IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

Horst Schilling, Deceased, by and through Gisela Schilling, as the Personal Representative of his Estate	)	Case No. 19 CV 000661
	)	Judge Vincent A. Culotta
Plaintiff	)	Plaintiff's Brief in Opposition to the Motion filed by Defendants: Heartland of Mentor; Heartland of Mentor, OH, LLC; HCR Manor Care Services, LLC; HCR IV Healthcare, LLC; Heartland Employment Services, LLC and Martin Allen, asking this Court to forever Stay this Case, as to these Defendants, and to Force this Case to Binding Arbitration.
vs.	)	
Heartland of Mentor, et al.	)	
Defendants.	)	

Now comes Plaintiff Horst Schilling, Deceased, by and through Gisela Schilling, as the Personal Representative of his Estate, by and through her attorneys, Blake A. Dickson, and Tristan R. Serri of The Dickson Firm, L.L.C., and respectfully requests that this Honorable Court Deny the Motion filed by Defendants Heartland of Mentor, Heartland of Mentor, OH, LLC, HCR Manor Care Services, LLC, HCR IV Healthcare, LLC, Heartland Employment Services, LLC and Martin Allen (hereafter referred to as the "Heartland Defendants") asking this Court to permanently and forever stay this case, as to these Defendants, and to force this case to binding arbitration.

I. Introduction.

All of the Heartland Defendants have moved this Court to forever stay this case and to force this case to binding arbitration, forever denying Horst Schilling's family their day in Court. The alleged basis for the Heartland Defendants' motion is a document entitled "VOLUNTARY ARBITRATION AGREEMENT". (A copy of which is attached hereto as Exhibit "A").

The only Defendant who is named in that "Agreement" is Defendant Heartland of Mentor. Heartland of Mentor is a Registered Trade Name. It is registered to Defendant Heartland of Mentor OH, LLC. The remaining Defendants are not named anywhere in the Arbitration Agreement.

Defendant HCR Manor Care Services, LLC is not named anywhere in the arbitration agreement. No one signed the agreement on behalf of Defendant HCR Manor Care Services, LLC. As a result, Defendant HCR Manor Care Services, LLC is not a party to the Arbitration Agreement. There is no basis to grant the Motion to Stay as to Defendant HCR Manor Care Services, LLC.

Defendant HCR IV Healthcare, LLC, is not named anywhere in the arbitration agreement. No one signed the agreement on behalf of Defendant HCR IV Healthcare, LLC. As a result, Defendant HCR IV Healthcare, LLC, is not a party to the Arbitration Agreement. There is no basis to grant the Motion to Stay as to Defendant HCR IV Healthcare, LLC.

Defendant Heartland Employment Services, LLC is not named anywhere in the arbitration agreement. No one signed the agreement on behalf of Defendant Heartland Employment Services, LLC. As a result, Defendant Heartland Employment Services, LLC is not a party to the Arbitration Agreement. There is no basis to grant the Motion to Stay as to Defendant Heartland Employment Services, LLC.

Defendant Martin Allen is not named anywhere in the arbitration agreement. Defendant Martin Allen did not sign the arbitration agreement. As a result, Defendant Martin Allen is not a party to the Arbitration Agreement. There is no basis to grant the Motion to Stay as to Defendant Martin Allen.

The Arbitration Agreement does not comply with O.R.C. §2711.22(A) and as a result it is unenforceable.

Pursuant to the Ohio Supreme Court's decision in *Peters v. Columbus Steel Castings, Co.*, 115 Ohio St.3d 134, 2007 Ohio 4787, 873 N.E.2d 1258 (2007), the wrongful death claims in this case are not stayed by the Arbitration Agreement.

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

Defendants' Motion to Stay should clearly be denied.

II. Facts.

Horst Schilling was admitted to the Heartland of Mentor nursing home on September 9, 2014, for general care and dementia. Mr. Schilling did not have any skin breakdown at the time of his admission.

Mr. Schilling was determined to be at risk for the development of pressure ulcers. Mr. Schilling did not have any skin breakdown until March of 2018.

On March 16, 2018, Mr. Schilling was transported to Lake Hospital, due to abnormal labs. He was at the hospital until March 21, 2018. On March 21, 2018, his hospital records document that

the "pt has an area of deep dark purple tissue the area is approx 4cm x 2cm with red/purple discoloration to the left sacrum the area the [sic] is currently blancheable the area of deep purple within the coccyx does not blanche with 15 sec of pressure, deep tissue injury, the pt denies pain with palpitation, he is unable to tell me if he fell on his bottom."

On March 21, 2018, Mr. Schilling was re-admitted to the Heartland of Mentor nursing home. The nursing staff documented in an "Admission/Readmission Screen" form that Mr. Schilling had "fluid filled blisters" on his right buttock and "excoriated open area" on his sacrum. The nursing staff also checked a box indicating that Mr. Schilling did not have a pressure ulcer. During a "Second skin look back", which was conducted later that day, "Pt readmitted with an open wound to sacral area, measuring 4.5 cm x 2.0cm with 100% slough. Also has 2 fluid filled blisters inside buttock crease on right buttock. Peri area is reddened and blanchable. New order for silvadene BID per Dr. Turc. Daughter was made aware that pt was readmitted with pressure wound."

Throughout Mr. Schilling's medical records, the nursing staff noted he was "At risk for alteration in skin integrity related to: Cardiac function, [and] impaired mobility." Due to Mr. Schilling being "at risk" for skin breakdown, the nursing staff were instructed to put in place a number of interventions:

- Barrier cream to peri area/buttocks as needed;
- Diet and supplements per physician order;
- Encourage fluids;
- Encourage to reposition as needed; use assistive devices as needed;
- Float heels as able;
- Observe skin condition with ADL care daily; report abnormalities;
- Obtain Labs as ordered and report results to physician;
- Podiatric care as needed;
- Pressure redistributing device on bed/chair;
- Provided preventative skin care routinely and prn.

On March 28, 2018, less than one week later, Mr. Schilling's MDS indicates that he has one unstageable pressure ulcer, measuring 4.5 c.m. x 2 c.m. x.1 c.m., which was present upon admission/entry or reentry. Under section "M1200. Skin and Ulcer Treatments" the only treatments that were being administered were the following:

- Pressure reducing device for chair;
- Pressure reducing device for bed;
- Nutrition or hydration intervention to manage skin problems;

- Pressure ulcer care; and
- Applications of ointments/medications other than to feet.

The Defendants did not turn and reposition Horst Schilling every two (2) hours. The key to the prevention of, and the healing of, pressure injuries is the ongoing relief of pressure. As a result, any nursing home resident, at risk for skin break down, or who has skin break down, who cannot turn and reposition themselves, must be turned and repositioned by the nursing home staff. Horst Schilling suffered from Alzheimers and dementia. As a result, he needed to be turned and repositioned by the staff. The Heartland Defendants did not turn and reposition Horst Schilling.

The Defendants did not create a Treatment Administration Record or "TAR" for turning and repositioning for Horst Schilling, which would have been a great way to document turning and repositioning and to make sure it was done.

The Defendants did create a "Survey Report" in Horst Schilling's chart. According to the survey report, Horst Schilling was not turned and repositioned every two hours.

From March 19, 2018 until Horst Schilling was discharged from the nursing home for the last time, six weeks later on May 1, 2018, Horst Schilling's records indicate that he was only turned and repositioned five (5) times. He should have been turned and repositioned over five hundred (500) times.

On April 3, 2018, Mr. Schilling was transported to Lake Hospital, after he had a change in mental status and became hypotensive. Upon his admission, Mr. Schilling was noted as having a "decubitus ulcer with some discharge on the coccygeal area." While at Lake Hospital, Mr. Schilling's physician requested a consult with Patrick D. Huck, M.D. regarding his pressure ulcer. Dr. Huck documented the "Pressure Sore on Sacrum, bone and muscle involvement. We'll start with daily Santyl. If exudate levels are high may switch to wound VAC. Will need serial debridement. Given his underlying dementia, and nutritional status, he may not be able to heal the ulcer, risks, benefits, and alternatives, were discussed with his daughter who is the POA. She understands risks of bleeding, infection, need for daily wound care, and the likely event that this will not heal."

On April 4, 2018, Mr. Schilling underwent his first of five (5) surgical debridement surgeries.

On April 10, 2018, Mr. Schilling was discharged from Lake Hospital, and re-admitted to the

Heartland of Mentor nursing home. The nursing staff documented his re-admission in his "Admission/Readmission Screen" form. This document indicated that Mr. Schilling had "reddened areas on both sides" of his groin; a pressure ulcer on his right heel that measured 2.5 x 3.1; a pressure ulcer on his left heel that measured 2.8 x 3.2; and a "large tunneling pressure wound with wound vac" on his sacrum.

On April 11, 2018, Mr. Schilling's care plan was revised, as "Resident has pressure ulcer to Coccyx area related to: impaired mobility - 4/10/18 retd from hospital with wound vac in place". The Heartland Defendants did not chart at all on Mr. Schilling's wounds in his nurse's notes dated April 12, 2018 nor on April 13, 2018 nor on April 14, 2018 nor on April 15, 2018 nor on April 16, 2018.

On April 17, 2018 a nurse's note indicated that "pt on two hr turn schedule and was compliant this shift." There is no corresponding physician order for turning and repositioning. Additionally, this is one of five documentations in the nursing notes indicating that Mr. Schilling was turned and repositioned.

Over the next seven (7) days, Mr. Schilling's wounds were not documented, with the exception of a few nurse's notes indicating the "wound vac running continuously at 125mmhg". During that seven (7) day period Mr. Schilling's wounds were not measured nor described, not once. There is no documentation that Mr. Schilling was turned or repositioned at all during that seven (7) day period.

On April 25, 2018, "WOUND VAC 125 SUCTION CONTINUOUS TO COCCYX CHANGE QM/W/F PER DR PATRICK HUCK. every day shift every Mon, Wed, Fri for WOUND completed by unit managers."

On May 1, 2018, Mr. Schilling was transported to Lake Health System, via ambulance for testing. Upon his admission to Lake Health System, the emergency physician documented "[P]atient is an 82-year-old male sent to the emergency department from his skilled nursing facility by Dr. Lele for evaluation of decreased appetite and possible infection from chronic sacral ulcer. [P]atient has history of dementia and is unable to provide any history, history provided by daughter. [D]aughter states that her primary doctor wanted him evaluated for his decreased appetite, possible bowel obstruction, or infection from his chronic sacral ulcer."

On May 2, 2018, Mr. Schilling was examined by Dr. Huck, who noted, "This an 82-year-old white male with dementia known to me from previous admission with a sacral decubitus ulcer. His wound was dressed and he was wound VAC at that time. The VAC at [sic] been discontinued at the nursing facility. He now returns with significant loss of skin, exposed sacrum, and extension of his wound down toward the perineum. He has had a poor nutritional status over this time. His mental status is decreased from the last time I saw him." It was also noted that Mr. Schilling's wound was a "stage IV sacral ulcer with eschar and sloughing. Satellite pressure ulcer II present with surrounding redness. Stage I pressure ulcer on left heel. Heels floated b/l and patient placed onto his side. Pressure ulcer with black, dry wound present to left heel. Heelbows in place b/l/."

This Satellite Stage II pressure ulcer was not documented by the nursing home.

On May 15, 2018 Mr. Schilling was discharged from Lake Health and admitted to the Grand River Health and Rehab center with three (3) unstageable pressure ulcers.

Mr. Schilling remained at the Grand River Health and Rehab center until he was transferred to Hospice at Western Reserve where he passed away on August 24, 2018.

III. Law and Argument.

The Defendants would like this Court to believe that there is a presumption in favor of arbitration. In fact, when there is a question as to whether there is a valid arbitration agreement, there is a presumption **against** arbitration.

Arbitration was originally conceived as an Alternative Dispute Resolution method to be engaged in between sophisticated businesses or sophisticated people engaged in business. It was never intended to be a method by which individuals, not engaged in business, would be forced to resolve their disputes against large, well-funded, sophisticated corporations. It was certainly never intended to be a method by which nursing home residents and their families would be forced to resolve their disputes against the large corporations that own nursing homes where the residents were neglected and abused.

In an article in McKnight's Long-Term Care News published on November 11, 2019, Peter Feeney the CEO of HealthCap, an insurance company that provides insurance for nursing homes, and attorney Christina Nechiporchik discussed why long-term care communities should consider arbitration agreements with their residents. Ms. Nechiporchik stated the number one reason was that

arbitration agreements "help reduce claims". In response to a question about how arbitration reduces claims, she explained "It decreases the chance of higher verdicts."

See https://www.mcknights.com/resources/ltcn-videos/inside-long-term-care-2019-healthcap /?mpweb=1326-6829-599160.

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

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

The Court went on to hold:

> **When there is a question as to whether a party has agreed to an arbitration clause, there is a presumption against arbitration.** Spalsbury v. Hunter Realty, Inc., et al. (Nov. 30, 2000), Cuyahoga App. No. 76874, citing Council of Smaller Enters. v. Gates, McDonald & Co. (1997), 80 Ohio St. 3d 661. **An arbitration agreement will not be enforced if the parties did not agree to the clause.** Henderson vs. Lawyers Title Insurance Corp., Cuyahoga App. No. 82654, 2004-Ohio-744, citing Harmon v. Phillip Morris Inc. (1997), 120 Ohio App. 3d 187, 189.

The issue of whether or not a party has agreed to arbitrate is determined on the basis of ordinary contract principles. *Kegg v. Mansfield* (Jan. 31 2000), Stark App. No. 1999 CA 00167, citing *Fox v. Merrill Lynch & Co., Inc.* (1978), 453 F.Supp. 561. See, also, *Council of Smaller Enter., supra; AT&T Technologies, Inc. v. Communications Workers of America* (1986), 475 U.S. 643.

In order to have a valid contract, there must be a "meeting of the minds" on the essential terms of the agreement, which is usually demonstrated by an offer, acceptance, and consideration. *Reedy v. The Cincinnati Bengals, Inc.* (2001), 143 Ohio App. 3d 516, 521. An offer is defined as "the manifestation of willingness to enter in a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Id.* Further, the essential terms of the contract, usually contained in the offer, must be definite and certain. *Id.*

"Ohio law continues to hold that the parties bind themselves by the plain and ordinary language used in the contract unless those words lead to a manifest absurdity." *Convenient Food Mart, Inc. v. Countrywide Petroleum Co., et al.*, Cuyahoga App. No. 84722, 2005-Ohio-1994. This is an objective interpretation of contractual intent based on the words the parties chose to use in the contract. *Id., citing Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St. 3d 130, paragraph one of the syllabus.

In *Council of Smaller Enters. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 665, 687 N.E.2d 1352 (1998), the Supreme Court of Ohio stated, "'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." The Court went on to hold that there is a **presumption against arbitration** 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 (1995).

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.). In *White*, the Tenth District Court of Appeals reversed the trial court's decision granting the defendants' motion to stay pending arbitration. The Tenth District found not all of the defendants were parties to the contract containing the arbitration provision. The contract in *White* was only signed by one of the five named defendants and it did not list any of the other defendants as parties. *Id.* at ¶21. Additionally, the individual who signed the contract on behalf of the single defendant was not acting on behalf of any of the other defendants. *Id.* The Court of Appeals refused to order the plaintiff to arbitrate her claims against the defendants who were not a party to the contract, stating:

> As the court recognized in *Stilings v. Franklin Twp. Bd. Of Trustees* (1994), 97 Ohio App.3d 504, 508, 646 N.E.2d 1184, "even though the general rule establishes a strong presumption in favor of arbitration, that rule cannot expand the scope of an arbitration clause beyond that which was expressly intended by the parties." In other words, a court must "**look to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.**" *E.E.O.C.*

> *v. Waffle House, Inc.*, (2002), 534 U.S. 279, 294, 122 S.Ct. 754, 764, 151 L.Ed. 2d 755.

Id. at ¶ 19 (emphasis added).

In *Hess v. Hess*, the Tenth District Court of Appeals also reversed the stay imposed by the trial court because there was a question regarding whether the party seeking to invoke the arbitration clause was privy to the agreement. *Hess v. Hess*, 10th Dist. Franklin No. 98AP-597, 1999 Ohio App. LEXIS 1419 (March 30, 1999). "**Parties not privy to a contract may not benefit from an arbitration agreement incorporated therein.**" *Id.* at *7, citing *Kline v. Oakridge Builders, Inc.*, 102 Ohio App.3d 63, 656 N.E.2d 992 (9th Dist. 1995) (emphasis added). The Tenth District held that the trial court "had insufficient basis to find that the matter was subject to the arbitration clause and should be stayed" and that it should have "at a minimum required proof" that the defendant was privy to the contract prior to issuing the stay. *Id.* at *7-8.

This Court must strictly construe the contract against the party who drafted it. *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208, 211, 519 N.E.2d 1380 (1988), citing *Faruque v. Provident Life & Acc. Ins. Co.*, 31 Ohio St. 3d 34, 508 N.E.2d 949 (1987) and *Thompson v. Preferred Risk Mut. Ins. Co.*, 32 Ohio St. 3d 340, 342, 513 N.E.2d 733, 736 (1987).

The drafters of the arbitration clause drafted the clause in such a way that none of the Defendants are parties to the arbitration clause.

> It is basic contract law that to have an enforceable contract, there must be a meeting of the minds of the parties to the contract. *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 2OBR632, 442 N.E.2d 1302. A valid contract must also be specific as to its essential terms, such as the **identity of the parties to be bound**, the subject matter of the contract, consideration, a quantity term, and a price term. *See Mr. Mark Corp. v. Rush, Inc.* (1983), 11 Ohio App.3d 167, 11 OBR 259, 464 N.E.2d 586; 18 Ohio Jurisprudence 3d (1980), Contracts, Sections 17 and 140).

Alligood v. Procter & Gamble Co., 72 Ohio App.3d 309, 591 N.E.2d 668 (1st Dist. 1991) (emphasis added).

All ambiguities are resolved against the drafter, and when there is "no evidence of a contract between [the parties], we do not reach this stage of resolving ambiguities." *St. Vincent Charity Hosp. v. URS Consultants*, 111 Ohio App.3d 791, 794, N.E.2d 381 (8th Dist. 1996). "Because

defendants have failed to demonstrate that between [the parties] an agreement to arbitrate was intended, the trial court did not err by denying defendants' joint motion to stay the proceedings."

A contract "must also be specific as to its essential terms, such as the **identity of the parties to be bound**. . . ." *Alligood v. Procter & Gamble Co.*, 72 Ohio App.3d 309, 591 N.E.2d 668 (1st Dist. 1991) (emphasis added). A plaintiff cannot be required to speculate on who the parties to a contract are. The drafters of this contract chose to draft this contract to name "Horst Schilling" and "Heartland of Mentor" as the only parties to this contract. *See* Exhibit "A."

As shown in *URS Consultants*, the moving Defendants failed to demonstrate, or provide any evidence whatsoever, that they are a party to this contract, there is not a valid contract obligating Plaintiff to arbitrate her disputes with these Defendants.

It is basic contract law that "[t]o prove the existence of a contract, 'a party must establish the essential elements of a contract: an offer, an acceptance, a meeting of the minds, an exchange of consideration, **and certainty as to the essential terms of the contract**. *Turner v. Langenbrunner*, 12th Dist. Warren No. CA2003-10-099, 2004-Ohio-2814, ¶ 13.

The Seventh District has also held:

> It is a general rule "that parties cannot enter into an enforceable contract unless they come to a meeting of the minds on the essential terms of contract. See *Alligood v. Proctor & Gamble Co.* (1991), 72 Ohio App. 3d 309, 311, 594 N.E.2d 668. In those cases, courts have identified the essential terms of a contract as "**the identity of the parties to be bound**, the subject matter of the contract, consideration, a quantity term, and a price term." *Id.*

McGee v. Tobin, 7th Dist. No. 04 MA 98, 2005 Ohio 2119, at ¶24. (Emphasis added).

In *McGee*, the Court found "In this case, the written document **clearly identifies the parties to the contract**, identifies the subject of the contract, states the quantity of land being sold, and states the "total price" for the 'house and all land.' These are the essential elements of this sale." *Id.* ¶25 (emphasis added).

A. The majority of the moving Defendants are not parties to the arbitration clause.

As the Heartland Defendants are requesting the stay, they must carry the burden regarding both the existence of an enforceable agreement to arbitration and its basic scope. *Dodeka, L.L.C. v.*

Keith, 11th Dist. Portage No. 2011-P-0043, 2012 Ohio 6212, ¶ 26. The Heartland Defendants have failed to carry their burden. There is no basis for their motion.

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.).

1. Most of the Heartland Defendants are not named anywhere in the Arbitration Agreement.

All of the Heartland Defendants have moved this Court to forever stay this case and to force this case to binding arbitration, forever denying Horst Schilling's family their day in Court. The alleged basis for the Heartland Defendants' motion is a document entitled "VOLUNTARY ARBITRATION AGREEMENT". (A copy of which is attached hereto as Exhibit "A").

The only Defendant who is named in that "Agreement" is Defendant Heartland of Mentor. Heartland of Mentor is a Registered Trade Name. It is registered to Defendant Heartland of Mentor OH, LLC. The remaining Defendants are not named anywhere in the Arbitration Agreement.

Defendant HCR Manor Care Services, LLC; Defendant HCR IV Healthcare, LLC; Defendant Heartland Employment Services, LLC and Defendant Martin Allen are not named anywhere in the arbitration agreement.

Further, as will be explained below, none of these Defendants signed the arbitration agreement nor did anyone sign the agreement on their behalf.

As a result, Defendant HCR Manor Care Services, LLC; Defendant HCR IV Healthcare, LLC; Defendant Heartland Employment Services, LLC and Defendant Martin Allen are not parties to the Arbitration Agreement. There is no basis to grant the Motion to Stay as to these Defendants.

The Heartland Defendants argue that this agreement binds the "the Center, Heartland of Mentor (including its 'parent, affiliates, and subsidiary companies'), the Patient and '[the Patient's] successors, spouse, children, next of kin, guardians, administrators, and legal representatives,' which includes Plaintiff herein." Defs' Mtn, page 2. Under Ohio law, a contract must be specific to the essential terms of the contract, including the parties to the contract. *McGee v. Tobin*, 7th Dist. No. 04 MA 98, 2005 Ohio 2119, at ¶24. The Defendants are asking this Court to allow a "catch all"

provision to stand in place of countless cases to the contrary. As the Court can see from Exhibit "A", the Arbitration Agreement provides as follows:

> **9. Binding on Parties & Others**: The Parties intend that this Agreement shall benefit and bind the Center, its parent, affiliates, and subsidiary companies, and shall benefit and bind the Patient (as defined herein), his/her successors, spouses, children, next of kin, guardians, administrators, and legal representatives.

As stated above, the only Defendant who is named in the "Agreement" is Defendant Heartland of Mentor. Heartland of Mentor is a Registered Trade Name. It is registered to Defendant Heartland of Mentor OH, LLC. The remaining Defendants are not named anywhere in the Arbitration Agreement. Defendants offer no evidence that Defendants HCR Manor Care Services, LLC; HCR IV Healthcare, LLC; Heartland Employment Services, LLC or Martin Allen are parents, affiliates, or subsidiary companies of Defendant Heartland of Mentor OH, LLC.

Further, these Defendants cannot be made parties to the Arbitration Agreement by including language in the contract that the contract applies to all parents, affiliates, or subsidiary companies. That is not how contracts work. In order for these Defendants to be a parties to this contract they must be named in the contract as parties and they must sign the contract or someone must sign on their behalf. That did not happen. Defendants HCR Manor Care Services, LLC; HCR IV Healthcare, LLC; Heartland Employment Services, LLC and Martin Allen are not parties to the arbitration agreement.

When asked if any other entity, other than Defendant Heartland of Mentor OH, LLC, owned or operated the subject nursing home the Defendants testified that there were none:

Q All right. Did any other individual or entity, other than Heartland of Mentor OH, LLC, own the subject nursing home from September 9, 2014 through May 1, 2018?
A What was the ending date?
Q May 1st of 2018.
A Yes. So yeah, no change during that period of time.
Q Okay. Did any other individual or entity operate the nursing home during that time period?
A No.
Q Did any company or individual provide what we would call management services to the nursing

15 home?
16 A Not what I would call management services, no.

Deposition of the Defendants pursuant to Civil Rule 30(B)(5) by Kathy Hoops; (Page 20:2 to 20:16)

B. Julie Koziol did not have authority to sign the arbitration clause on behalf of the majority of the moving Defendants.

The only Defendant named in the arbitration agreement as a party is Defendant Heartland of Mentor. That is a registered trade name. It is registered to Defendant Heartland of Mentor, OH, LLC. For the reasons explained below the arbitration agreement is not valid or enforceable as to Defendant Heartland of Mentor, OH, LLC.

Defendants HCR Manor Care Services, LLC; HCR IV Healthcare, LLC; Heartland Employment Services, LLC and Martin Allen are not named anywhere in the arbitration agreement. Further, no one signed the agreement on their behalf, as required by O.R.C. §2711.22(A). Therefore, these Defendants have no right to enforce the agreement and seek to stay this case.

Julie Koziol signed the agreement as the "Center Representative".

The Center is defined as Heartland of Mentor.

O.R.C. §2711.22(A) explicitly states, "a written contract between a patient and a hospital or healthcare provider to settle by binding arbitration. . . is valid, irrevocable, and **enforceable once the contract is signed by all parties."**

As this contract was not been signed by Defendants HCR Manor Care Services, LLC; HCR IV Healthcare, LLC; Heartland Employment Services, LLC and Martin Allen, none of these Defendants are entitled to have this case stayed pursuant to this contract.

A contract must be strictly construed against the party who drafted it. *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208, 211, 519 N.E.2d 1380 (1988), citing *Faruque v. Provident Life & Acc. Ins. Co.*, 31 Ohio St. 3d 34, 508 N.E.2d 949 (1987) and *Thompson v. Preferred Risk Mut. Ins. Co.*, 32 Ohio St. 3d 340, 342, 513 N.E.2d 733, 736 (1987). This agreement was presented to Mr. Schilling on a take it or leave it basis. This contract is a classic contract of adhesion. Any and all ambiguities must be resolved in favor of the non-drafting party.

The Heartland Defendants do not even claim that the agreement was signed on behalf of any other Defendant. As the Defendants are requesting the stay, they must carry the burden regarding

both the existence of the agreement to arbitrate and its basic scope. *Dodeka, L.L.C. v. Keith*, 11th Dist. Portage No. 2011-P-0043, 2012 Ohio 6212, ¶ 26.

Julie Koziol signed this agreement. She testified:

Q. So you were signing this agreement on behalf of Heartland of Mentor?
A. Yes.
Q. And those entities that I kind of named to you earlier, HCR Manor Care Services, LLC, did anyone ever tell you that you had the authority to sign a document on their behalf?
A. No.
Q. Did anyone ever tell you that you had the authority to sign a document on behalf of HCR IV Healthcare, LLC?
A. Not that I remember.
Q. And did anyone ever tell you that you had the authority to sign a document and bind a corporation called Heartland Services -- I'm sorry, Heartland Employment Services, LLC?
A. Not that I remember.
Q. Did anyone ever tell you that you had the authority to sign a document and bind a corporation called Heartland of Mentor, OH, LLC?
A. Not that I remember.
Q. Did anyone ever tell you that you had the authority to bind an individual named Martin Allen to a contract?
A. Not that I remember.

Deposition of Koziol, Julie, Pages 22-23: 6-25 and 1-5.

"The fact that one undertakes to make a contract as agent for a party, does not necessarily result in such party being bound by the contract made. In order to enforce any rights against such party under such a contract, it is necessary to establish that the one who assumed to act as agent for that party had power to make the contract for that party." *Miller v. Wick Bldg. Co.* (1950), 154 Ohio St. 93, 93 N.E.2d 467, at paragraph one of the syllabus.

As testified by Ms. Koziol, no one gave her the authority to bind Defendants Heartland of Mentor, OH, LLC, HCR Manor Care Services, LLC, HCR IV Healthcare, LLC, Heartland Employment Services, LLC nor Martin Allen.

Julie Koziol, the "Center Representative" who signed the agreement also testified:

Q. Have you ever heard of Heartland Employment Services, LLC?
A. I mean, it doesn't ring a bell, no.
Q. Have you ever heard of HCR IV Healthcare, LLC?
A. I wouldn't remember.
Q. HCR Manor Care Services, LLC?
A. No. I don't know.
Q. Heartland of Mentor, OH, LLC?
A. Don't remember.
Q. And then HCR Manor Care, Inc.?
A. I don't remember.
Q. Do you know who Martin Allen is?
A. No.

Deposition of Koziol, Julie, Page 12:11-23. Ms. Koziol, has never heard of these entities. She had no authority to sign a contract on their behalf.

No one signed the arbitration agreement on behalf of Defendants HCR Manor Care Services, LLC; HCR IV Healthcare, LLC; Heartland Employment Services, LLC and Martin Allen. These Defendants are not parties to the arbitration agreement. Pursuant to the clear requirements of O.R.C. §2711.22 these Defendants are not entitled to have this case stayed.

C. The Arbitration Clause is void under Ohio law.

O.R.C. §2711.23 is the section of the Ohio Revised Code that governs arbitration clauses concerning controversies involving a medical claim.

If an arbitration agreement involving a medical claim does not comply with O.R.C. §2711.23 then it is not enforceable.

O.R.C. §2711.23 provides that if an arbitration clause is entered into **prior** to the patient receiving care, it is **only** valid and enforceable if it meets several requirements.

The arbitration clause in this case fails to meet most these requirements.

As a result, it is invalid and unenforceable as a matter of law.

Section 2711.23 of the Ohio Revised Code states, in pertinent part (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 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 healthcare 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 day 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 right under division (B) of this section.

The arbitration agreement violates Section (A) because nowhere does it state that the care, diagnosis, or treatment will be provided whether or not the patient signs the agreement to arbitrate.

The arbitration violates Section (B) because no where does it indicate 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 healthcare provider or hospital in writing within thirty days after the patient's signing of the agreement.

The arbitration agreement violates Section (C). Nowhere does it mention 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 violates Section (F), because the arbitration clause does not state that the arbitration panel will consist of three (3) persons, no more than one whom shall be a physician or the representative of a hospital. See Exhibit "A." As described in the arbitration agreement:

> **4. Arbitration Panel:** Three (3) arbitrators (the "Panel") shall conduct the arbitration. Each Party will select on Arbitrator, the two selected Arbitrators will select a third. Each Arbitrator must be a retired State or Federal Judge or a Member of the State Bar where the Center is located with at least 10 years of experience as an attorney. The Panel will elect a Chief Arbitrator who will be responsible for established an resolving issues pertaining to procedure, discovery, admissibility of evidence, or any other issue.

Section 2711.23(F) of the Ohio Revised Code requires that the clause provide that, "Any arbitration panel shall consist of three persons, no more than one of whom shall be a physician or the representative of a hospital." Shall is commonly defined as "has a duty" or "is required to." *Black's Law Dictionary*, 1585 (10th Ed. 2014).

Section 2711.23 of the Ohio Revised Code is explicitly clear. In order for an arbitration clause to be valid and enforceable, it "shall include and be subject to" a list of conditions. The clause presented to Mr. Schilling violates O.R.C. §2711.23. Section 2711.23 of the Ohio Revised Code is not optional. Its terms are mandatory. Therefore, the clause in this case is invalid and unenforceable as a matter of law and Defendants' Motion to Stay should be denied.

D. Pursuant to the Ohio Supreme Court's decision in *Peters v. Columbus Steel Castings, Co.*, 115 Ohio St.3d 134, 2007 Ohio 4787, 873 N.E.2d 1258 (2007) the wrongful death claims of Howard Donaldson's next of kin cannot be stayed.

In *Peters v. Columbus Steel Casting Co.*, 115 Ohio St.3d 134, 2007 Ohio 4787, 873 N.E.2d 1258 (2007), the Supreme Court of Ohio considered the issue of "whether the personal representative of a decedent's estate is required to arbitrate a wrongful-death claim when the decedent had agreed

to arbitrate all claims against the alleged tortfeasor." *Peters*, 115 Ohio St.3d at 135. In considering the issue, the Court reviewed the separate nature of survival claims and wrongful death claims. The Court stated that "when an individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* leading to his or her death as well as a wrongful-death action *for the injuries suffered by the beneficiaries of the decedent* as a result of the death." *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 survivorship claims respectively.

The Supreme Court of Ohio recognized that although survival claims and wrongful-death claims both relate to the same allegedly negligent acts of a defendant, and such claims are both pursued by the same nominal party (i.e., the personal representative of the estate) in the same case, they are distinct claims that are brought for different parties in interest. *Id.*, citing *Mahoning Valley Ry. Co. v. Van Alstine*, 77 Ohio St. 395, 414, 83 N.E. 601 (1908). As a result of the different nature of wrongful-death claims from survival claims, the Court held that "**a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims**. The beneficiaries can agree to arbitrate these claims themselves, but they are not required to do so. Because Peter's beneficiaries did not sign the plan nor any other dispute-resolution agreement, they cannot be forced into arbitration." *Peters*, 115 Ohio St.3d at 138, citing *Thompson v. Wing*, 70 Ohio St.3d 176, 182-83, 637 N.E.2d 917 (1994) (emphasis added).

The Supreme Court of Ohio concluded that "[a]lthough we have long favored arbitration and encouraged 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 (emphasis added). The Court went on to state that "**[r]equiring Peters's beneficiaries to arbitrate their wrongful-death claims without a signed arbitration agreement would be unconstitutional, inequitable, and in violation of nearly a century's worth of established precedent**." *Id.* at 138-39 (emphasis added).

The Ohio Supreme Court's decision in *Peters* is controlling. The wrongful-death claims in this case are not subject to the arbitration clause signed by Horst Schilling. There is no basis to stay Plaintiff's wrongful death claims.

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

The arbitration clause is not enforceable because it is both procedurally unconscionable and substantively unconscionable.

"[A]n arbitration agreement is enforceable unless grounds exist at law or in equity for revoking the agreement." *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 67, 2009 Ohio 2054, 908 N.E.2d 408 (2009), citing R.C. §2711.01(A). "Unconscionability is ground for revocation of an arbitration agreement." *Id.* citing *Taylor Bldg. Corp. Of Am. v. Benfield*, 117 Ohio St.3d 352, 2008 Ohio 938, 884 N.E.2d 12 (2008). "Unconscionability includes both 'an absence of meaningful choice' on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.*, quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383, 613 N.E.2d 183 (1993). "The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable." *Id.*, citing *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006 Ohio 4464, 861 N.E.2d 553 (9th Dist.).

1. Procedural Unconscionability.

Procedural unconscionability is about power. Did the parties negotiate the terms of the contract from a position of equal footing or was it a contract of adhesion? "[N]o single factor alone determines whether a contract is procedurally unconscionable; a court must consider the totality of circumstances." *Arnold v. Burger King*, 8th Dist. Cuyahoga No. 101465, 2015 Ohio 4485, ¶ 79, 448 N.E.2d 69. "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.), quoting *Johnson v. Mobil Oil Corp.*, 415 F.Supp 264, 268 (E.D. Mich. 1976).

"Additional factors that may contribute to a finding of procedural unconscionability include the following: 'belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be

unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.'" *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009 Ohio 2054, ¶ 24, 908 N.E.2d 408.

In *Manley v. Personacare of Ohio*, 11th Dist. Lake No. 2005-L-174, 2007 Ohio 343, ¶ 31, the Eleventh District Court of Appeals, held that an arbitration agreement, signed by a nursing home resident during admission, was procedurally unconscionable. In *Manley*, the resident signed a "resident admission agreement" as well as an "alternative dispute resolution agreement between the resident and facility." *Id.* at ¶ 3. The Eleventh District Court of Appeals held that the arbitration clause was procedurally unconscionable, specifically noting, the resident, Manley, left the hospital and was directly admitted to the nursing home, she did not have a friend or family member with her during her admission, she was sixty-six (66) years old, she was college educated but had no legal experience and she did not have an attorney present when she entered into the arbitration agreement. *Id* at ¶¶ 21-23. The Eleventh District Court of Appeals went further, considering Manley's cognitive impairments when finding the arbitration clause unconscionable. The Court noted that Manley was competent, however, she suffered from a "very mild cognitive impairment." *Id.* at ¶ 24. After considering these factors, the Eleventh District Court of Appeals stated:

> The fact that a resident is signing an arbitration agreement contemporaneously with being admitted into a nursing home is troubling. By definition, an individual being admitted into a nursing home has a physical or mental detriment that requires them to need the assistance of a nursing home. Further, the reality is that, for many individuals, their admission to a nursing home is the final step in the road of life. 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.

In *Small v. HCF of Perrysburg*, 159 Ohio App.3d 66, 71-13, 2004 Ohio 5757, 823 N.E.2d 19 (6th Dist., 2004), the Sixth District held that an arbitration clause that provided for the arbitration of a nursing home resident's negligence claims were both procedurally and substantively unconscionable. The Court determined that the arbitration clause was procedurally unconscionable because "[w]hen Mrs. Small signed the agreement she was under a great amount of stress. The

agreement was not explained to her; she did not have an attorney present. Mrs. Small did not have any particularized legal expertise and was 69 years old on the date the agreement was signed. *Id.* at 73.

The signing of the arbitration clause in this case was extremely procedurally unconscionable. Mr. Schilling was 78 years old at the time of his admission. He was an elderly gentleman, who was seeking the care and treatment of the Defendants. He was diagnosed with dementia. *See* Affidavit of Richard Schilling, attached hereto as Exhibit "B." There is no evidence that anything was explained to Mr. Schilling. Mr. Schilling was not capable of understanding complex documents. *See* Exhibit "B." Mr. Schilling was born and raised in Germany. *Id.* He had no formal education in the English language. Mr. Schilling spoke and read English as a second language, and routinely called on his son to have any complex document explained to him due to his unfamiliarity with the English language.

Similar to *Small* and *Manley* Horst Schilling was admitted to the subject facility directly from the hospital. *See* Exhibit "C." This transition caused Mr. Schilling and his family a great amount of stress. *Id.* As the court stated in *Manley*, "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." *Manley* at ¶ 29. Being admitted to a nursing home is stressful and an emotional process for any individual. Mr. Schilling was not an exception.

In terms of bargaining power, the Heartland Defendants owned and operated a very large chain of nursing homes across the country. Mr. Schilling was a demented, 78 year old man, who was just discharged from the hospital. Mr. Schilling was demented. He spoke and read English as a second language. It is clear that the Heartland Defendants held all of the bargaining power.

The same is true when it comes to relevant experience dealing with legal issues. Defendants employed several individuals whose job was to meet with new residents and discuss the admissions process and paperwork. Defendants simply placed the admission agreement package in front of Mr. Schilling and told him where to sign. No attorney was present. No family was present. It is clear the Defendants had the relevant experience and business acumen.

In terms of whether alterations to the printed terms of the admissions paperwork or arbitration clause were possible, it is clear that Mr. Schilling did not altered a word of the arbitration clause. See Exhibit "A." This is due to his lack of knowledge in dealing with contracts. Mr. Schilling did not understand the concept of arbitration. *See* Exhibit "B." The arbitration clause is a boilerplate contract that was presented on a take it or leave it basis.

Accordingly, the process by which the arbitration clause was signed was procedurally unconscionable.

2. Substantive Unconscionability.

"Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability. However, courts examining whether a particular limitations clause is substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Small*, 2004 Ohio 5757 at ¶ 21.

The Eleventh District Court of Appeals "determined 'the burden is on the nursing home to produce something that reflects it was dealing with an individual who, at a minimum had the capacity to contract. Lacking such information in the record, any substantive deficiency would be fatal.'" *Pearson v. ManorCare Health Servs.*, 2015 Ohio 5460 ¶ 41 (11th Dis. 2015), quoting *Wascovich v. Personacare*, 190 Ohio App.3d 619, 2010 Ohio 4563, 943 N.E.2d 1030 (11th Dist. 2010). In *Pearson*, the defendants presented the deposition of an individual who helped the resident in the admissions process. The defendants were unable to produce any evidence of the specifics of the admissions process in question. The defendants relied on what was typically done during an admissions process. The court found the "lack of evidence that the resident could make a rational decision on whether to enter the agreement was a significant factor weighing in favor of substantive unconscionability." *Id.* at ¶58.

As the Heartland Defendants cannot produce any evidence surrounding the admission process, only what was typically done in these situations, any substantive deficiency is "fatal" and

should weigh heavily in favor of substantive unconscionability. The Heartland Defendants have failed to produce any evidence at all about Horst Schilling's admission. There is no evidence that anything was explained to Mr. Schilling. *See* Deposition of Koziol, Julie, Page 13-14: 24-25 and 1-14.

An arbitration clause that is part of a much larger document is substantively unconscionable, even if the agreement states that signing it is not a requirement of admission. R.C. 2711.23(G). Here, the Heartland Defendants cannot confirm what was given to Mr. Schilling, they can only state what the usual practice was in this type of situation, as such any deficiency is "fatal." *See* Deposition of Koziol, Julie, Page 15: 6-10. As testified by Ms. Koziol, the arbitration agreement is "the last thing we go over" during the admission process. *Id.* at 20:23-25. The Heartland Defendants would present this arbitration clause to their residents after they have gone over dozens of documents. This clause is clearly, in all respects, part of a larger document.

In *Arnold v. Burger King*, 2015 Ohio 4485, ¶ 85, 48 N.E.2d 69 (8th Dist. 2015), the Eighth District Court of Appeals analyzed an arbitration clause in the employment context. In the arbitration clause, it claimed "arbitration is 'quicker and less expensive for both sides.' " However, in *Arnold*, the Eighth District recognized that arbitration does not necessarily save money for a plaintiff:

> That is not always the case, particularly for the employee. For example, employment attorneys typically represent plaintiffs on a contingency basis so there is often no cost to the employee until success or settlement. Court filing fees are usually lower than the fees to initiate arbitration. Arbitration is generally beneficial for employers because it is, as opposed to litigation, less expensive due to brevity and lack of appeal rights. It is also advantageous to the employer where, as in this case, the agreement limits the worker's recovery of damages otherwise available via litigation, "[i]n the event you prevail, [the arbitrator] will limit your relief to compensation for demonstrated and actual injury to the extent consistent with the Procedural Standards [that are not attached to the MAA]."

Id.

Further, the Eighth District held that where an arbitration clause merely incorporates the rules for arbitration by reference, it is "necessary to delve deeply into the voluminous rules and procedures." *Id.* at ¶ 92. As in *Arnold*, the present arbitration clause merely incorporates the rules for arbitration by reference stating:

> The Panel shall apply the State Rules of Evidence and State Rules of Civil Procedure except where otherwise stated in this Agreement. Also, the Panel shall apply, and the arbitration award shall be consistent with, the State substantive law, including statutory caps, for the State in which the Center is located, except as otherwise stated in this Agreement or where preempted by the FAA.

As shown in Exhibit "A", the Heartland Defendants did not provide Mr. Schilling with the Rules and Procedures that govern the arbitration clause. Mr. Schilling was not provided with the rules and procedures of the arbitration process. There is no evidence before this Court that Mr. Schilling was properly informed of the rules and procedure of the arbitration process.

Further, Ms. Koziol testified that she was unaware of the rules or procedures governing the arbitration process nor does she know the rules regarding the FAA. *See* Deposition of Koziol, Julie, Page 24: 8-11. As such, if she, the employee who is responsible to answer questions regarding this arbitration clause, is unaware of the rules and procedures of the arbitration process there is no possible way she could properly inform Mr. Schilling of the rules and procedure of the arbitration process.

As Mr. Schilling did not have experience dealing with litigation or arbitration, he would not know the costs incurred by litigation, nor would he know that most personal injury cases are taken on a contingency basis. In fact, the individual who the Heartland Defendants employed to inform the residents of these facts, Julie Koziol, did not know what it costs to pursue a nursing home case in court or arbitration. *Id.* at 18: 14-17.

In *Manley v. Personacare of Ohio*, 11th Dist. Lake No. 2005-L-2007, 2007 Ohio 343, the Honorable 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.
>
> * * *
>
> This contract gives potential residents a choice between being out on the street with no medical care, or accepting the first available bed.
>
> * * *
>
> The arbitration provision is not in compliance with industry standards. Contract provisions of the type 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 suit. Certainly when she went into the nursing home she was anticipating her release.

Id. at ¶¶ 59-62.

The arbitration clause in this case is a classic contract of adhesion. There is nothing in the arbitration clause that says that sometimes nursing home residents are neglected and abused. *See* Exhibit "A." There is nothing in the clause regarding the benefits of a jury trial. *See Id.* It does not explain the specific rules that will be applied to the arbitration of their claims. *Id.*

These rules do not allow for the issuance of subpoenas, nor would they be able to enforce such subpoenas if allowed. The arbitration panel cannot force third parties to submit to a deposition, nor can the panel hold a party in contempt. A jury trial may last two to three weeks in a nursing home case. There is no indication as to how long the arbitration will last. Obviously, the Plaintiff, the party with the burden of proof, is hurt by any time limitation when presenting her case.

Further, each party must pay for their own attorney fees and the costs of preparing their case. There is nothing in the clause explaining 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.

Finally, "[a]t its core, the purpose of an arbitration agreement is to provide the parties an expeditious and economical way of resolving any dispute that could arise from their relationship." *Pearson*, 2015 Ohio 5460, ¶ 24, citing *Hayes v. The Oakridge Home*, 122 Ohio St.3d 63, 2009 Ohio 2054, ¶ 15, 908 N.E.2d 408. "To the extent that arbitration is an alternative means of determining

legal disputes, agreements to arbitrate further serve the purpose of decreasing the number of pending cases on court dockets." *Id.*

In *Wascovich*, despite language in an arbitration clause stating that it was "optional" and providing a thirty-day (30) right to cancel the agreement, the Eleventh District Court of Appeals determined that the agreement's terms were substantively unconscionable. *Wascovich v. Personacare of Ohio*, 2010 Ohio 4563, 190 Ohio App.3d 619, 943 N.E.2d 1030 (11th Dist. 2010). The Eleventh District noted:

> The main problem with affirming the substantive aspect of the agreement, however, is that under the facts of this case, the normal factors favoring arbitration do not apply. This is because there is no economy or efficiency achieved. In fact, the contrary is true, because a party may be forced to participate in two proceedings, instead of one. Rather than achieve cost savings, there would be a substantial increase in costs. The potential exists for an increase in the number of depositions and hearings, duplicate discovery, and expert testimony and expense in two forums. The addition of these factors outweighs the factors that weigh in favor of substantive conscionability.

Id. at ¶ 51.

Plaintiff's wrongful-death claims are not subject to arbitration as clearly articulated above. "Because there is no economy or efficiency achieved" the entire purpose of arbitration is moot. *Id.* "Rather than achieve a cost savings, there would be a substantial increase in cost." *Id.*

There is no question that the arbitration clause is substantively unconscionable, as well as procedurally unconscionable. Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion to Stay Pending Arbitration, as the arbitration clause is not enforceable as it is egregiously procedurally and substantively unconscionable.

IV. Conclusion

For all of the reasons articulated above, Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion asking this Court to forever stay this case in favor of binding arbitration.

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

By: _____

Blake A. Dickson (0059329)
Tristan R. Serri (0096935)
Enterprise Place, Suite 420
3401 Enterprise Parkway
Beachwood, Ohio 44122
Telephone (216) 595-6500
Facsimile (216) 595-6501
E-Mail BlakeDickson@TheDicksonFirm.com
E-Mail TristanSerri@TheDicksonFirm.com

Attorneys for Plaintiff Gisela Schilling, as the Personal Representative of the Estate of Horst Schilling, (deceased).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing, Plaintiff's Brief in Opposition to the Motion to Stay Pending Arbitration, was sent this **30th day of December, 2019**, via electronic mail, to the following:

J Randall Engwert, Esq.
REMINGER CO., L.P.A.
One SeaGate, Suite 1600
Toledo, Ohio 43604
Rengwert@reminger.com

Attorney for Defendants Heartland of Mentor, Heartland of Mentor, OH, LLC, HCR Manor Care Services, LLC, HCR IV Healthcare, LLC, Heartland Employment Services, LLC and Martin Allen.

David T. Moss, Esq.
W. Bradford Longbrake, Esq.
HANNA, CAMPBELL & POWELL, LLP
3737 Embassy Parkway, Suite 100
Akron, Ohio 44333
dmoss@hcplaw.net
blongbrake@hcplaw.net

Attorneys for Defendant Lake Hospital System, Inc., d/b/a Defendant Lake Health.

By: _____
Blake A. Dickson (0059329)
Tristan R. Serri (0096935)

VOLUNTARY ARBITRATION AGREEMENT ("AGREEMENT")

THE PARTIES ARE WAIVING THEIR RIGHT TO A TRIAL BEFORE A JUDGE OR JURY OF ANY DISPUTE BETWEEN THEM. PLEASE READ CAREFULLY BEFORE SIGNING. THE PATIENT WILL RECEIVE SERVICES IN THIS CENTER WHETHER OR NOT THIS AGREEMENT IS SIGNED. ARBITRATION IS DESCRIBED IN THE VOLUNTARY ARBITRATION PROGRAM BROCHURE COPY, ATTACHED AND MADE PART OF THIS AGREEMENT.

Made on _____ (date) by and between the Patient __Horst Schilling_____ or Patient's Legal Representative _____ (collectively referred to as "Patient") and the Center __Heartland of Mentor__.

1. **Agreement to Arbitrate "Disputes":** All claims arising out of or relating to this Agreement, the Admission Agreement or any and all past or future admissions of the Patient at this Center, or any sister Center operated by any subsidiary of HCR ManorCare, Inc.("Sister Center"), including claims for malpractice, shall be submitted to arbitration. Nothing in this Agreement prevents the Patient from filing a complaint with the Center or appropriate governmental agency or from seeking review under any applicable law of any decision to involuntarily discharge or transfer the Patient.

2. **Demand for Arbitration:** shall be written, sent to the other Party by certified mail, return receipt requested.

3. **FAA:** The Parties agree and intend that this Agreement, the Admission Agreement and the Patient's stays at the Center substantially involve interstate commerce, and stipulate that the Federal Arbitration Act ("FAA") and applicable federal case law apply to this Agreement, preempt any inconsistent State law and shall not be reverse preempted by the McCarran-Ferguson Act; United States Code Title 15, Chapter 20, or other law. Any amendment to such version of the FAA is hereby expressly waived.

4. **Arbitration Panel:** Three (3) arbitrators (the "Panel") shall conduct the arbitration. Each Party will select one Arbitrator, the two selected Arbitrators will select a third. Each Arbitrator must be a retired State or Federal Judge or a Member of the State Bar where the Center is located with at least 10 years of experience as an attorney. The Panel will elect a Chief Arbitrator who will be responsible for establishing and resolving issues pertaining to procedure, discovery, admissibility of evidence, or any other issue.

5. **Sole Decision Maker:** Except as otherwise provided in 6 below, the Panel is empowered to, and shall, resolve all disputes, including without limitation, any disputes about the making, validity, enforceability, scope, interpretation, voidability, unconscionability, preemption, severability and/or waiver of this Agreement or the Admission Agreement, as well as resolve the Parties' underlying disputes, as it is the Parties' intent to avoid involving the court system. The Panel shall not have jurisdiction to certify any person as a representative of a class of persons and, by doing so, adjudicate claims of persons not directly taking part in Arbitration.

6. **Procedural Rules and Substantive Law:** The Panel shall apply the State Rules of Evidence and State Rules of Civil Procedure except where otherwise stated in this Agreement. Also, the Panel shall apply, and the arbitration award shall be consistent with, the State substantive law, including statutory damage caps, for the State in which the Center is located, except as otherwise stated in this Agreement or where preempted by the FAA. The Panel's award **must** be **unanimous** and shall be served no later than 7 working days after the arbitration hearing. The award must state the Panels' findings of fact and conclusions of law, shall be marked "confidential", and must be signed by all three Arbitrators. If any damages are awarded, the award must delineate specific amounts for each type of damages awarded, i.e. economic, non-economic, etc. The failure of the Panel to issue a unanimous award creates an appealable issue, appealable to the appropriate court, in addition to those set forth in paragraph 7, below. In the event the appellate court finds a non-unanimous award invalid as against law or this Agreement, the award shall be vacated and the arbitration dismissed without prejudice. A subsequent arbitration, if any, of the same claim or claims shall remain subject to the terms of this Agreement.

7. **Final with Limited Rights to Review (Appeal):** The Panel's award binds the Parties. The Parties have a limited right of appeal for only the express reasons allowed by the FAA or as provided in 6, above.

8. **Right to Change Your Mind:** This Agreement may be cancelled by written notice sent by certified mail to the Center's Administrator within 30 calendar days of the Patient's date of admission. If alleged acts underlying the dispute

occur before the cancellation date, this Agreement shall be binding with respect to those alleged acts. If not cancelled, this Agreement shall be binding on the Patient for this and all of the Patient's subsequent admissions to the Center or any Sister Center without any need for further renewal.

9. Binding on Parties & Others: The Parties intend that this Agreement shall benefit and bind the Center, its parent, affiliates, and subsidiary companies, and shall benefit and bind the Patient (as defined herein), his/her successors, spouses, children, next of kin, guardians, administrators, and legal representatives.

10. Fees and Costs: The Panels' fees and costs will be paid by the Center except in disputes over non-payment of Center charges wherein such fees and costs will be divided equally between the Parties. The Parties shall bear their own attorney fees and costs in relation to all preparation for and attendance at the arbitration hearing.

11. Confidentiality: The arbitration proceedings shall remain confidential in all respects, including all filings, deposition transcripts, discovery documents, or other materials exchanged between the Parties and the Panels' award. In addition, following receipt of the Panels' award, each Party agrees to return to the producing Party within 30 days the original and all copies of documents exchanged in discovery and at the arbitration Hearing.

12. Non-waiver of this Agreement: A waiver of the right to arbitrate a specific Dispute or series of Disputes, as described above, does not relieve any Party from the obligation to arbitrate *other* Disputes, whether asserted as independent claims or as permissive or mandatory counterclaims, unless each such claim is also individually waived. With multiple Patient admissions, the presentation of an arbitration agreement at a later admission to the Center or a Sister Center shall not constitute a waiver by the Center of a prior signed arbitration agreement.

13. Severability: Except as provided in 6, any provision contained in this Agreement is severable, and if a provision is found to be unenforceable under State or Federal law, the remaining provisions of this Agreement shall remain in force and effect. This Agreement represents the Parties' entire agreement regarding Disputes, supersedes any other agreement relating to disputes, and may only be changed in writing signed by all Parties. This Agreement shall remain in full force and effect notwithstanding the termination, cancellation or natural expiration of the Admission Agreement.

14. Health Care Decision: The Parties hereby stipulate that the decision to have the Patient move into this Center and the decision to agree to this Agreement are each a health care decision. The Parties stipulate that there are other health care facilities in this community currently available to meet the Patient's needs.

THE PARTIES CONFIRM THAT EACH OF THEM UNDERSTANDS THAT EACH HAS WAIVED THE RIGHT TO TRIAL BEFORE A JUDGE OR JURY AND THAT EACH CONSENTS TO ALL OF THE TERMS OF THIS VOLUNTARY AGREEMENT. PATIENT ACKNOWLEDGES THE RIGHT TO REVIEW THIS AGREEMENT WITH AN ATTORNEY OR FAMILY BEFORE SIGNING.

PATIENT:

Horst Schilling Horst Schilling
Printed Name (Date)
10-6-14
Signature of Patient

PATIENT'S LEGAL REPRESENTATIVE:

Printed Name (Date)

Signature of Patient's Legal Representative[1] in his/her Representative capacity

Signature of Patient's Legal Representative in his/her Individual capacity

CENTER REPRESENTATIVE

Signature of Center Representative

[1] Patient's Legal Representative should sign on both lines above containing the phrase "Patient's Legal Representative."

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

Now comes Richard Schilling, and for her Affidavit, states as follows:

1. I, Richard Schilling, was the son of Horst Schilling.

2. I was not present when my father was admitted to the Heartland of Mentor nursing home.

3. I was not present when my father was given the admission agreement at the Heartland of Mentor nursing home.

4. I was not present when my father was given the alleged arbitration clause at the Heartland of Mentor nursing home.

5. My father did not have an attorney present when he was given and signed the admission agreement nor the alleged arbitration clause at the Heartland of Mentor nursing home.

6. My father did not have family or friends present when he was given and signed the admission agreement nor the alleged arbitration clause at the Heartland of Mentor nursing home.

7. When my father was admitted to the Heartland of Mentor nursing home he had dementia.

8. Due to my father's dementia, he was unable to understand complex documents.

9. My father was born and raised in Germany.

10. My father spoke English as a second language.

11. My father read English as a second language.

12. My father would have had issues reading any complex document in English, as he was never formally taught the English language.

13. My father did not have experience dealing with contracts.

14. My father did not know the difference between arbitration and litigation.

15. My father would not have understood the concept of arbitration.

16. I would routinely review documents, on behalf of my father, and explain the documents to

my father because he was unable to comprehend any type of complex documents.

17. My father would not have been able to understand the admission agreement, including the arbitration clause that he signed.

18. My father was very emotional when he was admitted to the Heartland of Mentor nursing home.

Richard Schilling

Sworn to and subscribed this 15th day of August, 2019.

NOTARY PUBLIC

NOTARIAL SEAL STATE OF OHIO

Tristan R. Serri, Attorney at Law
Resident Summit County
Notary Public, State of Ohio
My Commission Has No Expiration Date
Sec 147.03 RC

Admission Record Report

8200 Mentor Hills Drive,
Mentor, OH 44060-7861
(440) 256-1496

RESIDENT ADMISSION INFORMATION

RESIDENT NAME(LAST,FIRST,M.I.)	MEDICAL RECORD NO.	ADMITTED FROM	ROOM/BED
Schilling, Horst W.	32032	University Hospitals Case Medical Center (Cleveland)	-

MOST RECENT HOSPITAL STAY DATES	ORIGINAL ADMISSION DATE	INITIAL ADMISSION DATE (MDS)	CURRENT ADMISSION DATE
04/03/2018 - 04/10/2018	09/09/2014	09/09/2014	09/09/2014

RESIDENT DEMOGRAPHIC INFORMATION

RESIDENT NAME (TITLE,FIRST,M.I.,LAST)			SOCIAL SECURITY NUMBER	PREFERRED NAME
Horst W. Schilling			300-60-1812	
ADDRESS(ADDRESS1,ADDRESS2,CITY,STATE,ZIP)			PHONE	
1651 Mentor Ave #105, Painesville, OH, 44077			(440) 520-2970	
RESIDENT'S MAIDEN NAME	PRIMARY LANGUAGE		BIRTH DATE	AGE
			04/05/1936	82
RELIGIOUS AFFILIATION	CHURCH AFFILIATION			CHURCH PHONE
GENDER / MARITAL STATUS	RACE		LIFETIME OCCUPATION	
M	White		contractor	

CONTACT INFORMATION

EMERGENCY 1st CONTACT	ADDRESS(ADDRESS,CITY,STATE,ZIP)	HOME PHONE	OTHER PHONE, TYPE	RELATIONSHIP
Schilling, Gisela	284 Rockwood Dr, Painesville, OH, 44077		(440) 567-6766, Cell	Daughter
RESIDENT REPRESENTATIVE				
NEXT OF KIN				
Schilling, Gisela	284 Rockwood Dr, Painesville, OH, 44077		(440) 567-6766, Cell	Daughter
AR REPRESENTATIVE				
Schilling, Gisela	284 Rockwood Dr, Painesville, OH, 44077		(440) 567-6766, Cell	Daughter
DPOA/HC SURROGATE/PROXY				
Schilling, Gisela	284 Rockwood Dr, Painesville, OH, 44077		(440) 567-6766, Cell	Daughter

PROVIDER INFORMATION

PHYSICIAN - PRIMARY	ADDRESS(ADDRESS,CITY,STATE,ZIP)	WORK PHONE,EXT.	EMER. PHONE	NPI#
Lele, Anju	9000 Mentor Ave, Mentor, OH, 44060	(440) 974-4404		1558467423
PHYSICIAN - ALTERNATE				
PHARMACY				
Heartland Healthcare	4755 South Ave Toledo, OH, 43615-6422	(419) 535-8435		
DENTIST				
Fixler, Dina				
PODIATRIST				
Ritz, Gary				1487672622
PREFERRED HOSPITAL				
University Hospitals Case Medical	11100 Euclid Ave Cleveland, OH, 44106-1716	(216) 844-1000		
MORTUARY				

DIAGNOSIS INFORMATION

PRIMARY(ICD10 CODE)	ONSET DATE	DIAGNOSIS TYPE	SECONDARY(ICD10 CODE)	ONSET DATE	DIAGNOSIS TYPE
I69.90 - UNSPECIFIED SEQUELAE OF	09/09/2014	Admission	R13.19 - OTHER DYSPHAGIA	04/20/2018	Other
SECONDARY(ICD10 CODE)	ONSET DATE	DIAGNOSIS TYPE	SECONDARY(ICD10 CODE)	ONSET DATE	DIAGNOSIS TYPE
N39.0 - URINARY TRACT INFECTION, SITE NOT	04/10/2018	Admission	I21.4 - NON-ST ELEVATION (NSTEMI)	04/10/2018	Other
SECONDARY(ICD10 CODE)	ONSET DATE	DIAGNOSIS TYPE	SECONDARY(ICD10 CODE)	ONSET DATE	DIAGNOSIS TYPE
I48.91 - UNSPECIFIED ATRIAL FIBRILLATION	04/10/2018	Other	E55.9 - VITAMIN D DEFICIENCY, UNSPECIFIED	07/06/2017	Admission
SECONDARY(ICD10 CODE)	ONSET DATE	DIAGNOSIS TYPE	SECONDARY(ICD10 CODE)	ONSET DATE	DIAGNOSIS TYPE
F33.9 - MAJOR DEPRESSIVE DISORDER,	10/01/2016	Admission	F03.91 - UNSPECIFIED DEMENTIA WITH	09/18/2016	Other

PAYER INFORMATION

PRIMARY PAYER	POLICY/HIC NUMBER	GROUP NUMBER	SECONDARY PAYER	POLICY/HIC NUMBER	GROUP NUMBER
BMC - Buckeye MyCare - LTC	103966121899				
SECONDARY PAYER	POLICY/HIC NUMBER	GROUP NUMBER	SECONDARY PAYER	POLICY/HIC NUMBER	GROUP NUMBER
SECONDARY PAYER	POLICY/HIC NUMBER	GROUP NUMBER	INFORMATIONAL PAYER	POLICY/HIC NUMBER	GROUP NUMBER
			MCB - Medicare B	300601812A	
INFORMATIONAL PAYER	POLICY/HIC NUMBER	GROUP NUMBER	INFORMATIONAL PAYER	POLICY/HIC NUMBER	GROUP NUMBER
MDD - Medicare D	300601812A				

Form # 1 Revised on 01/01/2004