrawal from the agreement;

(J) The agreement shall contain a separately stated notice that clearly informs the patient of the patient's rights under division (B) of this section.

The arbitration clause in this case is absolutely invalid and unenforceable, as it does not comply with the clear requirements set forth within R.C. § 2711.23.

The arbitration clause in this case violates R.C. §2711.23(A) because it does not provide that "care, diagnoses, or treatment will be provided whether or not the patient signs the agreement."

The arbitration clause in this case violates R.C. §2711.23(C) because it does not provide that "the decision whether or not to sign the agreement is solely a matter for the patient's determination without any influence."

The arbitration clause in this case violates R.C. §2711.23(D) because it does not state that its terms constitute "a waiver of any right to a trial in court, or a waiver of any right to a trial by jury."

The arbitration clause in this case violates R.C. §2711.23(E) because it does not state that arbitration expenses shall be divided **equally** between the parties to the agreement." (Emphasis added). The arbitration clause states "any person requesting arbitration will be required to pay a filing fee to NAF or any other nationally recognized arbitration organization, and any other expenses associated with arbitration." R.C. §2711.23 is expressly clear that expenses must be divided **equally.** The arbitration agreement which Defendants are seeking to enforce absolutely does **not** provide that expenses will be divided equally. Under the alleged arbitration agreement, Plaintiff would be required to pay **all** expenses associated with arbitration, including the hourly fee for all

arbitrators, regardless of the merits of his claims. This expense is significant, given most plaintiff's attorneys handle cases on a contingent fee basis, which results in no out of pocket cost for a plaintiff. Having to pay all arbitration costs is a sufficient enough burden to deter a potential plaintiff who has been the victim of negligence, from moving forward with arbitration. This is a perfect example of why R.C. §2711.23(E) is in place.

During the Civil Rule 30(B)(5) deposition, it was clear that Ms. Wolfe, who reviewed the Admissions Agreement with the Gambles, is unaware of the fees associated with arbitration:

16 Do you know what the filing fee is for NAF
17 arbitration?
18 A. No.
19 Q. Did you give the Gambles any kind of
20 information about the fees that NAF charges for
21 arbitration?
22 A. No.
23 Q. Do you know what other expenses are
24 associated with arbitration?
25 A. No.

(Page 33:16 to 33:25)

Not only does the arbitration clause violate R.C. §2711.23(E) by requiring the person requesting arbitration to pay **all** fees associated with arbitration, but Ms. Wolfe, who reviewed the arbitration clause with the Gambles, was not able to explain the expenses that the Gambles would have to incur if they chose to pursue arbitration. Clearly, neither the Gambles, nor Ms. Wolfe, knew what was being agreed to.

The arbitration clause in this case also violates R.C. §2711.23(G) because it is not separate from any other documents, consent or agreements. As this Court can see, the arbitration clause in this case is part of a larger Admissions Agreement. **The arbitration clause begins on page 8 of the**

Admissions Agreement, and is the fifth section of the Agreement. There is no question that the alleged arbitration clause is not its own separate document as R.C. §2711.23(G) requires.

While Defendants may argue that there is a separate signature page relative to the arbitration clause, that signature page is unquestionably a part of the Admissions Agreement. The signature page relative to the arbitration clause was produced with the Admissions Agreement, and is explicitly labeled page "14 of 14". **If it were a separate document, it would not be sequentially numbered with the rest of the Admissions Agreement.**

The Civil Rule 30(B)(5) representative attempted to argue that the document was separate, but ultimately recognized that the language on signature page for the arbitration clause indicates that it is a part of the Admissions Agreement:

Q. And then page 14 that says Arbitration Clause at the top, it clearly says 14 of 14 on the bottom, right?
A. Yes.
Q. It's page 14 of the 14-page Admission Agreement, correct?
MR. RUBIN: Objection.
Q. Yes?
A. I mean, it says 14 of 14, but it's a separate clause from the whole agreement.
Q. It is? Because it clearly says that it's the 14th page of this 14-page agreement.
A. I see that.
Q. Is that true?
A. I see that.
Q. Is that what it says?
A. Yes.
Q. Okay. And it says, "The persons signing below have read all of the terms of this agreement." What agreement is that referring to?
A. I don't know where you just read that. Oh, right there.
Q. The very first sentence of page 14 says,

"The persons signing below have read all of the terms of this agreement." What agreement is it referring to?
A. The entire agreement.
Q. The entire Admission Agreement, correct?
A. Yes.
Q. "Including Chapter IV, Resolution of Disputes and Arbitration," Chapter IV being one of the chapters of the Admission Agreement, correct?
A. Yes.

(Pages 57:4 to 58:10)

Simply because Defendants' counsel refers to it as a separate document does not make it so. Once again, Defendants are attempting to re-write the Admissions Agreement, so that it better suits their arguments.

In addition, **the Admissions Agreement explicitly states that it incorporates "all documents that the Resident and/or Representative signed or received during the admission process to Facility."** The arbitration clause is a document that the representative signed during the admission process. Therefore, it is incorporated into the Admissions Agreement.

Further, the signature page would be insufficient on its own, as it does not comply with the requirements set forth in R.C. §2711.23, and does not explain the other terms relative to arbitration, such as what the parties are agreeing to arbitrate.

R.C. §2711.23 is explicitly clear. In order for an arbitration agreement to be valid and enforceable, it "shall include and be subject to" a list of conditions. The arbitration clause in this case violates R.C. §2711.23 in at least five (5) different ways. R.C. §2711.23 is not optional. Its terms are mandatory. Therefore, the clause in this case is invalid and unenforceable as a matter of law.

C. Defendants Eli Gunzberg, Eli M. Gunzberg Irrevocable Trust, and Frank Gunzberg 2015 Succession Trust are not parties to the Admissions Agreement nor to the arbitration clause, and therefore, Plaintiff cannot be compelled to submit her claims against these Defendants to arbitration.

A plaintiff cannot be compelled to submit claims against a party "to arbitration if those parties are not parties to the contract containing the arbitration provision." *White v. Equity, Inc.*, 191 Ohio App. 3d 141, 2010 Ohio 4743, ¶ 19, 945 N.E.2d 536 (10th Dist). "Parties not privy to a contract may not benefit from an arbitration agreement incorporated therein." *Hess v. Heer,* 10th Dist. Franklin No. 98AP-597, 1999 Ohio App. LEXIS 1419, *7 (March 30, 1999), citing *Kline v. Oakridge Builders, Inc.*, 102 Ohio App. 3d 63, 656 N.E.2d 992 (9th Dist. 1995). A trial court must "at a minimum" require proof that a defendant is privy to a contract containing an arbitration clause prior to issuing a stay. *Id.* at *7-8. Without such proof, a trial court has "insufficient basis to find that the matter was subject to the arbitration clause and should be stayed". *Id.*

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). 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 *Doe v. Vineyard Columbus*, 10th Dist. Franklin No. 13AP-599, 2014-Ohio-2617, ¶¶ 15- (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).

Defendants Eli Gunzberg, Eli M. Gunzberg Irrevocable Trust, and Frank Gunzberg 2015 Succession Trust are **not parties to the Admissions Agreement nor to the arbitration clause,** and therefore, Plaintiff cannot be compelled to submit her claims against these Defendants to arbitration.

The Admissions Agreement, which Defendants produced, states as follows:

Admission Agreement

I. PARTIES

This Agreement is made and entered into this 12 day of november 2016 by and between, **Selfridge Leasing, LLC d/b/a Valley Oaks Care Center** ("Facility"), Janet Gamble ("Resident"), and/ or John Gamble ("Representative"), if applicable. By signing this Agreement, the Representative is certifying that he/she: (1) has legal access to and agrees to make payment from the Resident's income, assets or resources, including Social Security, pension or retirement funds, annuities, insurance, etc., for charges incurred by the Resident for services performed by Facility or on the Resident's behalf by any other person or company for which the Resident is responsible for payment through Facility billing; (2) has an interest or responsibility in the Resident's welfare; and (3) has identified himself or herself to Facility as the person responsible for exercising the rights of the Resident if and when the Resident is mentally and/or physically incapable of exercising such rights on his/her own behalf.

Defendants Eli Gunzberg, Eli M. Gunzberg Irrevocable Trust, and Frank Gunzberg 2015 Succession Trust **are not listed anywhere in the arbitration clause nor the Admissions Agreement**.

Further Defendants Eli Gunzberg, Eli M. Gunzberg Irrevocable Trust, and Frank Gunzberg 2015 Succession Trust **did not sign the arbitration clause nor the Admissions Agreement, nor did anyone sign on their behalf**.

The only signatories to the agreement were John Gamble, who signed on behalf of Janet Gamble, and Stephanie Wolfe who signed on behalf of Selfridge Leasing, LLC d/b/a Valley Oaks Care Center.

Stephanie Wolfe, the Civil Rule 30(B)(5) representative confirmed that she did not sign the Admissions Agreement on behalf of anyone other than Selfridge Leasing, LLC d/b/a Valley Oaks Care Center:

Q. Janet Gamble, okay. And you were signing, according to this document, on behalf of Selfridge Leasing, LLC d/b/a Valley Oaks Care Center, correct?
A. Yes.
Q. And not on behalf of anybody else?
A. No.
Q. And that matches up with the front page of the document, which says that the agreement is entered into between Selfridge Leasing, LLC d/b/a Valley Oaks Care Center and Janet Gamble, as the resident, and John Gamble, as her representative?
A. Yes.

(Page 41:13 to 41:25)

In addition, paragraph A on page 10 of the agreement states, "There are no actual or intended third party beneficiaries of this Agreement other than those persons or entities whose names are

signed below." Therefore, Defendants cannot argue that they are actual or intended third party beneficiaries of the Admissions Agreement.

A contract must be strictly construed against the party who drafted it. *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208, 211 (1988), citing *Faruque v. Provident Life & Acc. Ins. Co.* (1987), 31 Ohio St. 3d 34, 31 OBR 83, 508 N.E. 2d 949. One or more Defendants drafted the arbitration clause and Admissions Agreement. Defendants could have drafted the arbitration clause to say anything they chose. They chose to draft the Admissions Agreement in a way that they were not parties to it.

Defendants Eli Gunzberg, Eli M. Gunzberg Irrevocable Trust, and Frank Gunzberg 2015 Succession Trust are not signatories parties to the arbitration clause. They are not parties to the clause. Therefore there is no basis for these Defendants to seek to compel arbitration and there is no basis to stay this case with respect to these Defendants.

D. Pursuant to the Ohio Supreme Court's decision in *Peters v. Columbus Steel Casting, Co.*, 115 Ohio St.3d 134, 2007 Ohio 4787, 873 N.E.2d 1258 the wrongful death claims of Janet Gamble's next-of-kin are not subject to the terminated Admissions Agreement.

As further evidence that the Defendants and their counsel are not pursuing their Motion to Stay in good faith, the Defendants and their counsel are arguing that the terminated arbitration clause also stays the wrongful death claims in this case, despite clear and controlling precedent from the Ohio Supreme Court. Defendants argue that the wrongful death claims of Janet Gamble's next-of-kin are bound by the terminated arbitration clause. They argue that with one signature, John Gamble, Janet Gamble's son, was somehow able to bind all of Janet Gamble's next-of-kin to the arbitration agreement.

Defendants are incorrect. John Gamble did not sign the Arbitration Clause nor the Admission Agreement in his personal capacity. Further, Defendants' argument is directly refuted by the Supreme Court of Ohio's decision in *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007 Ohio 4787, 873 N.E.2d 1258 (2007). In *Peters* the Supreme Court of Ohio considered the issue of "whether the personal representative of a decedent's estate is required to arbitrate a wrongful-death claim when the decedent had agreed to arbitrate all claims against the alleged tortfeasor." *Peters*, 115 Ohio St.3d at 135. In considering this issue, the Court reviewed the separate nature of survival claims and wrongful death claims. The Court stated "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." *Id.* 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. 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. Because Peter's beneficiaries did not sign the plan nor any other dispute- resolution agreement, they cannot be forced into arbitration." *Id.* at 138, citing *Thompson v. Wing*, 70 Ohio St. 3d 176, 182-83, 637 N.E.2d 917 (1994).

The Supreme Court of Ohio relied upon contract principles, stating, "there is no dispute 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.'" *Id.* at 136.

> However, Peters could not restrict his beneficiaries to arbitration of their wrongful-death claims, because he held no right to those claims; they accrued independently to his beneficiaries for the injuries they personally suffered as a result

> of the death. See Thompson, 70 Ohio St.3d at 182-183, 637 N.E.2d 917. Thus, a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims. Id. The beneficiaries can agree to arbitrate these claims themselves, but they are not required to do so. Because Peters's beneficiaries did not sign the plan or any other dispute-resolution agreement, they cannot be forced into arbitration.

Id. at 138. The Supreme Court of Ohio concluded: "[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: "[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." *Id.* at 138-39.

The holding and reasoning in *Peters* applies to the wrongful death claims which have been brought by Plaintiff David Gamble, on behalf of Decedent Janet Gamble's next-of-kin. The wrongful death claims in this case are not subject to arbitration pursuant to *Peters*. None of Janet Gamble's next-of-kin were ever a party to the arbitration clause, so they are not bound by it.

Defendants argue that the Admissions Agreement was signed by a beneficiary to Janet Gamble's estate, therefore the Supreme Court of Ohio's decision in *Peters* is not applicable. Defendants' argument is premised upon the ridiculous assertion that John Gamble was a party to the arbitration clause. John Gamble was not a party to the terminated arbitration clause. John Gamble is not listed as a party to the Admissions Agreement. John Gamble signed the document under the title "REPRESENTATIVE". As Defendants stated in their Motion to Stay, John Gamble was Janet Gamble's guardian. Therefore, John Gamble signed the Admissions Agreement on Janet Gamble's behalf. John Gamble is not personally bound by the terminated Admissions Agreement and Defendants offer no support whatsoever for their statement that John Gamble is bound by the

terminated Admissions Agreement.

The Civil Rule 30(B)(5) representative explicitly testified that John Gamble did not sign the Admissions Agreement in an individual capacity:

Q. Both pages 13 and pages 14, John Gamble was signing as Janet Gamble's representative as her guardian; is that correct?
A. Yes.
Q. Was he signing in any way on behalf of himself personally?
A. No. He was signing on behalf of his mother.

(Page 41:5 to 41:12)

John Gamble did not sign the arbitration clause in his individual capacity. John Gamble is not a party to the arbitration clause. Therefore, in addition to all of the other reasons explained in this motion, neither John Gamble nor any of Janet Gamble's next of kin are bound by the arbitration clause.

This exact issue was before the Third District Court of Appeals in *Loyer v. Signature Healthcare of Galion,* 3rd Dist. Crawford No. 3-16-09, 2016 Ohio 7736, where the decedent's husband, Calvin Loyer, signed an arbitration clause on his wife's behalf while she was being admitted to a nursing home. The Third District Court of Appeals ultimately held that the arbitration clause was not enforceable relative to the survivorship or the wrongful death claims. *Id.* at ¶19, 22. As for the wrongful death claims, the court stated:

> We conclude that the trial court did not abuse its discretion by denying defendants' motion to stay pending arbitration with respect to the wrongful-death claim because defendants failed to show that Calvin signed the arbitration agreement in his **individual capacity**.
>
> "'[A]rbitration 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.'" McFarren v. Emeritus at Canton, 2013-Ohio-3900, ¶ 29, 997 N.E.2d 1254, quoting Council of Smaller Ents. v. Gates, McDonald & Co., 80 Ohio St.3d 661, 665, 1998 Ohio 172, 687 N.E.2d 1352 (1998). See also Peters, 115 Ohio St. 3d 134, 2007-Ohio-4787, at ¶ 8, 873 N.E.2d 1258. "While arbitration is encouraged as a form of dispute resolution, the policy favoring arbitration does not trump the constitutional right to seek redress in court." Peters at ¶ 8. **An arbitration agreement is not enforceable against a beneficiary who signs that agreement in a purported representative capacity**. See McFarren at ¶ 30; Peters at ¶ 8. **Only if that beneficiary signs that agreement in his or her individual capacity will the arbitration agreement be enforceable against that beneficiary**. See id.; Id.
>
> As we noted above, aside from defendants' representative, King, Calvin was the only person to sign the arbitration agreement. However, **Calvin did not sign the arbitration agreement in his individual capacity, but, as we addressed above, signed as the purported representative of Edeltrud**. Indeed, Calvin's printed name appears as "Calvin Loyer Spouse" above the line entitled "Resident's Authorized Representative/Name and Relationship" and Calvin's signature appears above the line entitled "RESIDENT REPRESENTATIVE SIGNATURE."

Id. at ¶20-22. See also *Younce v. Heartland of Centerville*, 2nd Dist. Montgomery No. 26794, 65 N.E.3d 192, 2016 Ohio 2965 where the Second District Court of Appeals held that the plaintiff's wrongful death claims were not subject to arbitration because, although the decedent's spouse signed the arbitration agreement, "she did so in the capacity of Younce's 'legal representative,' and she did not do so in her individual capacity".

The Fifth District Court of Appeals has also decided the exact issue before this Court. In *McFarren v. Emeritus at Canton*, the court held "**arbitration agreements are not enforceable against non-signing beneficiaries to a wrongful death claim**." 5th Dist. Stark No. 2013CA00040, 2013 Ohio 3900, ¶30 (Emphasis added). The arbitration clause in *McFarren* was signed by the decedent's grandson and power of attorney. *Id.* at ¶6. The decedent later suffered a fall at the subject nursing home and died as a result. *Id.* at ¶7. The defendants sought to compel arbitration and the trial court granted the defendants' motion. *Id.* at ¶8. On appeal, the Fifth District held that

the trial court had erred in staying the wrongful death claims and the survivorship claims. *Id.* at ¶24, 30. The court relied heavily upon the Supreme Court of Ohio's language in *Peters*:

> Rather, the holding in Peters was based on common law principles governing contracts and found that **only signatories to an arbitration agreement are bound by its terms**. This holding comports with the general rule 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." Council of Smaller Ents. v. Gates, McDonald & Co., 80 Ohio St.3d 661, 665, 1998 Ohio 172, 687 N.E.2d 1352 (1998).

Id. at ¶29 (Emphasis added). The court specifically held that arbitration agreements are not enforceable against "non-signing" beneficiaries. *Id.* at ¶30. The court went on to elaborate that none of the beneficiaries were bound by the arbitration clause:

> Here, the only one of Rinker's beneficiaries to sign the arbitration agreement was Gerber. However, Gerber did not sign the arbitration agreement in his individual capacity, but signed as the purported "representative" of Rinker. Pursuant to Peters, the arbitration agreement in the instant case, as it pertains to the wrongful death claim, is not enforceable against Rinker's beneficiaries.

Id.

In the present case, John Gamble clearly singed under the line entitled "REPRESENTATIVE". John Gamble did not sign the agreement under "RESIDENT". Furthermore, Section IV of the Admissions Agreement, which pertains explicitly to arbitration, states "The Resident and/or Representative **on behalf of the Resident** agree that any dispute with the Facility relating to medical and other services rendered for any condition, ... shall be subject to binding arbitration." (Emphasis added). Therefore, the agreement explicitly states that the Representative, John Gamble, was entering into an agreement **"on behalf of the Resident"** and not in his individual capacity.

Defendants, by and through their Civil Rule 30(B)(5) representative testified that John

Gamble did not sign the Admissions Agreement in an individual capacity, but as Janet Gamble's representative. Defendants have offered no explanation for how John Gamble could be bound by an agreement which he did not sign in an individual capacity. Defendants' argument that John Gamble is bound by the terminated arbitration clause must fail.

Not only is John Gamble not personally bound by the terminated arbitration clause, but he was not capable of binding Janet Gamble's other next-of-kin to the arbitration clause. John Gamble was never appointed as the Personal Representative of Janet Gamble's Estate. At the time he signed the arbitration clause Janet Gamble was alive. John Gamble did not have any authority to bind any of Janet Gamble's next-of-kin at that time.

As the court stated in *McFarren v. Emeritus at Canton*, "arbitration agreements are not enforceable against non-signing beneficiaries". 5th Dist. Stark No. 2013CA00040, 2013 Ohio 3900, ¶30. This is consistent with the Supreme Court of Ohio's decision in *Peters*, that arbitration "may not be imposed on the unwilling" and to allow otherwise "would be unconstitutional, inequitable, and in violation of nearly a century's worth of established precedent." *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 138-39, 2007 Ohio 4787, 873 N.E.2d 1258 (2007). While "[i]njured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves." *Id.* at 138.

John Gamble had absolutely no authority whatsoever to bind any of Janet Gamble's next-of-kin to any agreement when he signed the now terminated arbitration clause. The fact that John Gamble was Janet Gamble's guardian is irrelevant to her wrongful death claims. As her guardian, John Gamble did not have the authority to bind Janet Gamble's next of kin any more than Janet Gamble did. Janet Gamble could not have bound her next-of-kin to the arbitration clause because

one cannot release claims that "accrue in favor of persons other than themselves." Nor could John Gamble. John Gamble held "no right to those claims" held by Janet Gamble's next-of-kin. Neither John Gamble, nor any of Janet Gamble's other children, were signatories to the terminated arbitration clause. There is no question that they are not subject to the terminated Admissions Agreement.

Defendants have offered no support whatsoever for their assertion that John Gamble, could somehow bind every one of Janet Gamble's next-of-kin. Their argument cannot be reconciled with the holding and language of *Peters*, and the subsequent cases which have relied upon it.

E. The arbitration clause is unenforceable because it is unconscionable.

Arbitration provisions may also be challenged in court under "such grounds as exist at law or in equity for the revocation of a contract". *Miller v. Household Realty Corp.*, 8th Dist. Cuyahoga No. 81968, 2003 Ohio 3359, ¶36. "Unconscionability is a ground for revocation of an arbitration agreement." *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 67, 2009 Ohio 2054, 908 N.E.2d 408 (2009), 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 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). "When a party attacks the arbitration provision by asserting that the provision itself is unconscionable, the enforceability of the arbitration provision is an issue for the Court." *Miller* at ¶38.

"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).

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.

> 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; *see also Small v. HCF of Perrysburg*, 159 Ohio App.3d 66, 823 N.E.2d 19 (6th Dist.) (holding an arbitration clause was procedurally unconscionable because of the resident's stress level, the absence of any explanation of the agreement, and the resident did not have an attorney present).

Of note, the court relied upon the deposition of the admissions coordinator in making their determinations:

> Additionally, the deposition of Darlene Stincic, the admissions coordinator, demonstrates that although she read the agreement to decedent, she had difficulty explaining what arbitration is, how it works, and what rights he was relinquishing by signing the arbitration agreement. Under the circumstances, we conclude the trial court did not err in finding the agreement was procedurally unconscionable.

Id. at ¶40.

In terms of bargaining power, Defendants are sophisticated individuals and corporations who

own and operate nursing homes. The Gamble family was going through the highly stressful and emotional process of admitting their mother into a nursing home. Defendants held all of the bargaining power. The same is true when it comes to relevant experience and business acumen. Appellees employed admissions personnel whose job it was to meet with new residents and discuss admissions paperwork. Defendants drafted and had total control over the Admissions Agreement, including the arbitration clause. It is clear that Defendants had all of the relevant experience and business acumen.

No one in the Gamble family altered the arbitration clause. In fact, the Civil Rule 30(B)(5) representative testified that she has never had someone refuse to sign the Admission Agreement or arbitration clause, nor has anyone ever altered the document. The arbitration clause in this case was a boilerplate contract that was presented to the Gambles on a take it or leave it basis. The arbitration clause was drafted by Defendants, in its entirety, to help protect Defendants from liability.

There is no question that the Defendants, the much stronger parties in this case, knew that the Gambles were unable to reasonably protect their interests by reason of their inability to understand the concept of arbitration. The Civil Rule 30(B)(5) representative testified that she did not discuss the specifics of arbitration, with the Gambles, including how it compares to litigation:

Q. Okay. Do you know how long an arbitration takes?
A. No.
Q. Did you talk to the Gambles at all about the alternative to arbitration?
A. No.
Q. Didn't say anything to them about litigation?
A. No.
Q. Did you talk to them about any of the fees associated with litigation?

22 A. No.

(Page 35:11 to 35:22)

Janet Gamble did not receive any benefit from the arbitration clause. The arbitration clause was drafted solely to limit the liability of the Defendants. Accordingly, the process by which the arbitration clause was signed in this case was procedurally unconscionable.

"Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable... 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 v. HCF of Perrysburg*, 159 Ohio App.3d 66, 71, 823 N.E.2d 19 (6th Dist.).

The arbitration clause in this case is part of a larger Admissions Agreement. The fact that the terms of the arbitration clause are not a separate document is enough for this Court to find that the clause is substantially unconscionable, as it violates Ohio law.

In *Manley v. Personacare of Ohio*, 11th Dist. Lake No. 2005-L-2007, 2007-Ohio-343, ¶¶ 59-62, Judge Mary Colleen O'Toole discussed the substantive unconscionability of nursing home arbitration clauses in her dissenting opinion:

> 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.
>
> * * *
>
> 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.

The arbitration clause at issue was buried on page 8 of a 14 page Admissions Agreement that was presented to the Gamble family the morning that they were admitting their mother to the subject nursing home.

The arbitration clause at issue in this case is a classic contract of adhesion. Defendants were in complete control of the process from beginning to end. There is nothing in the arbitration clause referencing the possibility of negligence or abuse. There is not a section discussing the benefits of a jury trial. There is nothing discussing the specific rules that will be applied to the arbitration of potential claims. The arbitration clause is also absent of any specific rules that will be applied to the arbitration of claims. The arbitration panel cannot enforce a subpoena. These panels cannot force third parties to submit to a deposition, nor hold a party in contempt. The clause in question requires the party requesting arbitration to pay all arbitration costs. There is nothing in the clause which advises 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.

As outlined above, the arbitration clause in question does not conform to industry standards

because it does not contain all of the necessary requirements of R.C. §2711.23, including the requirement that it state that "the arbitration expenses shall be divided equally between the parties to the agreement" and that the agreement must be "separate from any other agreement, consent, or document."

The arbitration clause in this case was signed before Janet Gamble or 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. There is no question that the arbitration clause is substantively unconscionable, as well as procedurally unconscionable.

F. This Court should sanction Defendants and their counsel for pursing this frivolous Motion to Stay and Compel/Enforce Arbitration.

Plaintiff's counsel has sent multiple letters and e-mails to Defendants' counsel explaining that Defendants have no good faith basis to seek to compel arbitration in this case. Within that correspondence, Plaintiff's counsel pointed out that Page 8, Section IV, Paragraph C of the Admissions Agreement explicitly stated that the entire agreement automatically terminated upon Janet Gamble's death - and that Janet Gamble died on February 27, 2017.

Plaintiff's counsel further explained that if Defendants continued to pursue their Motion to Stay Proceedings and Compel/Enforce Arbitration, that Plaintiff's counsel would have no choice but to seek sanctions, including attorney fees incurred in defending against Defendants' frivolous Motion.

Defendants counsel has refused to withdraw their Motion to Stay.

Given the fact that the Admissions Agreement unequivocally terminated on February 27, 2017, Defendants and their counsel should be sanctioned for filing a baseless Motion, which was

clearly filed solely for the purpose of delaying this case.

Ohio Civil Rule 11 states in pertinent part (emphasis added):

> The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; **that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.** If a document is not signed or is signed with intent to defeat the purpose of this rule, **it may be stricken as sham and false and the action may proceed as though the document had not been served.** For a **willful violation of this rule, an attorney or pro se party**, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, **including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule.**

Numerous court of appeals have upheld the imposition of sanctions when a party files a motion or pleading with knowledge that it cannot be supported. *First Fed. Bank of Ohio v. Angelini*, 3rd Dist. Crawford No. 3-11-16, 2012 Ohio 2136 (holding the trial court properly imposed sanctions when the defendants filed counterclaims that were not recognized by Ohio law, were "based upon a legal nullity" and when counsel's actions were "unwarranted, willful, and frivolous"); *Rust v. Harris-Gordon*, 6th Dist. Lucas No. L-03-1091, 2004 Ohio 1636 (holding the trial court properly imposed sanctions pursuant to Civil Rule 11 when a party continued to pursue a claim which he had previously been informed was not viable); *Sickle v. Yeager*, 11th Dist. Trumbull No. 2015-T-0096, 2016 Ohio 4740 (affirming trial court's imposition of sanctions when appellants' motion "had no basis in law or fact.").

The purpose of Civil Rule 11 "is to deter pleading and motion abuses; it is to assure the court that the pleading or motion was filed in good faith with sufficient grounds to support it. If a court determines that a pleading or motion was filed to defeat this purpose, it may strike the document". *Woods v. Savannah Foods & Industries*, 6th Dist. Lucas No. L-92-160, 1993 Ohio App. LEXIS

1151, *20 (Feb. 26, 1993), citing *Stevens v. Kiraly*, 24 Ohio App.3d 211, 213, 494 B.E.2d 1160 (9th Dist 1985).

There is no "good ground" to support Defendants' Motion to Stay. Defendants and their counsel were in possession of the entire Admissions Agreement at the time they filed their Motion to Stay, as it was attached to their Motion and had previously been produced to Plaintiff's counsel. That Admissions Agreement clearly included the self-termination clause.

Plaintiff's counsel has written letters and e-mails to Defendants' counsel trying to convince Defendants' counsel to withdraw their frivolous motion without involving the Court and without any sanctions. Defendants had the ability to withdraw their Motion to Stay following the Civil Rule 30(B)(5) deposition, during which their representative confirmed that the termination clause applies to the entire Admissions Agreement.

Defendants' counsel tried to lead the Civil Rule 30(B)(5) deponent to change her prior testimony and to testify that the Admissions Agreement says something that it clearly does not say.

The fact that Defendants are still pursuing their Motion to Stay and Compel/Enforce Arbitration after receiving Plaintiff's counsel's correspondence, and after the Civil Rule 30(B)(5) deposition, is evidence that Defendants and their counsel are pursuing their motion - not because it is meritorious nor because they have any hope of ultimately prevailing with the motion - but because they are seeking a delay of this meritorious case so their clients can avoid being held accountable for as long as possible. This Honorable Court should not allow Defendants' counsel to succeed.

The termination clause is not vague. It is crystal clear. The entire Admissions Agreement, including the arbitration clause, terminated upon Janet Gambles death, one (1) year prior to Plaintiff filing his Complaint.

The decision granting or denying a motion to compel arbitration is a final appealable order. *Strader v. Magic Motors of Ohio, Inc.*, 5th Dist. Stark No. 2006CA00376, 2007 Ohio 5358. Regardless of whether this Court denies or grants Defendants' frivolous Motion to Stay, either party will have the right to appeal that decision to the Seventh District Court of Appeals. The party who does not prevail in the Court of Appeals could then attempt to appeal that decision to the Supreme Court of Ohio. Therefore, by filing their Motion to Stay and Compel/Enforce Arbitration, Defendants have essentially ensured that this case will be subject to at least an eighteen (18) month delay, **for absolutely no reason**. Such a long delay will only prejudice Plaintiff. During that delay, witnesses' memories will fade, documents will be misplaced, witnesses will move and become harder if not impossible to locate. Janet Gamble's family should not be forced to incur such a long delay in their pursuit of justice and accountability, considering there is no question that there is not an enforceable agreement in this case.

Defendants and their counsel clearly violated Civil Rule 11. Therefore, this Court is well within its right to impose sanctions upon Defendants and their counsel.

"A trial court has broad discretion in determining what sanction, if any, is to be imposed for violating [Civil Rule 11]." *Rust v. Harris-Gordon*, 6th Dist. Lucas No. L-03-1091, 2004 Ohio 1636; See also *Nancy Lowrie & Assocs. v. Ornowski*, 8th Dist. Cuyahoga No. 100694, 2014 Ohio 3718.

Civil Rule 11 explicitly provides that if a document is signed "with intent to defeat the purpose of this rule, it may be stricken as sham and false". The purpose of Civil Rule 11 is to "deter pleading and motion abuses" and " to assure the court that the pleading or motion was filed in good faith with sufficient grounds to support it." *Woods v. Savannah Foods & Industries*, 6th Dist. Lucas No. L-92-160, 1993 Ohio App. LEXIS 1151, *20 (Feb. 26, 1993), citing *Stevens v. Kiraly*, 24 Ohio

App.3d 211, 213, 494 B.E.2d 1160 (9th Dist 1985).

In *Kaufman v. Young*, 8th Dist. Cuyahoga No. 105761, 2017 Ohio 9179, the Eighth District Court of Appeals upheld a trial court's decision to strike a party's motion which was willfully misleading. The defendant in Kaufman had filed a reply brief which made material misrepresentations in the case law which it cited. *Id.* at ¶15. The trial court then granted the plaintiff's motion to strike the defendants reply brief. *Id.* On appeal, the Eighth District stated:

> [W]e find no abuse of discretion in the trial court's decision to strike the Youngs' reply brief or to deny their request that their reply brief be reinstated. In sum, the propositions for which they cited *Cavoto* and *Pitcher* could be deemed misleading. Although the court could have ignored the Youngs' arguments relative to the two cases, it was within its discretion to strike the reply brief altogether and we decline to second-guess its decision.

Id. at ¶31.

IV. Conclusion.

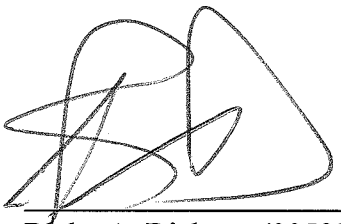
Given the fact that Defendants' Motion was filed solely to delay this case, the most appropriate sanction would be to strike Defendants' Motion to Stay and Compel/Enforce Arbitration. If this Court rules on Defendants' Motion to Stay, that decision will be appealed and an unnecessary and extensive delay will ensue. The **only** way to prevent Defendants from benefitting from the filing of their frivolous Motion is for this Court to strike their Motion. This Court should not tolerate such an abuse of process by Defendants and their counsel.

Plaintiff respectfully requests that this Honorable Court strike Defendants' Motion to Stay and Compel/Enforce Arbitration, as it was clearly filed in violation of Civil Rule 11.

Plaintiff further requests that this Honorable Court sanction the Defendants and their counsel in the amount of $500.00.

If this Court does not strike Defendants' Motion to Stay, Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion to Stay.

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

By: 

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E-Mail TSerri@TheDicksonFirm.com

Attorneys for Plaintiff David Gamble, as the Personal Representative of the Estate of Janet Gamble, (deceased).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via electronic mail, this **10th day of October, 2018**, to the following:

Thomas P. Mannion, Esq.
Ryan K. Rubin, Esq.
LEWIS BRISBOIS BISGAARD & SMITH LLP
1375 E. 9th Street, Suite 2250
Cleveland, Ohio 44114
Tom.Mannion@LewisBrisbois.com
Ryan.Rubin@LewisBrisbois.com

Attorneys for Defendants Valley Oaks Care Center, Selfridge Leasing, LLC, Eli Gunzberg, Eli M. Gunzberg Irrevocable Trust, and Frank Gunzberg 2015 Succession Trust.

By: _____
Blake A. Dickson (0059329)
Danielle M. Chaffin (0093730)
Tristan R. Serri (0096935)

Attorneys for Plaintiff David Gamble, as the Personal Representative of the Estate of Janet Gamble (deceased).

Admission Agreement

I. PARTIES

This Agreement is made and entered into this 4 day of november 2015 by and between, **Selfridge Leasing, LLC d/b/a Valley Oaks Care Center** ("Facility"), Janet Gamble ("Resident"), and/ or John Gamble ("Representative"), if applicable. By signing this Agreement, the Representative is certifying that he/she: (1) has legal access to and agrees to make payment from the Resident's income, assets or resources, including Social Security, pension or retirement funds, annuities, insurance, etc., for charges incurred by the Resident for services performed by Facility or on the Resident's behalf by any other person or company for which the Resident is responsible for payment through Facility billing; (2) has an interest or responsibility in the Resident's welfare; and (3) has identified himself or herself to Facility as the person responsible for exercising the rights of the Resident if and when the Resident is mentally and/or physically incapable of exercising such rights on his/her own behalf.

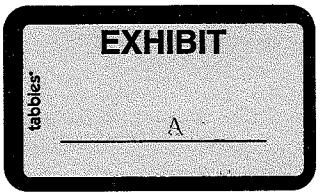
II. SERVICES

A. **Basic Services.** Facility will provide room, board, laundry, housekeeping, social activities and general nursing services as required by law (collectively, the "Basic Services") to the Resident. Basic Services do not include special duty nursing care, special equipment, therapy, medications, guest meals, laboratory and x-ray services, medical supplies, personal comfort items, beauty/ barber shop services, and miscellaneous personal services.

B. **Additional Services.** In addition to the basic services, Facility will provide additional, non-routine services and supplies, such as pharmacy and oxygen ("Additional Services") in accordance with the orders of the Resident's attending physician and/ or upon the Residents request or consent.

C. **Services of Other Providers.** The Resident may receive services from outside providers in Facility on condition that the outside provider is properly licensed and certified under the law, complies with all applicable government rules and Facility policies, and enters into an agreement to provide services with Facility, if applicable.

D. **Purchase of Medications from an Outside Provider.** It is understood that the Resident has a free choice of a provider pharmacy as long as such pharmacy adheres to the applicable State specification and regulations for long-term care. The pharmacy of choice needs to provide twenty-four (24) hour emergency service. It is the responsibility of the pharmacy and/ or the Representative to have the medications delivered to the Facility when the Facility contracted pharmacy is not utilized. The Resident understands that if a delay



occurs in ordering medications from _____ (insert name of outside pharmacy desired), the Facility reserves the right to order from the Facility contracted pharmacy as an emergency measure. The Resident and/ or Representative understand they will be charged for any drugs or medication at the Facility's contracted pharmacy rates.

III. FINANCIAL OBLIGATIONS

A. Payment Source. Resident and Representative agree that charges incurred by the Resident for his/her stay at Facility will be paid from the following source (please initial appropriate payment source):

1. _____ Private Pay

2. _____ Private Pay until approved by Medicaid

3. _____ Medicaid

4. ✓ Medicare, if eligible, and then followed by:
   a) _____ Private Pay
   b) _____ Medicaid

5. _____ Managed Care (please provide name of plan: _____), if eligible, and followed by:
   a) _____ Private Pay
   b) _____ Medicaid

If the Resident or Representative requests a change in payor source, Facility may request a copy of the Resident's current and three (3) prior years' Federal income tax returns for review.

B. Basic Fee. Resident and/or Representative shall pay in advance for all Basic Services and supplies provided by Facility, such as room, board, nursing, laundry, housekeeping, social and activity services, as set forth in the attached rate schedule (Schedule 1).

C. Services Not Covered by the Basic Fee. Resident and/or Representative agree to pay all charges incurred for Resident's care that are not covered by the Basic Fee upon receipt of an invoice, as set forth in the attached Schedule 1.

D. Changes to Fees. Facility may change its fees subject to thirty (30) days' written notice to Resident and/or Representative.

E. Services of Other Providers. The Resident may receive services from outside providers while residing at Facility so long as the outside provider is properly licensed and certified under the law, complies with all applicable

government rules and Facility's policies, and enters into an agreement to provide services with Facility, if applicable. The Resident and/or Representative agree to be responsible for charges incurred by outside providers.

F. **Assignment of Benefits.** The Resident and/or Representative hereby direct all payments made on Resident's behalf by third party payors, including payments from Medicare and Medicaid, to be made directly to Facility for any services furnished by Facility. If Resident is or will be a Medicaid recipient, then in addition, Resident and/ or Representative hereby direct all resource payments made to the Resident or on Resident's behalf, including payments from the Social Security Administration and pension benefits, to be made directly to Facility. The Resident and/or Representative agree to execute any forms that are necessary to implement this assignment of benefits. As of March 1, 2013, all federal benefit payments, including social security, supplemental security income, railroad retirement, civil (non-military) retirement, or VA (compensation or pension only), must be made electronically via direct deposit to a bank or credit union account or a Resident Fund Account.

G. **Resident Fund Account.** The Resident and/ or Representative have the option of authorizing Facility to safeguard and administer a Resident Fund Account on behalf of the Resident by signing the Resident Fund Authorization Agreement. Deposits and withdrawals from such account may be made during regular business hours. A quarterly account statement will be provided to the Resident and/ or Representative. If the Resident transfers to another facility, discharges, or passes away, the account will be closed and a final accounting with any remaining funds will be given to the Resident and/ or Representative. If the Resident is covered by Medicaid and they pass away, any money in the account must be returned to the state unless it is utilized to pay funeral expenses. Any federal benefit payments must be made electronically via direct deposit.

H. **Obligation to Keep Facility Informed.** The Resident and/or Representative will inform Facility as soon as possible if: (1) the Resident has decided to transfer any property, money or stock to another person or entity; (2) a decision has been made to have the Resident change insurance companies or managed care programs; or (3) the Resident inherits any property or money, or receives property or money as a gift. The Resident and/or Representative agree to provide Facility with an accurate financial statement of the Resident's income and resources upon request by Facility.

I. **Financial Obligation of Representative.** Except as specifically provided otherwise in this Agreement, or as agreed to by Personal Representative, all financial obligations in this Agreement are the Residents. By signing this Agreement, Representative has represented to the Facility that they have legal access to Resident's income, assets and resources, including but not limited to social security, pension or retirement funds, annuities, insurance, bank accounts, and mutual funds.

J. **No Requirement of Third Guarantee.** Nothing in this Agreement shall be construed to require that the Representative sign this Agreement as a condition of admission or that the Representative is in any way personally liable for payment for services rendered by Facility to the Resident; provided, however, that if the Resident does not have the capacity to understand this Agreement (as determined by the Medical Director or the Resident's attending physician at the time of admission), then the Representative must execute this Agreement and would be liable for services rendered to the Resident by Facility to the extent of the Resident's income, assets or resources to which the Representative has legal access. Representative shall be obligated to pay to Facility from the Representative's own resources, as damages, an amount equivalent to : (1) any payments or funds of the Resident that are available to pay for the Resident's care, which the Representative withholds, misappropriates for personal use, or otherwise does not turn over to Facility for payment of the Resident's financial obligations under this Agreement; or (2) unpaid charges due to Facility as a result of the Representative's failure to cooperate in the Medicaid application process or redetermination process described below.

K. **Public Assistance.** Facility currently participates in the Medicare and Medicaid programs.

1. **Medicaid Benefits:** The Resident and/or Representative are obligated to notify Facility at the point that the Resident's assets and resources total $ 1500.00 . The Resident and/or Representative are obligated to apply for Medicaid benefits within sixty (60) days of the point in time when the Resident's resources will no longer be sufficient to pay for all of Facility's charges.

   a. The Resident and/or Representative are obligated to make full and complete disclosure regarding all financial resources and income during the Medicaid application process, and to cooperate fully in providing all requested information.

   b. In the event that the Resident's eligibility for Medicaid benefits is denied, interrupted or terminated due to the failure of the Resident and/or the Representative to cooperate in the application or determination process, the Resident shall pay all applicable charges for services and supplies rendered. The Resident and/or Representative hereby grant to Facility an irrevocable Power of Attorney, coupled with an interest, to take any and all necessary action on the Resident's behalf with the applicable government agency should the Resident and/or Representative fail to timely submit the necessary information to the agency in order to make a determination of Medicaid eligibility.

c. The Resident and/or Representative understand that merely applying for financial assistance from Medicaid does not mean that the Resident will receive Medicaid.

d. While the Resident's application is being reviewed for Medicaid eligibility, the Resident and/or Representative agree to assign or continue to pay the resource amount that the Resident will be billed from Facility (from the Resident's resources).

e. The Resident and/or Representative understand the following with regard to the Medicaid application process: (i) when applying for Medicaid, the government will examine all transfers of property and resources that the Resident has made for the previous three (3) years, and all trusts created for the past five (5) years, to determine if any improper transfers were made; (ii) the government presumes that any transfer of property or resources in the look-back period is improper if the transfer made the Resident Medicaid-eligible, divested the Resident of proceeds that would be available if the property were sold, or if the Resident transfers income-producing property or resources; and (iii) if the Resident makes an improper transfer, then the Resident will not be eligible to receive Medicaid assistance for a designated period of time. Examples of improper transfers could include: the transfer of the Resident's house, car and other personal property to certain persons, the transfer of the Resident's bank accounts, stocks or bonds, the transfer of real estate, and the creation of certain trusts.

f. The Resident and/or Representative recognize that if the Resident is not approved for the Medicaid program, he/she is financially responsible for his/her care and any other services, supplies, items or goods provided to the Resident by Facility at any time, including for services provided while the Medicaid application was pending.

g. The Resident and/or Representative understand that if the Resident is approved for Medicaid, then the law requires that all of the Resident's income, assets, and resources, including but not limited to, his/her Social Security check, his/her pension or retirement fund, his/her annuities or insurance, revenues from the sale of his/her house, must be used to pay for the Resident's care at Facility. Some of the Resident's resources may be exempted if he/she has a spouse who still lives at home.

2. **Medicare Part A and Medicare Part B Benefits.** To the extent that the Resident is a beneficiary under either Medicare Part A or Medicare Part B insurance and the nursing services or ancillary services or supplies ordered by a physician are covered by such insurance, Facility or other provider will bill the charges for covered services or supplies to the Medicare program. The Resident is responsible for and shall pay any coinsurance or deductible amounts under Medicare Part A or Part B insurance. Facility shall accept payment from the Medicare intermediary or carrier as payment in full only for those services deemed to be covered in full under the Medicare Part A or Part B program. Services not covered by Medicare are identified in the attached rate schedule (Schedule 2).

Once approved for Medicare or Medicaid, the Resident is responsible for maintaining continued eligibility through compliance with all applicable State and Federal rules, including prompt submission of information requested by the government or Facility.

L. **Private Pay Residents.** Resident and/ or Representative shall pay in full and in advance each month, a sum equal to one month of Basic Rate charges as set forth in the attached Rate Schedule (Schedule 1). In addition, Resident and/ or Representative shall pay in full all charges for Additional Services incurred in the preceding month for which no advance payment was received by the Facility, as well as any applicable co-payments for therapy and other services incurred during the preceding month that are billed under Part B of the Medicare program, upon receipt of an invoice from Facility. If the Resident is covered by a health insurance plan, health maintenance organization or other third party payer, including without limitation applicable co-insurance and deductible amounts, and other amounts not timely paid by the third party payer, except and to the extent prohibited by law. In the event insurance payment is not made directly to the Facility, Resident and/ or Representative is responsible to ensure full payment of any and all applicable coinsurance is made to the Facility.

M. **Managed Care Residents.** Resident and/ or Representative are responsible to pay all services and supplies that the Resident receives. If arrangements are made by Resident and/ or Representative to have certain of those services and supplies covered by a health insurance plan, health maintenance organization or other third party payer (other than Medicare or Medicaid), Resident and/ or Representative shall pay all costs not covered by such third party payer, including, without limitation, all applicable co-insurance and deductible amounts, and other amounts not timely paid by the third party payer in accordance with this Agreement, except and to the extent not prohibited by law.

N. **Late Charges and Cost of Collection.** Any charge not paid by Resident and/or Representative within fifteen (15) days of its due date shall be subject to a late charge equal to one and one-half percent (1-1/2%) of the amount due per month, payable on demand, to cover Facility's expenses in connection with administering and collecting same, and such payment shall not constitute a waiver of Facility's other rights and remedies under this Agreement. In the event that Facility initiates any legal action or proceedings to collect payments due from the Resident under this Agreement, the Resident and/or Representative shall be responsible to pay all attorney's fees and costs incurred by Facility in pursuing the enforcement of the Resident's financial obligations under this Agreement.

O. **Refund.** If this Agreement is terminated, Facility will refund on a pro-rata basis to the Resident that portion of the pre-paid fee that is not owed for services rendered. Resident personal fund balances held by Facility will be refunded in accordance with State law.

P. **Denials of Coverage and Non-Covered Charges.** The Resident and/or Representative remain responsible for charges for services that are not covered by third party payors, including any governmental program, retroactive to the date of the initial delivery of services.

Q. **Disputed Debts.** Resident and/or Representative are responsible for payment in full of all amounts due and owing to Facility. However, if the Resident or Representative disputes a debt, then all communications, including an instrument tendered as full satisfaction of a debt, are to be sent directly to the Administrator of Facility.

R. **Indemnification.** The Resident and/or Representative is responsible to pay for any damages or injuries caused by the Resident to Facility's property, residents, staff or other persons, and shall indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from the Resident's actions or omissions.

S. **Medications.** Resident shall be charged for the costs related to his/her refusal to use generic medications, supplies and/or treatments as selected by Facility.

IV. TERMINATION

A. **Term.** This Agreement shall continue until it is terminated as specified in Sections IV.B. or IV.C. of this Agreement

B. **Termination by Facility.** This Agreement may be terminated by Facility upon any of the following events, subject to State and Federal transfer and discharge provisions: (1) the Resident's/Representative's failure to make payment in accordance with Article III of this Agreement, subject to Section IV.E.

below; (2) discharge from Facility; (3) the Resident's continued stay jeopardizes the health, safety or welfare of the Resident or other residents of Facility; or (4) Facility's license or certification has been revoked, renewal denied, or Facility is voluntarily closed.

C. **Termination by Resident.** This Agreement may be terminated by the Resident and/or by Representative at any time; however, Facility requests that the Resident and/or Representative provide it with at least thirty (30) days' advance notice so that it can conduct proper discharge planning. This Agreement shall automatically terminate upon the death of the Resident.

D. **Payment of Accrued Charges.** All accrued charges for which the Resident is personally responsible must be paid in full upon invoice.

E. **Inability to Pay.** This Agreement shall not be terminated solely by reason of the Resident's financial inability to pay for services. Facility will provide services for the life of the Resident without regard to the Resident's ability to pay or to continue payment for the full cost of services, **PROVIDED, HOWEVER**, nothing contained herein shall be interpreted or applied to preclude or limit Facility from exercising its right to terminate the Agreement if:

1) the Resident has financial need and refuses to apply for any and all applicable financial assistance; and/or

2) the Resident refuses to pay for services for which the Resident has contracted, even though the Resident has sufficient resources to do so.

IN ADDITION, Resident and/or Representative, on behalf of the Resident, agree not to willfully divest or transfer the Resident's assets, or to in any way impair the Resident's ability to meet his/her financial obligations hereunder. Further, should it be determined that Resident is financially unable to pay for services, then, subject to any claim by a governmental agency, the Resident and Representative, on behalf of the Resident, agree to convey and transfer to Facility any and all property thereafter inherited by the Resident, in an amount equal to the total subsidy and/or unpaid balance received by the Resident from Facility.

V. RESOLUTION OF DISPUTES/ARBITRATION

A. **Nonpayment of Charges.** Any controversy, dispute, disagreement or claim of any kind arising out of, or related to this Agreement, or the breach thereof, regarding nonpayment by Resident or Representative for payments due to the Facility shall be settled exclusively by binding arbitration as set forth in Section V.D. below.

B. **Resident's Rights.** Any controversy, dispute, disagreement or claim of any kind arising between the parties after the execution of this

Agreement in which Resident or a person on his/her behalf alleges a violation of any right granted Resident in a State or Federal statute shall be settled exclusively by binding arbitration as set forth in Section V.D. below.

C. **All Other Disputes.** Any controversy, dispute, disagreement or claim of any kind arising out of, or related to this Agreement, or the breach thereof, shall be settled exclusively by binding arbitration as set forth in Section IV.D. below. This arbitration clause is meant to apply to all controversies, disputes, disagreements or claims including but not limited to, all breach of contract claims, all negligence and malpractice claims, all tort claims, and all allegations of fraud in the inducement or requests for rescission of the contract.

D. **Conduct of Arbitration.** The Resident's agreement to arbitrate disputes is not a condition of admission. The Resident and/or Representative on behalf of the Resident agree that any dispute with the Facility relating to medical and other services rendered for any condition, including any services rendered prior to the date this agreement was signed, and any dispute including but not limited to diagnosis, treatment, or care of the Resident, shall be subject to binding arbitration. Should the Resident and/or Representative acting on behalf of the Resident agree to binding arbitration of disputes by signing this Agreement, then Facility, in reliance upon this agreement to arbitrate disputes, will submit to binding arbitration as follows: Any arbitration conducted pursuant to this Article V shall be conducted at the Facility in accordance with the National Arbitration Forum ("NAF") Code of Procedure for Arbitration or other such nationally recognized forum and/or procedure for arbitration. The award rendered by the arbitrator(s) shall be final, and judgment on the award shall be entered as a judgment in accordance with applicable law in any court having jurisdiction thereof. The parties understand that arbitration proceedings are not free and that any person requesting arbitration will be required to pay a filing fee to NAF or any other nationally recognized arbitration organization, and any other expenses associated with arbitration. The issue of whether a party's claims are subject to arbitration under this Agreement shall be decided through the NAF or any other nationally recognized arbitration process. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective. If you would like information regarding NAF's arbitration process, you may contact NAF at (651) 631-1105 or (800) 474-2371, or at P.O. Box 50191, Minneapolis, MN 55405.

The Resident and/or Representative on behalf of the Resident shall have 60 days from the signing of this Agreement, and the attached Arbitration Clause, to revoke their decision to settle disputes through binding arbitration as outlined in the above paragraphs.

V. MISCELLANEOUS

A. Limitations of Facility. Facility shall not be responsible for the care and well-being of the Resident when the Resident leaves Facility's premises. Procedures established by Facility for signing in and out of the premises shall be followed by the Resident, his/her relatives, visitors, and friends. Facility shall exercise reasonable care toward the Resident as his/her known condition requires. However, the parties agree that Facility is not an insurer of the Resident's welfare, safety or his property. The parties agree that Resident will exercise due care to protect himself/herself from harm and theft. There are no actual or intended third party beneficiaries of this Agreement other than those persons or entities whose names are signed below.

B. Resident's Records. Resident and/or Representative authorize: (1) Facility to make the Resident's personal and medical records, and copies thereof, prepared and maintained by Facility, available to Facility's employees, agents, attorneys and consultants; (2) the release of the records prepared and maintained by Facility to any other health care provider from whom the Resident receives treatment, to third party payors of health services, and to any managed care organization in which the Resident may be enrolled; (3) the release to Facility of records prepared or maintained by any third party payor of health care services pertaining to health care services rendered to the Resident by Facility; and (4) the release to Facility of any records prepared or maintained by any health care provider from which the Resident has received services. Resident's records shall otherwise remain strictly confidential and shall only be released in accordance with the law. Resident and/or Representative releases Facility from any liability for damages or other loss as the result of disclosure of Resident's records in accordance with this provision.

C. Waiver. The failure of Facility in any one or more instances to insist upon strict compliance by the Resident and/or Representative with, or its waiver of any breach of, any of the terms or provisions of this Agreement, shall not be construed to be a waiver by Facility of its rights to insist upon strict compliance by the Resident and/or Representative with all of the terms of this Agreement.

D. Partial Illegality. This Agreement shall be construed in accordance with the laws of the State of Ohio, and the county in which Facility is located shall be the sole and exclusive venue for any dispute between the parties, including, but not limited to, litigation, special proceedings, or other proceedings between the parties that may be brought, arise out of, or in connection with or by reason of this Agreement. If any portion of this Agreement is determined to be illegal or not in conformity with applicable laws and regulations, such part shall be deemed to be modified so as to be in accordance with such laws and regulations, and the validity of the balance of this Agreement shall not be affected.

E. **Amendments.** Facility is not liable for, nor bound in any manner by, any statements, representations or promises made by any person representing or purporting to represent Facility, unless such statements, representations or promises are set forth in writing. Modification of this Agreement may be made only by agreement of both/all the parties in writing; provided, however, Facility reserves the right to amend the Agreement at any time in order to conform to changes in federal, state or local laws or regulations.

F. **Representations of Resident and/or Representative.** The Resident and/or Representative represent(s) that the information contained on the application forms, financial statements and health history are true to the best of his/her/their knowledge and belief. Resident and/or Representative understand that Facility has relied upon such information and agree that if any of the facts were misrepresented or any important information was left out, then Facility may be forced to discharge the Resident.

G. **Incorporation of Other Documents.** The following documents are hereby incorporated into this Agreement by reference: All attached rate schedules and all of Facility's policies governing the Resident's responsibilities, as may be amended from time to time by Facility in its sole discretion; all application forms, financial statements, and medical records provided to Facility as part of the Resident's application for admission to Facility; the Admission Authorizations; and all documents that the Resident and/or Representative signed or received during the admission process to Facility.

H. **Personal Belongings.** Facility is not responsible for the loss of any personal property owned by Resident (including, but not limited to, hearing aids, eye glasses and dentures), relatives, visitors or friends, unless delivered to the custody of administration for safekeeping and acknowledged by receipt. Facility discourages any items of personal or monetary value being brought into Facility. Upon discharge from Facility, Resident and/or Representative should gather the Resident's personal belongings quickly. It is not Facility's responsibility to ensure the storage or safekeeping of Resident's personal items.

I. **Nondiscrimination.** Facility offers its services to persons whose needs cab be met by Facility without regard to race, creed, sex, age, religion, national origin, handicap or disability.

J. **No Assignment.** No assignment of this Agreement or the rights and obligation hereunder shall be valid without the specific written consent of both parties hereto, provided, however, that this Agreement may be assigned by Facility to any successor entity operating it, and such assignment shall forever release Facility hereunder.

K. Bed Hold and Leave of Absence.

1. If a Resident's primary pay source is **PRIVATE PAY**, the Facility will automatically hold a Resident's bed at the routine per diem charge pending the Resident's stay in a hospital or any other place outside the Facility, unless the Facility is specifically instructed in writing not to hold the bed prior to the Resident leaving the Facility, by the Resident and/ or Representative, regardless of whether the Resident actually returns to the Facility. The Resident and/ or Representative shall be required to pay all charges incurred if the Facility does not receive the required notice prior to the Resident leaving the Facility. It is the right of each Resident who demonstrates mental and physical capabilities (determined by the Medical Director or the Resident's attending physician at the time of admission) to participate in the Facility's leave of absence program, at any time that is consistent with mature adult judgment and accompanied by a responsible adult.

2. If Resident's primary pay source is **MEDICAID**, and if the state in which the Facility is located does not provide for paid hold/ leave days, the Facility will hold a bed for the Resident up to 30days. If the Resident's absence from the Facility exceeds the days provided during the calendar year or the state does not provide for paid hold/ leave days, the Facility shall not hold the bed and the Resident will be discharged from the Facility effective the first day following the last paid Medicaid hold/ leave or in-house day. Where a Resident's paid leave days for a calendar year have been exhausted, the Resident will be entitled to re-admission to the Facility, if desired, upon the first availability of a bed in a semi-private room, if the Resident: (a) requires the services provided by the Facility; (b) is eligible for Medicaid nursing facility services; and (c) meets all State required Level of Care and Pre-Admission Screen requirements.

3. If Resident's primary source is **MEDICARE** only, the Facility shall not hold the bed unless payment arrangements have been made with the Facility's Administrator prior to the Resident leaving the Facility. Medicare does not pay for Bed Holds, however, Resident may pay privately for a Bed Hold.

THE PARTIES AGREE THAT THEY HAVE HAD AMPLE TIME TO CONSIDER THE ALTERNATIVES FOR REQUIRED CARE AND ARE AWARE THAT THERE ARE OTHER SKILLED NURSING FACILITIES OR COMPARABLE PROVIDERS OF THE CARE REQUIRED WITHIN A REASONABLE DISTANCE THAT HAVE THE CAPACITY TO PROVIDE THE REQUIRED SERVICES.

UPON DUE CONSIDERATION OF THE TERMS OF THIS AGREEMENT, THE PARTIES DO FOR THEMSELVES, THEIR HEIRS, ADMINISTRATORS AND EXECUTORS, AGREE TO THE TERMS OF THIS AGREEMENT IN CONSIDERATION OF FACILITY 'S ACCEPTANCE OF AND RENDERING SERVICES TO THE RESIDENT.

IN WITNESS WHEREOF, the parties, intending to be legally bound, have signed this Agreement as of the date first above written.

RESIDENT:

Signature

Janet Gamble

Print Name

REPRESENTATIVE:

Signature

John Gamble

Print Name

SELFRIDGE LEASING, LLC d/b/a
VALLEY OAKS CARE CENTER

Signature

ARBITRATION CLAUSE

THE PERSON(S) SIGNING BELOW HAVE READ ALL OF THE TERMS OF THIS AGREEMENT, INCLUDING CHAPTER IV, RESOLUTION OF DISPUTES/ARBITRATION, AND HAVE HAD AN OPPORTUNITY TO ASK QUESTIONS REGARDING THOSE TERMS. THE PARTIES UNDERSTAND THAT THIS CLAUSE IS NOT A CONDITION OF ADMISSION, AND THAT BY SIGNING THIS AGREEMENT THEY ARE VOLUNTARILY AGREEING TO WAIVE THEIR RIGHT TO SUE IN A COURT OF LAW AND ARE AGREEING TO ARBITRATE DISPUTES.

THE RESIDENT AND/OR REPRESENTATIVE ON BEHALF OF THE RESIDENT SHALL HAVE 60 DAYS FROM THE SIGNING OF THE AGREEMENT, AND THE ARBITRATION CLAUSE, TO REVOKE THEIR DECISION TO SETTLE DISPUTES THROUGH BINDING ARBITRATION AS OUTLINED IN THE ABOVE PARAGRAPHS.

IN WITNESS WHEREOF, the parties, intending to be legally bound, have signed this Agreement as of the date first above written.

RESIDENT:

Signature

Janet Gamble.

Print Name

REPRESENTATIVE:

John Gamble

Signature

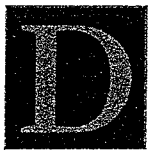
John Gamble

Print Name

SELFRIDGE LEASING, LLC d/b/a
VALLEY OAKS CARE CENTER

Stephanie Ruiz

Signature



The Dickson Firm

September 8, 2018

VIA ELECTRONIC MAIL TOM. MANNION@LEWISBRISBOIS.COM AND RYAN.RUBIN@LEWISBRISBOIS.COM AND ORDINARY U.S. MAIL

Thomas P. Mannion, Esq.
Ryan K. Rubin, Esq.
LEWIS BRISBOIS BISGAARD & SMITH LLP
1375 E. 9th Street, Suite 2250
Cleveland, Ohio 44114

RE: *David Gamble as the Personal Representative of the Estate of Janet Gamble (deceased) v. Valley Oaks Care Center, et al.*
Columbiana County Court of Common Pleas, Case No. 2018 CV 0100
The Honorable Judge Scott A. Washam

Counselors:

I am once again asking that you withdraw your Motion to Stay Proceedings and Compel/Enforce Arbitration.

Page 8, Section IV, Paragraph C of the Admission Agreement clearly states, "This Agreement may be terminated by the Resident and/or by Representative at any time". Janet Gamble hereby terminates the *entire* Admissions Agreement, including the arbitration clause.

Page 8, Section IV, Paragraph C of the Admission Agreement also states, "This Agreement shall automatically terminate upon the death of the Resident." Janet Gamble died on February 27, 2017. Therefore, the entire Admissions Agreement *automatically* terminated on that date.

You previously argued that the arbitration clause was a separate document, based upon the fact that it has its own signature page. The arbitration clause is clearly part of the admission agreement. Even the signature page is marked as page 14 of 14 of the Admissions Agreement.

The Civil Rule 30(B)(5) representative testified that the arbitration clause is part of the Admissions Agreement, and that the entire Admissions Agreement terminates upon the resident's death. Defendants are bound by the testimony of their Civil Rule 30(B)(5) representative.

The entire Admissions Agreement, including the arbitration clause, terminated on February 27, 2017. Defendants cannot seek to enforce a contract which is no longer in effect.

The entire arbitration clause is invalid and unenforceable, as it violates O.R.C. §2711.23(G) because the arbitration clause is contained with the Admissions Agreement, and

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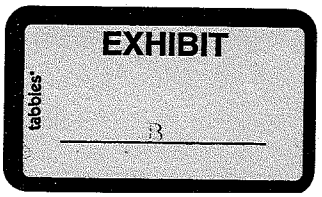
Stop Elder Abuse



is not a separate document.

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

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

The requirements within O.R.C. §2711.23 are not optional. They are mandatory. There is no question that the arbitration clause which Defendants are seeking to enforce is invalid and unenforceable pursuant to R.C. §2711.23, as it is not separate from any other document.

Defendants have no good faith basis to move to compel arbitration or stay this case pending arbitration.

I would prefer that this issue be resolved amicably. As a result, I am asking you to withdraw your Motion to Stay so we can proceed with the merits of this case. If you do not withdraw the Motion to Stay I will seek sanctions against you and your clients. I would sincerely prefer not to do that. Please withdraw the motion.

Thank you for your attention.

Very truly yours,

Blake A. Dickson