IN THE COURT OF COMMON PLEAS
WAYNE COUNTY, OHIO

KATHRYN KICK, as the personal representative of the Estate of ALICE RITZI (deceased),	)	CASE NO. 12-CV-0124
	)	JUDGE MARK K. WIEST
Plaintiff,	)	PLAINTIFF'S MOTION FOR LEAVE TO FILE SUR REPLY BRIEF, INSTANTER, IN RESPONSE TO DEFENDANTS' REPLY BRIEF FILED IN SUPPORT OF DEFENDANTS' MOTION TO FOREVER STAY THIS CASE AND SEND IT TO BINDING ARBITRATION IN LIEU OF TRYING THIS CASE TO A JURY.
vs.	)	
SMITHVILLE WESTERN CARE CENTER, et al.,	)	
Defendants.	)	

Now comes Plaintiff Kathryn Kick, as the personal representative of the Estate of Alice Ritzi (deceased), by and through her attorneys, Blake A. Dickson and Mark D. Tolles, II of The Dickson Firm, L.L.C., and respectfully requests leave from this Honorable Court to file the Within Reply Brief, Instanter, in response to the Reply Brief filed by the Defendants in response to Plaintiff's Brief in Opposition to Defendants' Motion to Stay this case forever, and send it to binding arbitration in lieu of trying it to a jury.

Defendants Smithville Western Care Center, Smithville Western Care, Inc., Smithville Western, Inc., CMS & Co. Management Services, Inc., Sprenger Retirement Centers, Bluesky Healthcare, Inc., Sprenger Enterprises Inc., and Grace Management Services, Inc., have moved this Honorable Court, pursuant to O.R.C. § 2711, for a permanent stay of this case, pending binding arbitration. The Defendants have asked this Court to forever deny Plaintiff Kathryn Kick, and the Estate of Alice Ritzi, and Alice Ritzi's family their constitutional right to a jury trial, in favor of the woefully inadequate alternative of binding arbitration. Nowhere in Defendants' Motion to Stay is there any mention of the Federal Arbitration Act. Now, in their Reply Brief, the Defendants claim that the Court has to enforce the Federal Arbitration Act.

A. Defendants' Reply Brief should not be considered by this Court.

Local Rule 4(C)(2) provides, "Reply or additional briefs or memorandums shall be submitted only with the approval of the Court." The Defendants did not ask for nor obtain approval from this Court to file a Reply Brief. As a result, pursuant to Local Rule 4(C)(2) their Reply Brief is not properly before this Court and should not be considered.

If this Court is inclined to consider Defendants' Reply Brief, Plaintiff asks this Court to permit Plaintiff to file the within Sur Reply Brief, Instanter.

B. The subject Residency Agreement Automatically Terminated when Alice Ritzi died on March 11, 2011.

Section III of the subject "Health Care Center Residency Agreement" is entitled "TERMINATION". Paragraph B. reads as follows (emphasis added):

> B. Termination by Resident. You may terminate this Agreement at any time; however, Facility requests that You provide it with at least three (3) days advance notice so that it can conduct proper discharge planning. **This Agreement shall automatically terminate upon the death of the Resident.**

Alice Ritzi died on March 1, 2011. A copy of her Death Certificate is attached hereto as Exhibit "A". The Health Care Center Residency Agreement that contains the Arbitration Clause that the Defendants are relying on terminated on March 1, 2011. The complaint in this case was filed on February 17, 2012. The Health Care Residency Agreement was terminated long before the complaint was even filed in this case. The Court need read no further. The subject agreement terminated back on March 1, 2012 and is not in effect. Defendants' Motion to Stay based on this terminated agreement must clearly be denied.

C. There is no basis to stay the wrongful death claims.

Plaintiff Kathryn Kick, as the personal representative of the Estate of Alice Ritzi (deceased),

is pursuing both wrongful death claims and survivorship claims in this case. The Ohio Supreme Court held in *Peters v. Columbus Steel Castings Co.,* (2007), 115 Ohio St.3d 134, 2007-Ohio-4787, in ¶1 of the Syllabus that, "A survival action brought to recover for a decedent's own injuries before his or her death is independent from a wrongful-death action seeking damages for the injuries that the decedent's beneficiaries suffer as the result of the death, even though the same nominal party prosecutes both actions." The Court went on to say, in numbered ¶2 of the Syllabus, "A decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims."

In response to this argument Defendants cite the U.S. Supreme Court's decision in *Marmet Health Care Center, Inc., et al. v. Clayton Brown*.

There is nothing in the *Marmet* case that would compel this Court to enforce the arbitration clause in this case. Defendants did not move to stay this case pursuant to the Federal Arbitration Act. Even if they had, there is no basis to stay the wrongful death claims in this case as Alice Ritzi's next of kin are not parties to any arbitration clause.

> In a decision concerning all three cases, the state court held that, "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." *Brown v. Genesis Healthcare Corp.*, No. 35494 (W.Va., June 29, 2011), App. to Pet. for Cert. in No. 11-391, pp. 85a-86a (hereinafter Pet. App.).

Marmet at page 2. The Court in *Marmet* went on to say, "The FAA provides that a 'written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. §2." *Marmet* at page 3. That is the whole point made in *Peters*. None of Alice Ritzi's next

of kin had a contract with any of the Defendants in this case. Therefore, their claims, the wrongful death claims, are not barred by the arbitration clause in this case, as they are clearly not parties to it.

The Ohio Supreme Court held in its conclusion in the *Peters* case, at ¶20, "Although 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**. Requiring Peters' 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. As such, the judgment of the court of appeals is hereby affirmed." (emphasis added)

The *Peters* case is the controlling authority on the issue of arbitration clauses as they apply or do not apply in wrongful death cases in Ohio. Pursuant to *Peters* the arbitration clause in this case is not binding on Alice Ritzi's beneficiaries. There is no basis to stay the wrongful death claims in this case. Kathryn Kick did not have the authority to bind Alice Ritzi's heirs. There is no argument that Kathryn Kick was asked to agree, on her own behalf, to arbitrate any disputes. Therefore, this arbitration clause is not binding on Alice Ritzi's next of kin. No member of Alice Ritzi's family is a party to any arbitration clause. As a result, Plaintiff has requested that this Court deny the Motion to Stay, filed by the Defendants, with respect to the wrongful death claims in this case, and otherwise as articulated below.

In the *Marmet* case the Court remanded the case back to the West Virginia Trial Court saying, "On remand, the West Virginia court must consider whether, absent that general public policy, the arbitration clauses in Brown's case and Taylor's case are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Marmet* on

page 5. So the U.S. Supreme Court clearly contemplated that certain arbitration clauses may not be enforceable for many reasons.

9 U.S.C. §2 of the Federal Arbitration Act provides (emphasis added);

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, **shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract**.

As Plaintiff argued in Plaintiff's Brief in Opposition to Defendant's Motion to Stay, the arbitration clause in this case is not enforceable against the next of kin as they are not parties to the clause. No contract is enforceable against someone who is not a party to it. These are basic contract principles and they apply to this case.

In Maestle v. Best Buy, 2005-Ohio-4120 (August 11, 2005), the Eighth Appellate District Court of Appeals held:

> 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 (emphasis added):

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

Harmon v. Phillip Morris Inc. (1997), 120 Ohio App. 3d 187, 189.

> The issue of whether or not a party has agreed to arbitrate is determined on the basis of ordinary contract principles. Kegg v. Mansfield (Jan. 31 2000), Stark App. No. 1999 CA 00167, citing Fox v. Merrill Lynch & Co., Inc. (1978), 453 F.Supp. 561. See, also, Council of Smaller Enters., supra; AT&T Technologies, Inc. v. Communications Workers of America (1986), 475 U.S. 643. In order to have a valid contract, there must be a "meeting of the minds" on the essential terms of the agreement, which is usually demonstrated by an offer, acceptance, and consideration. Reedy v. The Cincinnati Bengals, Inc. (2001), 143 Ohio App. 3d 516, 521. An offer is defined as "the manifestation of willingness to enter in a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Id. Further, the essential terms of the contract, usually contained in the offer, must be definite and certain. Id.
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> "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.

Alice Ritzi did not sign the arbitration clause. This is not in dispute.

In *Council of Smaller Enters. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 1998 Ohio 172, 687 N.E.2d 1352 (1998), the Supreme Court of Ohio reaffirmed the first principle to be analyzed when considering the applicability of any arbitration clause or agreement. The Court stated that "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' * * * This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievances to arbitration." *Council of Smaller Enters.*, 80 Ohio St.3d at 665, quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986), quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). The Court went on to hold that there is a presumption against arbitrability when

"there is serious doubt that the party resisting arbitration has empowered the arbitrator to decide anything". *Id.* at 667-68, citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (In *First Options*, the Supreme Court of the United States held that the since the Kaplans had not personally signed the document containing the alleged arbitration clause, they were not required to arbitrate the underlying dispute).

In the present case, Decedent Alice Ritzi did not sign any agreement requiring her to arbitrate any claims that may arise against the Defendants. Her daughter apparently signed the clause pursuant to a Power of Attorney. That Agreement automatically terminated on March 1, 2011. Defendants' Motion must clearly be denied.

D. The only party to the alleged "agreement" is Smithville Western, Inc. Therefore, it does not apply to Defendants Smithville Western Care Center, Smithville Western Care, Inc., CMS & Co. Management Services, Inc., Sprenger Retirement Centers, Bluesky Healthcare, Inc., Sprenger Enterprises Inc., and Grace Management Services, Inc.

In addition to the fact that this "Agreement" automatically terminated on March 1, 2011, the only party to this alleged "agreement" is Smithville Western, Inc. Therefore, it does not apply to Defendants Smithville Western Care Center, Smithville Western Care, Inc., CMS & Co. Management Services, Inc., Sprenger Retirement Centers, Bluesky Healthcare, Inc., Sprenger Enterprises Inc., and Grace Management Services, Inc. There is no arbitration agreement which applies to Defendants Smithville Western Care Center, Smithville Western Care, Inc., CMS & Co. Management Services, Inc., Sprenger Retirement Centers, Bluesky Healthcare, Inc., Sprenger Enterprises Inc., and Grace Management Services, Inc. so there is no argument that any part of this case should be stayed as to these Defendants.

As stated above, this clause should be evaluated like any other contract. The contract automatically terminated on March 1, 2011, so Defendants' Motion to Stay must be denied. Alice Ritzi's next of kin are not parties to the "Agreement" so the clause is not valid against them. Defendants Smithville Western Care Center, Smithville Western Care, Inc., CMS & Co. Management Services, Inc., Sprenger Retirement Centers, Bluesky Healthcare, Inc., Sprenger Enterprises Inc., and Grace Management Services, Inc. are not parties to the "Agreement" so the "Agreement" is not valid against them.

Not surprisingly, O.R.C. § 2711.01(A) defines a valid arbitration agreement, in pertinent part, as "any agreement in writing between two or more persons to submit to arbitration any controversy existing between them". *See also* O.R.C. § 2711.22(A).

O.R.C. §1335.05 provides in part (emphasis added);

> **§ 1335.05. Certain agreements to be in writing**
>
> No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, **or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.**

In their Reply Brief Defendants argue that the arbitration clause provides that Decedent Alice Ritzi agreed to arbitrate all "claims against Facility, its employees, agents, officers, directors, any parent, subsidiary or affiliate of Facility." Defendants go on to argue in a completely conclusory fashion on page 6 of their Reply Brief, "Thus, the agreement as enforced against Plaintiff requires

arbitration of claims against all named Defendants." This Court does not before it one shred of evidence as to the identity, the structure nor the relationship to the subject nursing home of Defendants Smithville Western Care Center, Smithville Western Care, Inc., CMS & Co. Management Services, Inc., Sprenger Retirement Centers, Bluesky Healthcare, Inc., Sprenger Enterprises Inc., and Grace Management Services, Inc. There is no evidence before this Court that these Defendants are employees, agents, officers, directors, parents, subsidiaries or affiliates of the "Facility". What is clear is that these Defendants are not parties to the Health Care Residency Agreement. Only Smithville Western, Inc. is. Therefore, Defendants' Motion should clearly be denied as to Defendants Smithville Western Care Center, Smithville Western Care, Inc., CMS & Co. Management Services, Inc., Sprenger Retirement Centers, Bluesky Healthcare, Inc., Sprenger Enterprises Inc., and Grace Management Services, Inc.

E. The arbitration clause is void as a matter of law.

In Plaintiff's Brief in Opposition, Plaintiff argued that the subject Arbitration Clause is void as a matter of law as it violates O.R.C. §3721.13(A)(15). In response the Defendants argue that the US Supreme Court rejected this argument in *Marmet*. This is clearly untrue. In the *Marmet* case the Court remanded the case back to the West Virginia Trial Court saying, "On remand, the West Virginia court must consider whether, absent that general public policy, the arbitration clauses in Brown's case and Taylor's case are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Marmet* on page 5. So the U.S. Supreme Court clearly contemplated that certain arbitration clauses may not be enforceable for many reasons. In Ohio this clause is not enforceable as it seeks to deny Alice Ritzi a right promised to her by the Ohio Revised Code, which right cannot be waived. The arbitration clause in this case specifically says,

"Other than changing the forum for lawsuits, this Agreement does not waive any of your resident rights as provided for in R.C. 3721.10 through 3721.17;" If that is true then the clause is void because one of the resident rights is provided in O.R.C. §3721.13(A)(15) which states that a resident has the right to exercise all "civil rights", which rights the resident may not waive, as provided by O.R.C. §3721.13(C).

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

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

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

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

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

O.R.C. 3721.17(I) provides (emphasis added);

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

O.R.C. 3721.10 to O.R.C. 3721.17, the exact same sections specifically mentioned in the subject arbitration clause in this case set forth the rights guaranteed to nursing home residents. Plaintiffs are alleging in this case that the Defendants violated Decedent Alice Ritzi's rights as set forth in O.R.C. 3721.10 to 3721.17. The Arbitration Clause in this case is an attempt on the part of the nursing home to induce Decedent Alice Ritzi to waive her right to pursue a cause of action

against the Defendants. Pursuant to O.R.C. §3721.13(C) (emphasis added), **"Any attempted waiver of the rights listed in division (A) of this section is void."** Therefore, since the arbitration clause in this case attempts to induce Decedent Alice Ritzi to waive one of her rights, as listed in Section (A) of O.R.C. §3721.13, the clause is void as a matter of law and Defendants' Motion to Stay should be denied.

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

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

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

> In its analysis of the details of this particular matter, the majority ignores the big picture. This is an important case. This court should declare all nursing home preadmission arbitration agreements unenforceable as a matter of public policy. **Arbitration clauses that limit elderly or special-needs patients' access to the**

> **courts for claims of negligence or abuse in their care should simply not be honored or enforced by the courts of this state.** The General Assembly has enunciated a public policy in favor of special protection of nursing-home residents through its passage of the Ohio Nursing Home Patients' Bill of Rights, *R.C. 3721.10 et seq.* "[W]here there is a strong public policy against a particular practice, a contract or clause inimical to that policy will likely be declared unconscionable and unenforceable unless the policy is clearly outweighed by some legitimate interest in favor of the individual benefitted by the provision." 8 Williston on Contracts (4th Ed.1998) 43, Section 18:7.

Hayes, 122 Ohio St. 3d at 72, 2009 Ohio 2054, 908 N.E. 2d at 417. There is no legitimate interest that outweighs the public policy in favor of protecting nursing home residents. Nursing Homes attempt to impose these clauses on their residents to protect themselves from liability. Justice Pfeiffer went on to say;

> A public policy against preadmission arbitration agreements is reflected in the Ohio Nursing Home Patients' Bill of Rights. Further, this court should recognize a public policy against preadmission arbitration agreements based upon the practical inappropriateness of such agreements for nursing-home residents.
>
> By enacting the Ohio Nursing Home Patients' Bill of Rights, *R.C. 3721.10 et seq.*, the General Assembly has demonstrated particular interest in ensuring the rights of nursing-home patients and has provided statutory remedies for those patients whose rights are violated. *R.C. 3721.13(A)* specifically enumerates 32 important rights, including the right "to a safe and clean living environment" (*R.C. 3721.13(A)(1)*), the right "to be free from physical, verbal, mental, and emotional abuse and to be treated at all times with courtesy, respect, and full recognition of dignity and individuality" (*R.C. 3721.13(A)(2)*), "the right to adequate and appropriate medical treatment and nursing care and to other ancillary services that comprise necessary and appropriate care consistent with the program for which the resident contracted" (*R.C. 3721.13(A)(3)*), the right "to have all reasonable requests and inquiries responded to promptly" (*R.C. 3721.13(A)(4)*), the right "to have clothes and bed sheets changed as the need arises, to ensure the resident's comfort or sanitation," (*R.C. 3721.13(A)(5)*), and the right "to voice grievances and recommend changes in policies and services to the home's staff, to employees of the department of health, or to other persons not associated with the operation of the home, of the resident's choice, free from restraint, interference, coercion, discrimination, or reprisal." (*R.C. 3721.13(A)(31)*).

R.C. 3721.17 contains the enforcement provision of the Ohio Nursing Home Patients' Bill of Rights. Pursuant to *R.C. 3721.17(I)(1)(a)*, "[a]ny resident whose rights under *sections 3721.10 to 3721.17 of the Revised Code* are violated has a cause of action against any person or home committing the violation." The use of injunctive relief to achieve a proper level of care is clearly contemplated by the General Assembly. The General Assembly calls for the award of attorney fees when residents resort to injunctive relief. In cases "in which only injunctive relief is granted, [the court] may award to the prevailing party reasonable attorney's fees limited to the work reasonably performed." *R.C. 3721.17(I)(2)(c)*.

R.C. 3721.17 also allows residents to employ other methods to ensure their rights. Those include reporting violations of the Ohio Nursing Home Patients' Bill of Rights to the grievance committee established at the home pursuant to *R.C. 3721.12(A)(2)*. The statute requires that a combination of residents, sponsors, or outside representatives outnumber nursing home staff two to one on such committees. Another statutory option for residents is to pursue a claim through the Department of Health. *R.C. 3721.031*.

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

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

The tactics employed by Oakridge and countenanced by the majority in this case are appalling. This court today provides a roadmap for nursing-home facilities to avoid the responsibilities of the Ohio Nursing Home Patients' Bill of Rights.

Is it really acceptable to shove an arbitration agreement under the nose of a 95-year-woman, newly arrived at the nursing home, as she goes through the signing frenzy of the admission process? Does the majority really believe that Florence Hayes knowingly and voluntarily gave up her statutory rights through a negotiation process?

The majority suggests that the Constitution demands today's result and that it is this court's duty to defend the right to private contract. The majority writes: "Our citizens do not lose their constitutional rights and liberties simply because they age." Yes, somewhere in the penumbra of the penumbra of the right to contract, if you squint just so, you can make out what the majority identifies today: the right of the elderly to be "taken in" by nursing homes. This court's corollary right for nursing homes is the right to say, "You signed it. Live with it! Ohio Nursing Home Patients' Bill of Rights? You waived it! Your fundamental constitutional rights? You waived them too! And don't forget to remind your son that we need next month's check for

$ 5,500 by the first."

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

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

F. The AMA, the ABA and the AAA have all come out against clauses like the one at issue in this case.

As the Court tries to determine if the arbitration clause at issue in this case is unconscionable, Plaintiff urges the Court to consider that the American Medical Association, the leading national organization of doctors and other health care providers, the American Bar Association, the leading national organization of lawyers and the American Arbitration Association, the leading national organization of Arbitrators, have all come out against arbitration clauses like the one at issue in this case.

In the Fall of 1997, the American Arbitration Association, the American Bar Association and the American Medical Association, the leading associations involved in alternative dispute resolution, law, and medicine, collaborated to form a Commission on Health Care Dispute Resolution (the Commission). The Commission's goal was to issue, by the Summer of 1998, a Final Report on the appropriate use of alternative dispute resolution (ADR) in resolving disputes in the private managed health care environment. Their Final Report discusses the activities of the Commission from its formation in September 1997 through the date of its report, and sets forth its unanimous recommendations. The Commission issued its Final Report on July 27, 1998. [1] That

[1] The entire 46 page report is available at the web site for the American Arbitration Association at the following address: http://www.adr.org/sp.asp?id=28633

report concluded on page 15, in Principle 3 of a section entitled, "C. A Due Process Protocol for Resolution of Health Care Disputes." that; "**The agreement to use ADR should be knowing and voluntary**. **Consent to use an ADR process should not be a requirement for receiving emergency care or treatment. In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises**." (Emphasis added.)

The arbitration clause at issue in the within case clearly violates the guidelines set forth above. It should not be enforced. It cannot be over-emphasized that the American Arbitration Association, the American Bar Association and the American Medical Association, the leading associations involved in alternative dispute resolution, law, and medicine, have come together and issued a joint report which argues against enforcing arbitration clauses like the one at issue in this case.

The arbitration clause in this case is dated before Decedent Alice Ritzi or her family had a claim. According to the report cited above, the clause should not be enforced. The arbitration clause in this case was not entered into knowingly, nor was it entered into voluntarily, as will be demonstrated below.

G. In addition to being void, the arbitration clause is also both procedurally and substantively unconscionable.

Even if the Court does not find the arbitration clause in this case void as a matter of law since it seeks to divest Alice Ritzi of the rights that are guaranteed to her by the Nursing Home Bill of Rights as contained in the Ohio Revised Code, the Court should still deny Defendant's Motion to Stay, in its entirety, since the arbitration clause in this case is both procedurally and substantively

unconscionable. Attached hereto as Exhibit "B" is an Affidavit signed by Kathryn Kick attesting to facts that are relevant to this Court's determination as to whether this clause is unconscionable.

Arbitration clauses were first used in business contracts, between sophisticated business persons, as a means to save time and money should a dispute arise. As evidenced by the plethora of recent cases involving the applicability of arbitration clauses, these clauses are now being used in transactions between large corporations and ordinary consumers. This has been a significant cause for concern for a number of courts that have considered this issue. The clause at issue in this case is being applied in a negligence action. This should be of particular concern as negligence cases are typically fact-driven, and benefit from the discovery process afforded in a civil action. Further, negligence cases often hinge on the "reasonableness" of a particular action or inaction. Such a subjective analysis is best left to a jury acting as the fact finder. As Justice Lanzinger said in her concurring opinion in *Hayes*;

> At least one appellate court has expressed unease over applying arbitration clauses, which initially were designed to save time and money for sophisticated business people involved in contract disputes, to situations where nursing-home residents give up court trials in negligence actions. *Small v. HCF of Perrysburg, Inc., 159 Ohio App.3d 66, 2004 Ohio 5757, 823 N.E.2d 19*. Although the General Assembly has not prohibited use of arbitration agreements in nursing-home settings, there is movement at the federal level to do so. Two recently introduced Congressional bills would invalidate pre-dispute arbitration agreements between nursing homes and their residents. H.R. 1237, 111th Cong. (introduced Feb. 26, 2009); S. 512, 111th Cong. (introduced Mar. 3, 2009).

Hayes, 122 Ohio St. 3d at 72-73, 2009 Ohio 2054, 908 N.E. 2d at 417.

The majority in *Hayes v. The Oakridge Home*, (2009) 122 Ohio St. 3d 63, 72, 2009 Ohio 2054, 908 N.E. 2d 408, 417 held that an arbitration clause contained in a nursing home admission agreement can be held to be unenforceable, if it is found to be procedurally and substantively

unconscionable.

> As noted above, an arbitration agreement is enforceable unless grounds exist at law or in equity for revoking the agreement. *R.C. 2711.01(A)*. Unconscionability is a ground for revocation of an arbitration agreement. *Taylor Bldg., 117 Ohio St. 3d 352, 2008 Ohio 938, P33, 884 N.E.2d 12*. In *Taylor*, we recently explained unconscionability in this context as follows:
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> "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.'" *Lake Ridge Academy v. Carney (1993), 66 Ohio St.3d 376, 383, 613 N.E.2d 183*, quoting *Williams v. Walker-Thomas Furniture Co. (C.A.D.C.1965), 350 F.2d 445, 449, 121 U.S. App. D.C. 315*; see also *Collins v. Click Camera & Video, Inc. (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294*. The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable. See generally *Ball v. Ohio State Home Servs., Inc., 168 Ohio App. 3d 622, 2006 Ohio 4464, 861 N.E.2d 553*; see also *Click Camera, 86 Ohio App.3d at 834, 621 N.E.2d 1294*, citing White & Summers, Uniform Commercial Code (1988) 219, Section 4-7 ('One must allege and prove a "quantum" of both prongs in order to establish that a particular contract is unconscionable')." *Taylor Bldg., 117 Ohio St. 3d 352, 2008 Ohio 938, P34, 884 N.E.2d 12*.

Hayes, 122 Ohio St. 3d at 67, 2009 Ohio 2054, 908 N.E. 2d at 412. Plaintiff urges this Court to deny Defendants' Motion to Stay by finding that the arbitration clause in this case is both procedurally and substantively unconscionable. As Justice Pfeiffer pointed out in his dissent in Hayes;

> The party challenging a contract as unconscionable must prove a quantum of both procedural and substantive unconscionability. *Taylor Bldg. Corp. of Am. v. Benfield, 117 Ohio St. 3d 352, 2008 Ohio 938, P34, 884 N.E.2d 12*. However, substantive and procedural unconscionability need not be present in equal measure in the agreement in question:
>
> "'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' (15 Williston on Contracts (3d ed. 1972) § 1763A, pp. 226-227 * * *. In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz v. Found. Health Psychcare Servs., Inc. (2000), 24 Cal.4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669*.

> In other words, "'[T]he substantive/procedural analysis is more of a sliding scale than a true dichotomy. The harsher the clause, the less "bargaining naughtiness" that is required to establish unconscionability.'" *Tillman v. Commercial Credit Loans, Inc. (2008), 362 N.C. 93, 103, 655 S.E.2d 362*, quoting *Tacoma Boatbuilding Co. v. Delta Fishing Co. (W.D.Wash.1980), 28 U.C.C.Rep.Serv. (CBC) 26, 37, fn. 20*. The seriousness of the substantive unconscionability of the arbitration agreements in this case requires proof of only minor procedural unconscionability.

Hayes, 122 Ohio St. 3d 63 at 76-77, 2009 Ohio 2054, 908 N.E. 2d 420-421.

In *Maestle v. Best Buy*, (2005), 2005 Ohio 4120, 2005 Ohio App. LEXIS 3759, the Eighth Appellate District Court of Appeals held (emphasis added):

> **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.

As stated by the Ohio Supreme Court in Branham v. Cigna Healthcare, 81 Ohio St. 3d 388, 390 692 N.E. 2d 137, 140 (1998), "While the law of this state favors arbitration, Council of Smaller Enterprises, infra, 80 Ohio St. 3d [661] at 666, 687 N.E.2d [1352] at 1356; Schaefer v. Allstate Ins. Co. (1992), 63 Ohio St. 3d 708, 711-712, 590 N.E.2d 1242, 1245, **not every arbitration clause is enforceable**. R.C. 2711.01(A); Schaefer, 63 Ohio St. 3d 708, 590 N.E.2d 1242." (emphasis added).

As Justice Cook stated in the Dissent in, Williams v. Aetna Fin. Co., 83 Ohio St. 3d 464, 700 N.E.2d 859 (1998), though state and federal legislation favors enforcement of agreements to arbitrate, both O.R.C. §2711.01(A) and Section 2, Title 9, U.S. Code permit a court to invalidate an arbitration clause on equitable or legal grounds that would cause any agreement to be revocable. One such ground is unconscionability.

> 'Unconscionability has generally been recognized to include 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.' Williams v. Walker Thomas Furniture Co. (C.A.D.C.1965), 121 U.S. App. D.C. 315, 350 F.2d 445,449." Lake Ridge Academy v. Carney (1993), 66 Ohio St. 3d 376, 383, 613N.E.2d 183, 189. Accordingly, unconscionability has two prongs: a procedural prong, dealing with the parties' relation and the making of the contract, and a substantive prong, dealing with the terms of the contract itself. Both prongs must be met to invalidate an arbitration provision.
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> In explaining the analogies between this case and Patterson, the majority appears to stress the disparity of bargaining power between the parties and arbitration costs as reasons for nullifying the agreement to arbitrate as unconscionable. These factors, however, if by themselves deemed to render arbitration provisions of a contract unconscionable, could potentially invalidate a large percentage of arbitration agreements in consumer transactions.
>
> The disparity of bargaining power between Williams and ITT would be one factor tending to prove that the contract was procedurally unconscionable. A finding of procedural unconscionability, or that the contract is one of adhesion, however, requires more. "Black's Law Dictionary (5 Ed.1979) 38, defines a contract of adhesion as a 'standardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. * * * ' " Sekeres v. Arbaugh (1987), 31 Ohio St. 3d 24, 31, 31 Ohio B. Rep. 75, 81, 508 N.E.2d 941, 946947 (H. Brown, J., dissenting), citing Wheeler v. St. Joseph Hosp. (1976), 63 Cal. App. 3d 345, 356, 133 Cal. Rptr. 775, 783; Std. Oil Co. of California v. Perkins (C.A.9, 1965), 347 F.2d 379, 383. See, also, Nottingdale Homeowners' Assn., Inc. v. Darby (1987), 33 Ohio St. 3d 32, 37, 514 N.E.2d 702, 707, fn. 7.

In *Small v. HCF of Perrysburg*, (2004) 159 Ohio App. 3d 66, a case cited in almost every case that has been decided on this issue, since the *Small* opinion was issued, including the Ohio Supreme Court's decision in *Hayes*, the trial court ordered the plaintiffs in that case to submit their claims of nursing home negligence against the Defendant to arbitration, and stayed the case until the conclusion of the arbitration. The Plaintiffs appealed. On appeal, the Plaintiffs, now the Appellants, argued that "the clause was unconscionable because Mrs. Small, at the time she signed the document, was concerned about the immediate health of her husband and was in no position to review and fully

appreciate the terms of the agreement." Small at 69. The Sixth District Court of Appeals held the arbitration clause unconscionable. In deciding this issue the Sixth District Court of Appeals held as follows (emphasis added):

> As set forth above, R.C. 2711.01(A) provides that an arbitration clause may be unenforceable based on legal or equitable grounds. An arbitration clause may be legally unenforceable where the clause is not applicable to the matter at hand, or if the parties did not agree to the clause in question. Benson v. Spitzer Mgt., Inc., 8th Dist. No. 83558, 2004 Ohio 4751, P13, citing Ervin v. Am. Funding Corp. (1993), 89 Ohio App.3d 519, 625 N.E.2d 635. Further, an arbitration clause is unenforceable if it is found by a court to be unconscionable. Unconscionability refers to the absence of a meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to one party. Collins v. Click Camera & Video, Inc. (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294. Accordingly, unconscionability consists of two separate concepts: (1) substantive unconscionability, which refers to the commercial reasonableness of the contract terms themselves and (2) procedural unconscionability, which refers to the bargaining positions of the parties. Id. Collins defines and differentiates the concepts as follows:
>
> "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. See Chanda, supra; Berjian, supra.
>
> "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.' Johnson v. Mobil Oil Corp. (E.D.Mich.1976), 415 F. Supp. 264, 268." Id.
>
> In order to negate an arbitration clause, a party must establish a quantum of both substantive and procedural unconscionability. Id. In reviewing the arbitration clause at issue, we will individually discuss each prong.

"Substantive Unconscionability

Appellants contend that the arbitration clause is substantively unconscionable because: (1) it gives The Manor the right to proceed in any forum its chooses for the resolution of fees disputes while limiting residents' claims to arbitration; (2) the arbitration clause, despite the language in the agreement, was a condition of admission; (3) the prevailing party is entitled to costs and reasonable attorney fees; (4) the issue of whether a resident's claim is subject to arbitration is improperly to be determined through the arbitration process; and (5) the clause requires that arbitration be conducted at the facility rather than a neutral setting. Appellee counters each assertion.

At the outset, we note that the arbitration clause does contain a sentence which provides that admission is not conditioned on agreement to the clause. However, the same clause states that any "controversy, dispute, disagreement or claim" of a resident "shall be settled exclusively by binding arbitration." Further, and most importantly, the bold print directly above the signature lines states that by signing the agreement the parties agree to arbitrate their disputes and that the parties agree to the terms of the agreement "in consideration of the facility's acceptance of and rendering services to the resident." The residents or their representatives are provided no means by which they may reject the arbitration clause. Accordingly, we believe that the resident or representative is, by signing the agreement that is required for admission, for all practical purposes being required to agree to the arbitration clause.

On review of the arbitration clause and the arguments of the parties, we find troubling the fact that the prevailing party is entitled to attorney fees. Typically, attorney fees are not awarded to the prevailing party in a civil action unless ordered by the court (such as following a finding of frivolous conduct.) Though the prevailing party may be the resident or representative, individuals may be discouraged from pursuing claims because, in addition to paying their attorney and, pursuant to the arbitration clause, the costs of the arbitration, they may be saddled with the facility's costs and attorney fees. Such a burden is undoubtedly unconscionable.

“Procedural unconscionability

As stated above, procedural unconscionability involves an examination of the bargaining position of the parties. In her affidavit, Mrs. Small stated that when she arrived at The Manor she was concerned about her husband's health because he appeared to be unconscious. Shortly after his arrival she was informed that Mr. Small was going to be transported by ambulance to the hospital. Mrs. Small was then approached by an employee of The Manor and asked to sign the Admission Agreement. The agreement was not explained to her and Mrs. Small stated that she

signed the agreement "while under considerable stress * * *." Mrs. Small stated that the entire process, from their arrival at The Manor until the ambulance left, took approximately 30 minutes.

After careful review of the particular facts of this case, we find procedural unconscionability. When 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.

In finding that The Manor's arbitration clause is unconscionable, we must make a few observations. Though we firmly believe that this case demonstrates both substantive and procedural unconscionability, there is a broader reason that arbitration clauses in these types of cases must be closely examined. Arbitration clauses were first used in business contracts, between sophisticated business persons, as a means to save time and money should a dispute arise. As evidenced by the plethora of recent cases involving the applicability of arbitration clauses, the clauses are now being used in transactions between large corporations and ordinary consumers, which is cause for concern. Particularly problematic in this case, however, is the fact that the clause at issue had potential application in a negligence action. Such cases are typically fact-driven and benefit from the discovery process afforded in a civil action. Further, negligence cases often hinge on the "reasonableness" of a particular action or inaction. Such a subjective analysis is often best left to a jury acting as the fact finder. These observations are not intended to prevent the application of arbitration clauses in tort cases, we merely state that these additional facts should be considered in determining the parties' intentions.

Based on the foregoing, we find that appellants' first assignment of error is well taken. Due to our disposition of appellants' first assignment of error, we find that appellants' second assignment of error is moot.

On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Wood County Court of Common Pleas is reversed. The case is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, costs of this proceeding are assessed to appellee.

Small at 71-73 (emphasis added).

1. The subject Arbitration Clause is procedurally unconscionable.

As stated in Small, above, “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.' Johnson v. Mobil Oil Corp. (E.D.Mich.1976), 415 F. Supp. 264, 268." Id." Small at 71. The Ohio Supreme Court in Hayes also held;

> In determining whether an arbitration agreement is **procedurally unconscionable,** courts consider "the circumstances surrounding the contracting parties' bargaining, such as the parties' "'**age, education, intelligence, business acumen and experience**, * * * **who drafted the contract**, * * * **whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question**."'" (Ellipses sic.) *Taylor Bldg., 117 Ohio St. 3d 352, 2008 Ohio 938, P44, 884 N.E.2d 12*, quoting *Collins v. Click Camera, 86 Ohio App.3d at 834, 621 N.E.2d 1294*, quoting *Johnson v. Mobil Oil Corp. (E.D.Mich.1976), 415 F.Supp. 264, 268*.
>
> 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.'" *Taylor Bldg., 117 Ohio St. 3d 352, 2008 Ohio 938, P44, 884 N.E.2d 12*, quoting *Restatement of the Law 2d, Contracts (1981), Section 208, Comment d*.

Hayes, 122 Ohio St. 3d at 67-68, 2009 Ohio 2054, 908 N.E. 2d at 413 (emphasis added).

As clearly articulated in the Affidavit attached hereto as Exhibit "B", signed by Kathryn Kick: Kathryn Kick is Alice Ritzi's daughter. When her mother was admitted to the Smithville Western Care Center nursing home, she only intended to sign paperwork that would enable her to be admitted. No one ever mentioned arbitration to Kathryn Kick at the Smithville Western Care Center at any time. No one ever asked Kathryn Kick anything about her mother's right to a trial by

jury. No one ever explained to Kathryn Kick the difference between arbitration and litigation. No one ever gave Kathryn Kick, nor her mother any choice whatsoever relative to whether her mother would be able to sue the nursing home if they gave her improper care or whether she would have to arbitrate such a claim.

Alice Ritzi was admitted to the Smithville Western Care Center from Wooster Community Hospital. She had been at Wooster Community Hospital for approximately three days. On June 22, 2009, Kathryn Kick was 73 years old. She graduated high school in 1954. She did not receive any formal education after that.

In June of 2009, Kathryn Kick had no idea she was signing any document that had anything to with arbitration. She had no experience with arbitration. She does not really know what arbitration is or how it works. She does not know the difference between arbitration and litigation. The people at the Smithville Western Care Center drafted all of the documents that Kathryn Kick signed. Kathryn Kick thought she was signing documents to have her mother admitted to the nursing home. No one explained anything to her about law suits or arbitration at the Smithville Western Care Center Nursing Home at any time. No one told Kathryn Kick that any changes to the paperwork were possible. Kathryn Kick did not draft any of the paperwork. Kathryn Kick did not make any changes to any of the paperwork that was given to her to sign at the Smithville Western Care Center. The paperwork was placed in front of Kathryn Kick and she was told that she had to sign the paperwork in order to get her mother admitted to the nursing home. When she signed the paperwork, Kathryn Kick was worried about her mother's health. Kathryn Kick simply wanted to get her mother admitted to the Smithville Western Care Center nursing home. Kathryn Kick was very concerned about her mother's health when she was admitted to the Smithville Western Care

Center Nursing Home. Kathryn Kick was worried about her mother's safety. Kathryn Kick wanted her mother to be some place where she would not fall again.

Kathryn Kick spent a few minutes signing the paperwork. She did not read the paperwork. She was told it was just paperwork to get her mother admitted to the Smithville Western Care Center nursing home. She was never told that the paperwork had anything to do with arbitration or litigation. She did not have an attorney present when she signed the paperwork. She was not told she could have an attorney present nor have an attorney review the paperwork before she signed it. She was told she had to sign the paperwork to get her Mom admitted to the nursing home. Kathryn Kick does not have any particular legal expertise. No one ever mentioned nor explained to her that if she signed this paperwork, her mother would be waiving her right to a jury trial if she had to sue the nursing home for giving her substandard care.

Kathryn Kick never bargained with anyone over the arbitration provision in the admission paperwork because she did not know that that provision even existed. Alice Ritzi was 93 years old on June 22, 2009. Neither Kathryn Kick nor her mother had any experience with litigation nor with arbitration. Kathryn Kick is not a lawyer. Kathryn Kick has no experience drafting and negotiating contracts. No one ever asked Kathryn Kick about her education nor her experience. Neither Decedent Alice Ritzi (who never signed any paperwork), nor Kathryn Kick changed one word of any of the paperwork. No one told Alice Ritzi nor Kathryn Kick that they could change any of the paperwork. Kathryn Kick was told she had to sign the paperwork to get her mother admitted to the nursing home.

The arbitration clause in this case should not be enforced. If it is, it will deny Alice Ritzi, by and through her Estate, her constitutionally protected right to a trial by jury. In addition, it will

prevent the Plaintiff from investigating this case, as it will prevent the Plaintiff from conducting discovery. None of this was explained to Alice Ritzi, nor to Kathryn Kick. No one told Alice Ritzi nor Kathryn Kick, that if Alice Ritzi was the victim of abuse or neglect at the Smithville Western Care Center, and if Alice Ritzi or her family wanted to pursue a claim, they would not be able to subpoena witnesses, nor propound interrogatories, nor propound request for production of documents nor file motions to compel so she or her family could properly pursue the case. None of this was ever explained to Alice Ritzi, nor to Kathryn Kick. As a result it was impossible for either Alice Ritzi or Kathryn Kick to make an informed decision. It was impossible for either of them to knowingly and voluntarily give up Alice Ritzi's right to a jury trial and her right to conduct discovery before that jury trial. No one ever explained these concepts to Alice Ritzi nor to Kathryn Kick.

In terms of alternative sources of supply, nursing home beds in good nursing homes are in high demand. Beds in good nursing homes are very hard to come by.

Certainly, Defendant Smithville Western, Inc., as the much stronger party in this case, knew that the weaker party, Alice Ritzi, would be unable to receive any benefit from this arbitration clause. Defendant Smithville Western, Inc. drafted the arbitration clause in this case to limit its liability. Its goal was to eliminate, or at least reduce, the amount that it would have to pay to the victims of its abuse and neglect. There was no benefit to Alice Ritzi, at all. The Defendants are trying to take away her right to a jury trial and to discovery in exchange for nothing. This arbitration clause is the very definition of unconscionable.

2. The subject Arbitration Clause is substantively unconscionable.

As stated in *Small* above, "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. See Chanda, supra; Berjian, supra." Small at 71. The Ohio Supreme Court in *Hayes* also held;

> An assessment of whether a contract is **substantively unconscionable** involves consideration of the **terms of the agreement** and whether they are **commercially reasonable**. *John R. Davis Trust 8/12/05 v. Beggs, 10th Dist. No. 08AP-432, 2008 Ohio 6311, P 13*; *Dorsey v. Contemporary Obstetrics & Gynecology, Inc. (1996), 113 Ohio App.3d 75, 80, 680 N.E.2d 240*. Factors courts have considered in evaluating whether a contract is substantively unconscionable include **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**. *John R. Davis Trust at P 13*; *Collins v. Click Camera, 86 Ohio App.3d at 834, 621 N.E.2d 1294*. No bright-line set of factors for determining substantive unconscionability has been adopted by this court. The factors to be considered vary with the content of the agreement at issue.

Hayes, 122 Ohio St. 3d at 69, 2009 Ohio 2054, 908 N.E. 2d at 414 (emphasis added).

With respect to the substantive prong, dealing with the terms of the contract itself, the arbitration clause is a classic boilerplate agreement. It is a contract of adhesion. Defendants attached to their Motion to Stay, as Exhibit "A" a copy of the ten page "Health Care Residency Agreement". The arbitration clause was contained at pages 8-10.

There is nothing in the clause about the benefits of a jury trial.

There is nothing in the clause about whether or not juries are biased against nursing homes.

There is nothing in the clause that says that sometimes nursing home residents are neglected or abused.

There is nothing in the clause telling new residents that most nursing home cases are handled on a contingent fee basis so the resident or his or her family do not have to pay any amount in legal fees up front.

There is nothing in the clause about the exorbitant fees required, as explained below.

The arbitration clause indicates in paragraph C. that the National Arbitration Forum ("NAF") will be the entity who conducts the arbitration. Further, the arbitration is to be conducted in accordance with NAF Mediation Rules and the NAF Code of Procedure. Recently the Minnesota Attorney General sued the National Arbitration Forum, charging that it runs a biased process that favors major credit-card companies. The civil suit filed against the National Arbitration Forum in state District Court in Minneapolis alleges that far from being an impartial venue for resolving such disputes, the NAF has conflicting ties to major collection law firms that represent credit-card companies. Indeed, the case claims that New York hedge fund, Accretive LLC—in which Seagram heir Edgar Bronfman Jr. is a general partner—has cross ownership with major collection law firms and the NAF, sending collection cases between the two. The suit also alleges Accretive is involved in the arbitration firm's business development. **In response to the suit, the National Arbitration Forum announced that it will voluntarily cease to administer consumer arbitration disputes as of Friday, July 24, 2009, as part of a settlement agreement with the Minnesota Attorney General**. The organization that Defendant Smithville Western, Inc. seeks to use for this arbitration was so corrupt that it was sued by the Minnesota Attorney General's office and it no longer participates in arbitrations like the one Defendant Smithville Western, Inc. is trying to force.

The NAF Code of Procedure is a **47 page document** that was certainly not provided to Alice Ritzi nor to Kathryn Kick by Defendant Smithville Western, Inc. at any time. Despite the fact that these procedures are supposedly binding on Alice Ritzi, they were not part of her admissions packet. A copy of the NAF procedures was attached to Plaintiff's Brief in Opposition to Defendants' Motion to Stay. These procedures provide that all arbitrations are confidential. There is also a confidentiality clause in the Smithville Western, Inc,. arbitration clause. Clearly this benefits Smithville Western, Inc.

Only 25 written questions are permitted by the NAF rules instead of 40 interrogatories as provided by the Ohio Civil Rules.

Further, if either party resists discovery, discovery may only proceed if the party requesting the discovery satisfies a certain threshold. See Rule 29.

The rules provide for subpoenas. The problem is that these procedures cannot be enforced. There is no consequence for ignoring discovery requests or the orders of an arbitration panel. The panel cannot force third parties to submit to a deposition the way the Court can. The panel cannot hold a party in contempt.

Unlike a jury trial, which may last two to three weeks in a nursing home case, the arbitration hearing is limited to three (3) hours. See Rule 34. Obviously, the Plaintiff, the party with the burden of proof, is hurt by limiting the time for the presentation of her case. More time can be requested for a hearing - resulting in more fees and costs.

An award shall not exceed the relief requested in the claim, unlike a civil tort case where the plaintiff is not limited by the complaint, since no specific amount is specified.

According to the NAF fee schedule, a copy of which was attached to Plaintiff's Brief in

Opposition to Defendants' Motion to Stay, another important document that was not provided to Alice Ritzi, for claims worth less than $75,000.00, additional filing fees of $242.00 have to be paid, a commencement fee of $243.00 has to be paid, an Administrative fee of $1,025.00 has to be paid, a participatory hearing fee of $975.00 has to be paid. In addition, NAF charges $250.00 for each request for a discovery order, $50.00 for a request for adjournment, $20.00 processing plus $100.00 for some objections, $250.00 for others and $500.00 for others. Litigants are charged $100.00 to file a Post-Hearing Memorandum, and $750.00 for written findings of fact, conclusions of law or reasons for an award in a common claim case.

For a claim like this case, worth in excess of $75,000.00, the claimant has to pay a filing fee of up to **$1,750.00**, a commencement fee of **$1,750.00** and an administrative fee of **$1,500.00**. The claimant must state the value of his claim up front, as he is limited to that amount, as stated above. Therefore, claimants must state a higher value for their claim and therefore pay the higher fees. Therefore, if the arbitration clause were enforced in this case, the Estate of Alice Ritzi would have to pay **$5,000.00 just to file a claim** plus all of the additional fees as articulated above.

The arbitration clause in this case does provide that filing fees shall be shared equally by the Resident and the Facility. That means that the Estate of Alice Ritzi will still have to pay **$2,500.00** to request Arbitration. After the filing fees, each party is to pay their own fees, expenses and costs. That means that the Estate of Alice Ritzi would have to pay the hourly rate for all three arbitrators. According to page 7 of the fee schedule, the party who requests the hearing must pay all of the fees associated with the hearing including payment for all of the time spent by the three arbitrators at their respective hourly rates. In addition there is a fee of $150.00 for every request to the forum and a fee of $100.00 for every objection. There is a fee of $100.00 for every request for an extension of time

and a fee of $50.00 for every objection to such a request.

The fees charged by NAF are outrageous. They were never disclosed to Alice Ritzi. Clearly, these fees would have a chilling effect on anyone contemplating a claim.

There is no question that the subject arbitration clause is substantively unconscionable.

Both prongs are met in this case.

The subject arbitration clause should not be enforced by this Honorable Court. Defendant's Motion to Stay should clearly be denied.

G. The subject arbitration clause violates Federal Law.

The subject arbitration clause is a violation of Federal Law. The Defendants are not permitted to require additional consideration from a resident, in exchange for admission to their nursing home, pursuant to 42 U.S.C. § 1396r(c)(5)(A)(iii), which provides that, in the case of an individual who is entitled to medical assistance for nursing facility services, a nursing facility must;

> not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter, any gift, money donation, or other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility.

Further, federal regulations provide;

> In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility.

42 C.F.R. § 483.12(d)(3).

Both the Medicare and Medicaid programs mandate that participating facilities must accept program payments as "full payment." 42 U.S.C. § 1395r(c)(5)(A)(iii). Because Alice Ritzi, already

had the right to a jury trial, prior to signing the admission agreement, requiring her to sign an agreement, giving up that right, is unauthorized additional consideration, notwithstanding the fact that she did not sign the arbitration clause in this case.

In a January 2003 memorandum, the Centers for Medicare & Medicaid Services (CMS) addressed the agency's position on binding arbitration. CMS stated "Under both programs, however, there may be consequences for the facility where facilities attempt to enforce these agreements in a way that violates Federal requirements." CMS offered guidance to State Survey Agency Directors -- that if a facility either retaliates against or discharges a resident due to the resident's failure to agree to or comply with a binding arbitration clause, then the state and region may start an enforcement action against the facility.

III. CONCLUSION.

Defendant's Motion to Stay should clearly be denied. The entire Heath Care Center Residency Agreement automatically terminated on March 1, 2011 when Alice Ritzi died. The subject arbitration clause does not apply to the wrongful death claims in this case. The subject arbitration clause was never signed by Alice Ritzi. Defendant Smithville Western, Inc. is the only Defendant who is a party to the arbitration clause. It is void as a matter of law. The clause is both procedurally and substantively unconscionable and the clause is therefore unenforceable. The AMA, the ABA and the AAA have all come out against clauses like the one at issue in this case. The subject arbitration clause is unenforceable, as there was no meeting of the minds and no consideration. The subject arbitration clause violates Federal Law.

Plaintiff respectfully requests that Defendant's Motion to Stay Proceedings and Compel/Enforce Arbitration be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Plaintiff's Motion for Leave to File Sur Reply Brief in Response to Defendants Reply Brief filed in response to Plaintiff's Brief in Opposition to Defendants' Motion to Stay Proceedings and Compel/Enforce Arbitration, was sent by ordinary U.S. Mail, this 22nd day of May, 2012, to the following:

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