No. _____

# In The Supreme Court of the United States

BEVERLY ENTERPRISES, INC., et al.,

*Petitioners,*

v.

JUDY CYR, AS ADMINISTRATOR OF THE ESTATE OF FRANKIE CAMPBELL, IN HER REPRESENTATIVE CAPACITY ON BEHALF OF THE CHILDREN OF FRANKIE CAMPBELL,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

May a court decline to appoint an arbitrator and compel arbitration under section 5 of the Federal Arbitration Act when an arbitration agreement, which includes a severance clause and is expressly governed by the Federal Arbitration Act, 9 U.S.C. § 5, does not identify a particular arbitrator but instead selects a particular arbitral code of procedure, and the arbitral forum that administers that code of procedure is no longer available?

## LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners Beverly Enterprises, Inc., Golden Gate National Senior Care, LLC, GGNSC Holdings, Inc., GGNSC Clinical Services, LLC, GGNSC Administrative Services, LLC, and GGNSC Augusta Windmere, LLC d/b/a Golden LivingCenter-Windmere were plaintiffs in the district court and appellees in the Eleventh Circuit. Respondent, Judy Cyr, as Administrator of the Estate of Frankie Campbell, in Her Representative Capacity on Behalf of the Children of Frankie Campbell, was defendant in the district court and appellant in the Eleventh Circuit.

Drumm Corp. is the owner of Petitioner GGNSC Holdings, LLC.

GGNSC Equity Holdings, LLC is the owner of Petitioner GGNSC August Windermere, LLC d/b/a Golden LivingCenter – Windmere.

Pearl Senior Care, LLC is the owner of Petitioner Beverly Enterprises, Inc.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Beverly Enterprises, Inc., Golden Gate National Senior Care, LLC, GGNSC Holdings, Inc., GGNSC Clinical Services, LLC, GGNSC Administrative Services, LLC, and GGNSC Augusta Windmere, LLC d/b/a Golden LivingCenter-Windmere respectfully submit this Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The decision of the U.S. Court of Appeals (App., *infra*, 1a-5a) is unpublished but available at 608 F. App'x 924 (11th Cir. 2015). The district court's decision compelling arbitration, from which appeal was taken (App., *infra*, 6a-26a), is reported at 84 F. Supp. 3d 1350 (S.D. Ga. 2015). The Eleventh Circuit's order denying rehearing en banc (App., *infra*, 27a-28a) is unpublished.

## JURISDICTION

The Eleventh Circuit issued its decision on July 31, 2015. Petitioners' Motion for En Banc Reconsideration was denied on September 21, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

9 U.S.C. § 5 states:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

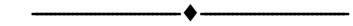


## PRELIMINARY STATEMENT

Congress anticipated that in some instances an arbitration agreement may not designate a particular arbitrator or, if designated, the arbitrator may not be available at the time arbitration is required. Congress decided that such circumstances should not interfere with the parties' overriding intent to arbitrate. The Federal Arbitration Act ("FAA") provides that if for any reason there shall be a lapse in the naming of an arbitrator, then a court "shall" appoint

an arbitrator who shall act under the parties' arbitration agreement with the same force as if he or she had been specifically named in the agreement. 9 U.S.C. § 5. Courts cannot erect laws to circumvent Section 5 of the FAA. *See Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 792 (7th Cir. 2013) (citing *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)). Nonetheless, several different U.S. Courts of Appeals, including the Eleventh Circuit below, have articulated varying and conflicting standards under which a court may nonetheless decline to appoint substitute arbitrators under section 5 of the FAA.

In this case, the Eleventh Circuit applied what has come to be known as the "integral part" test to decline appointment of a substitute arbitrator based on the conclusions that (i) a clause selecting a particular code of procedure was integral to the parties' agreement, and (ii) the arbitral forum that administers that code was unavailable. This ruling has no basis in the mandatory language of the FAA and also conflicts with decisions of the Seventh Circuit rejecting the integral part test, as well as with decisions of the Third and Ninth Circuits, which endorse the test but reach opposite conclusions under similar facts. The Eleventh Circuit's decision also conflicts with prior decisions of this Court.



## STATEMENT OF THE CASE

In 2008, Judy Cyr's mother, Frankie Campbell, was admitted to Golden LivingCenter-Windermere. App. 7a. The parties agreed to arbitrate any disputes. App. 7a. The arbitration agreement incorporated the National Arbitration Forum ("NAF") Code of Procedure and contained a mandatory severance clause:

> It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident **shall be resolved exclusively by binding arbitration at a place agreed upon by the parties, or in the absence of such an agreement, at the facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated by this Agreement**, and not by a lawsuit or resort to court process. . . . This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.
>
> * * *
>
> **In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective.**

App. 7a (emphasis added). Further, Rule 48.C of the NAF Code of Procedure itself also contains a mandatory severance provision. ("In the event a court of competent jurisdiction shall find any portion of this Code . . . to be . . . unenforceable, that portion shall not be effective and the remainder of the Code shall remain effective.").

Ms. Campbell died, and Cyr filed a state-court wrongful death claim against Petitioners (collectively, "Beverly Enterprises"). App. 9a. Beverly Enterprises, invoking diversity jurisdiction, filed a Complaint to Compel Arbitration, requesting that the district court compel arbitration of Cyr's state court claims. App. 10a. Cyr moved to dismiss, arguing that the arbitration agreement is unenforceable. App. 10a-11a.

In light of a 2009 consent decree between the NAF and the Minnesota Attorney General, which was entirely unrelated to the healthcare industry, the NAF is no longer available to administer consumer arbitrations. But relying on the FAA and the Eleventh Circuit's earlier decision in *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000), the district court held that the arbitration agreement's incorporation by reference of the NAF Code was not integral to the agreement and therefore the agreement was enforceable despite the NAF's unavailability. That court denied Cyr's motion to dismiss and directed her claims to arbitration. App. 25a-26a.

Cyr appealed, and the Eleventh Circuit held that the arbitration agreement was not enforceable because

it incorporated the NAF Code, and the NAF is now unavailable for consumer arbitrations. App. 1a-5a. The Court of Appeals concluded that the NAF Code is integral to the agreement "because the agreement explicitly incorporates the NAF Code, making the code an essential part of the agreement." App. 4a.

The Eleventh Circuit distinguished its prior decision in *Brown*, which the district court had relied on, on the ground that the decision predated the 2009 consent decree. App. 3a. The court relied on two Georgia state court decisions holding that the 2009 consent decree cancels the NAF Code.[1] The Court of Appeals did not attempt to explain why those decisions could effectively overrule *Brown*. App. 4a.

Petitioners sought rehearing en banc. App. 29a. The Court of Appeals denied the petition on September 21, 2015. App. 27a.



## REASONS FOR GRANTING THE PETITION

When an arbitration agreement invokes only the rules of a specific arbitral body, and that arbitral body later decides that it will not perform the arbitration, arbitration under the same rules with a different

[1] *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 685-89 (Ga. Ct. App. 2013); *Sunbridge Retirement Care Associates, LLC v. Smith*, 757 S.E.2d 157, 160 (Ga. Ct. App. 2014).

arbitrator would not frustrate the parties' intent to arbitrate their claims. Courts around the nation, including different federal courts of appeals, have grappled with this issue but have not handled it in a consistent manner. *See generally* Nicole Wanlass, *No Longer Available: Critiquing the Contradictory Ways Courts Treat Exclusive Arbitration Forum Clauses When the Forum Can No Longer Arbitrate*, 99 MINN. L. REV. 2005 (2015). As one commentator observes: "A federal circuit split and a wide divergence in state court opinions have materialized over whether these contractual forum-selection provisions are integral or merely ancillary." Daniel A. Sito, "*Integral*" *Decision-making: Judicial Interpretation of Predispute Arbitration Agreements Naming the National Arbitration Forum*, 81 U. CHI. L. REV. 1991, 1992 (2014) [hereinafter Sito].

The Eleventh Circuit's ruling in this case directly conflicts with prior decisions from that circuit and decisions from other circuits. *See Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224 (11th Cir. 2012); *Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012); *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013); *Reddam v. KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006).

Furthermore, the integral part test used by the Eleventh Circuit in this and other cases – as well as

by the Third, Fifth, and Ninth Circuits[2] – is contrary to the mandatory "shall" language of FAA section 5. *See Green*, 724 F.3d at 791-93. For this reason, the Seventh Circuit emphatically rejects this test. *Green*, 724 F.3d 787. In fact, one Eleventh Circuit panel has candidly acknowledged that the integral part approach "is not without controversy." *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1350 (11th Cir. 2014). As concluded by one commentator, the policy considerations underlying the integral part test "are better addressed through § 5's discretionary mechanism for selecting a replacement arbitrator." Sito, 81 U. CHI. L. REV. at 1992.

In the Seventh Circuit's opinion in *Green*, Judge Frank Easterbrook condemned the result-oriented invocation of the integral part test: "We are skeptical of decisions that allow a court to declare a particular aspect of an arbitration clause 'integral' and so on that account scuttle arbitration itself." 724 F.3d at 791. "As far as we can tell," Judge Easterbrook wrote, "no court has ever explained what part of the text or background of the Federal Arbitration Act requires, or even authorizes, such an approach." *Id*. at 792.

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[2] *Khan v. Dell, Inc.*, 669 F.3d 350, 354 (3d Cir. 2012); *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*, 689 F.3d 481, 491 n.7 (5th Cir. 2012); *Ranzy v. Tijerina*, 393 Fed. App'x 174, 175-76 (5th Cir. 2010) (unpublished); *Reddam v. KPMG LLP*, 457 F.3d 1054, 1059-61 (9th Cir. 2006), *abrogated on other grounds as recognized by Atlantic Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 940 (9th Cir. 2010).

The present petition should be granted to resolve the conflict among the courts of appeals and to clarify that courts applying the FAA must strictly limit the circumstances in which they will release a party from a promise to arbitrate due to the unavailability of a selected arbitral body. As it now stands, there is a "severe disuniformity in this area of the law, in which the same contract can be interpreted differently in different jurisdictions, and the decision of one court has little binding effect on the interpretation of another." Sito, 81 U. CHI. L. REV. at 2037.

## I. Certiorari Is Warranted To Resolve A Pronounced Conflict Among The Courts Of Appeals Regarding When A Court May Decline To Appoint A Substitute Arbitrator Under Section 5 Of The FAA.

The FAA is the culmination of Congress's efforts to prohibit state courts' "widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). The statute encapsulates "an emphatic federal policy in favor of arbitral dispute resolution." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012); *see also Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (federal policy "ensure[s] the enforceability, according to their terms, of private agreements to arbitrate"). In furtherance of that policy, Congress included section 5 in the FAA preemptively to address situations in which, after consenting parties agreed to arbitrate future

disputes, a chosen arbitrator may become unavailable for any reason. In such circumstances, section 5 dictates that, rather than void the otherwise-binding contract to submit claims to arbitration, a court "shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein[.]" 9 U.S.C. § 5.

Despite this unqualified and mandatory congressional directive, judicial application of section 5 has produced inconsistent results. *See generally* Nicole Wanlass, *No Longer Available: Critiquing the Contradictory Ways Courts Treat Exclusive Arbitration Forum Clauses When the Forum Can No Longer Arbitrate*, 99 MINN. L. REV. 2005 (2015). By choosing to void a fully enforceable contract signed by consenting parties instead of appointing a substitute arbitrator under section 5, the court below's opinion directly conflicts with section 5 of the FAA, this Court's interpretation of the FAA, and the rulings of at least the Second, Third, Seventh, and Ninth Circuits. Given the wide variance among the circuits in applying section 5 to similar contractual language, petitioners respectfully request that this Court grant certiorari review to resolve the conflict that presently exists in this important and often recurring area of federal arbitration law.

### A. The Circuit Courts Of Appeals Are Divided On Whether There Is An "Integral Part" Exception To Section 5 Of The FAA.

In deciding to ignore section 5's mandate to appoint an arbitrator, the Eleventh Circuit applied what has come to be known as the integral part test to conclude that the designation of the NAF Code of Procedure was "integral to the agreement in this case" and enforcement of the agreement with a substitute arbitrator applying the same procedural code would not be possible. [Opinion at 4] The Eleventh Circuit originally coined the "integral part" test 15 years ago in *Brown*, 211 F.3d at 1222. The origin for this test was not any statutory authority but, instead, the court in *Brown* relied upon a passing observation in the district court decision in *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1375 (N.D. Ill. 1990) that the choice of a particular forum was not integral to the parties' bargain. Neither *Zechman* nor *Brown* explained why an affirmative answer to the "integral part" question would matter under section 5 of the FAA, which uses mandatory and unconditional language directing that a district court "shall" appoint a substitute arbitrator. 9 U.S.C. § 5. Recently, the Eleventh Circuit recognized that the use of this test "is not without controversy." *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1350 (11th Cir. 2014).

Although the integral part test has now been adopted by some other circuits, it has been rejected

by others. The Second and Seventh Circuits do not apply the test. *See, e.g.*, *In re Salomon Inc. S'holders Derivative Litig.*, 68 F.3d 554 (2d Cir. 1995); *Green*, 724 F.3d at 789. In *Green*, Judge Easterbrook emphatically rejected the integral part test, complaining that courts applying the test "proceed as if it were an established rule of law that section 5 cannot be used to appoint a substitute arbitrator when the contract designation was an 'integral part' of the bargain." *Id*. But no court, he lamented, "has ever explained what part of the text or background of the Federal Arbitration Act requires, or even authorizes, such an approach." *Id.*

Judge Easterbrook rightly concluded that the subjective integral part test is neither required nor permitted by section 5. *Id*. at 791-93. Under FAA section 5, arbitration clauses remain enforceable if for "any" reason there is "a lapse in the naming of an arbitrator." *Id.* Thus, when a court declares that part of an arbitration clause is integral and that the clause is hence unenforceable, "it is effectively disagreeing with Congress, which provided that a judge can appoint an arbitrator when for 'any' reason something has gone wrong." *Id.* at 791. *See also Adler v. Dell Inc.*, No. 08-cv-13170, 2009 WL 4580739, at *4 (E.D. Mich. Dec. 3, 2009) ("the FAA omits any mention of parsing through the parties' intent. Congress envisioned a situation such as the one presented to this court in which the named arbitrator is no longer available").

This Court has insisted that "the [FAA] not be added to in a way that overrides contracts to resolve disputes by arbitration." *Green*, 724 F.3d at 792 (citing *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)). In *American Express*, the Court rejected a judicially-created exception to the enforcement of arbitration agreements. *Am. Express Co.*, 133 S. Ct. at 2310-12. The Court explained that adding requirements to the FAA can prevent arbitration from being a fast and economical process. *Id.* And, as Circuit Judge Easterbrook observed, this concern has been validated by use of the necessarily-subjective evaluation inherent in the integral part test. *Green*, 724 F.3d at 792.

Regarding the specific issue of NAF arbitration procedures involved in the present case, a court cannot properly determine whether the NAF procedures are integral to the arbitration agreement without a trial at which the parties "testify about what was important to them and lawyers present data about questions such as whether consumers or businesses shifted from arbitration to litigation when the [NAF] stopped accepting new consumer disputes for resolution." *Id.* "The process would be lengthy, expensive, and inconclusive to boot." *Id*.

The better approach is to treat a reference to an unavailable means of arbitration as "equivalent to leaving the issue open." *Green*, 724 F.3d at 792. If an arbitration clause does not specify how many arbitrators, what forum, or any other administrative matters, then a court unquestionably is obligated to use

section 5 to supply the particulars. *Id*. Likewise, section 5 easily can be used in this and similar cases to select an arbitral forum that may use the procedural code of the unavailable code administrator. *See id*. at 790 (because "no author can control how or by whom a written work is used . . . an agreement to conduct arbitration under the [NAF] Code, with the [NAF] itself on the sidelines is valid . . . [a]ll that remains is the selection of an arbitrator and a district court can use § 5 to make the appointment"). As noted by the Seventh Circuit, this Court has already implicitly recognized that the NAF is replaceable when it compelled arbitration in a case that called for arbitration with the NAF. *Id.* (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 677 n.2 (2012) (Ginsburg, J., dissenting)).

### B. In Addition, A Circuit Split Exists Over The Application Of The Integral Part Test.

Since the Eleventh Circuit first decided that the application of section 5 would turn on a determination of whether the designation of a particular arbitral forum or its procedural code was integral to the agreement to arbitrate, "[a] federal circuit split and a wide divergence in state court opinions have materialized over whether these contractual forum-selection provisions are integral or merely ancillary." Sito, 81 U. CHI. L. REV. at 1992. Indeed, although the integral part test has been applied by the Third, Fifth, Ninth, and Eleventh Circuits, two of those Circuits (the

Third and the Ninth) have addressed substantially similar contractual language and determined that the integral part test requires the appointment of a substitute arbitrator, whereas the other two Circuits (the Fifth (in unpublished per curiam opinions) and Eleventh)) have chosen instead to not enforce the contracts. *Compare Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012) *and Reddam v. KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006), *with Cyr v. Beverly Enters.*, 84 F. Supp. 3d 1350 (11th Cir. 2015) *and Ranzy v. Tijerina*, 393 F. App'x 174 (5th Cir. 2010) (unpublished). The inconsistent application of the same test to substantially similar contractual language highlights the conceptual weakness of the integral part test as a governing standard.

In *Khan*, the Third Circuit addressed contract language like the language considered by the Eleventh Circuit below requiring that all disputes "shall be resolved exclusively and finally by binding arbitration administered by the National Arbitration Forum." 669 F.3d at 355. The Third Circuit in *Khan* reasoned that the term "exclusively" (also used in the arbitration agreement at issue in this case) could modify "binding arbitration," "the National Arbitration Forum," or both. *Id*. Relying on the Eleventh Circuit's decision in *Brown*, the Third Circuit held that "exclusively" modified only "binding arbitration." *Id.* ("The arbitration agreement in *Brown* was interpreted as demonstrating an intent to arbitrate that trumped the designation of a particular arbitrator who was no longer available."). Under *Khan*, a

particular arbitrator's availability is not "integral" to an arbitration agreement unless the parties expressly and affirmatively state that they will not arbitrate unless the chosen arbitrator is available. *Id.* at 355.

Similarly, the Ninth Circuit also will not deem any particular forum integral to an arbitration agreement when the agreement merely selects a code of procedure and not a specific arbitrator. *See Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006). In *Reddam*, the arbitration agreement required that "[a]ny arbitration under this agreement shall be determined pursuant to the rules in effect of the National Association of Securities Dealers[.]" *Id.* at 1057. But when the NASD became unavailable to conduct the arbitration, the Ninth Circuit nevertheless compelled arbitration with an alternate arbitrator because "there was not . . . an express statement that the NASD would be the arbitrator." *Id.* at 1060.

The Fifth Circuit, in an exercise of circular reasoning, has found a particular arbitrator's availability to be integral to an agreement whenever the parties' agreement "specifies that the laws and procedures of a particular forum shall govern any arbitration between them." *Ranzy*, 393 F. App'x at 176. *Ranzy* was an unpublished per curiam opinion that considered an arbitration agreement that selected *both* a forum and a code of procedure by requiring both that the parties "shall" submit all claims to the NAF for arbitration and also that the procedural rules of the NAF "shall" govern the arbitration. 393

F. App'x 174, 176. Notably, *Ranzy* ignored the same "shall" language in Section 5 of the FAA.

Applying the integral part test as it was interpreted in *Khan*, *Reddam*, and even the Eleventh Circuit's own ruling in *Brown*, leads to the inescapable conclusion that the parties' arbitration agreement, which selected only a code of procedure and not any particular arbitrator, should be enforced. The Court of Appeals' decision in the present case cannot be reconciled with the parties' undoubted agreement, in part because that agreement does not require a neutral arbitrator provided or sanctioned by the NAF. *See* App. 28 (arbitration shall be administered "in accordance" with the NAF Code of Procedure); *see also Green*, 724 F.3d at 788, 793; *Khan*, 669 F.3d at 351, 356-57. Circuit Judge Easterbrook cogently describes the logical fallacy employed by the court below and the other Circuits that have voided binding contracts based on the belief that the parties considered a certain code of procedure to be integral to the agreement:

> Suppose . . . an arbitrator is forbidden to use the [NAF's] Code of Procedure but must employ different rules. Would that affect the desirability of arbitration, from either a lender's perspective or a customer's? If, as the district judge thought, the designation of the [NAF] (or at least of its Code) is "integral" to the agreement, this implies a belief that the customer, the lender, or both would rather litigate than arbitrate under any other rules or in any other forum. Does that

> belief have any support? When the [NAF] stopped accepting arbitrations, did *any* merchant revise its contracts to eliminate the arbitration clause? Has any customer insisted on the [NAF] as a condition of agreeing to arbitration? The district court did not identify anyone, ever, for whom the answer has been "the National Arbitration Forum or no arbitration at all."

*Green*, 724 F.3d at 790.

### C. The Eleventh Circuit's Application Of The Integral Part Test Conflicts With The FAA And Supreme Court Precedent.

There is no question here about the existence of a valid arbitration agreement between the parties. Because the parties selected the FAA to govern the arbitration agreement (App. 28), the court below should only have considered federal precedents interpreting the FAA. *See, e.g.*, *Inetianbor*, 768 F.3d at 1350 (relying on federal precedent to hold that NAF was not integral to the agreement); *Jones v. Sallie Mae*, No. 3:13-cv-837-J-99MMH, 2013 WL 6283483, at *9 (M.D. Fla. Dec. 4, 2013) (same); *see also Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) (FAA's effect "is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."). And yet the Court of Appeals inexplicably based its opinion not on federal precedents – including the Eleventh Circuit's own prior

precedent – instead relying on two Georgia state court opinions: *Miller v. GGNSC Atlanta, LLC*¸ 746 S.E.2d 680, 685-89 (Ga. Ct. App. 2013), and *Sunbridge Retirement Care Associates, LLC v. Smith*, 757 S.E.2d 157, 160 (Ga. Ct. App. 2014). By adopting the reasoning of the state courts in *Miller* and *Sunbridge*, the court indirectly adopted the now-familiar state court hostility to arbitration, which the FAA preempts. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745, 1747 (2011) (holding that a state law rule that "would have a disproportionate impact on arbitration agreements" is preempted); *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2012).[3]

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[3] In contravention of the FAA's congressional purpose to curtail state court hostility to arbitration agreements, numerous state courts have invoked the integral part test as a basis to void valid arbitration agreements due to an arbitrator's unavailability that easily could have been remedied by appointing a substitute under Section 5. *See*, *e.g.*, *Wert v. Manorcare of Carlisle PA, LLC*, No. 62 MAP 2014, ___ A.3d ___ (Pa. Oct. 27, 2015); *Crossman v. Life Care Ctrs. of Am., Inc.*, 738 S.E.2d 737 (N.C. Ct. App. 2013); *Riley v. Extendicare Health Facilities, Inc.*, 826 N.W.2d 398 (Wis. Ct. App. 2013); *Hart v. Evangelical Lutheran Good Samaritan Soc'y*, No. SUCCV2011-02815-A, 2013 WL 4526274 (N.M. Ct. App. June 19, 2013); *Apex I Processing, Inc. v. Edwards*, 962 N.E.2d 663 (Ind. Ct. App. 2012); *GGNSC Tylertown, LLC v. Dillon ex rel. Hargrove*, 87 So. 3d 1063 (Miss. Ct. App. 2012); *Geneva-Roth, Capital, Inc. v. Edwards*, 956 N.E.2d 1195 (Ind. Ct. App. 2011); *Licata v. GGNSC Malden Dexter LLC*, 2012 WL 1414881 (Mass. Super. Mar. 14, 2012); *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456 (Fla. 2011); *Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803 (N.M. 2011); *Carr v. Gateway, Inc.*, 944 N.E.2d 327 (Ill. 2011); *Stewart v. GGNSC-Canonsburg, L.P.*,

(Continued on following page)

The limited role of state law in determining the validity of arbitration agreements is well established: "The FAA allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically." *Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir. 2002). Thus, only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Following *Concepcion* and *Casarotto*, state courts must treat arbitration agreements the same as they would treat any other type of contract. Any rule, or application of a rule, that would treat or impact arbitration agreements differently from any other contract is preempted.

*Miller* and *Sunbridge*, and the Eleventh Circuit's decision in this case, violate this well-established rule. Specifically, the arbitration agreement at issue here includes a broad severance clause permitting any term preventing arbitration to be severed from the contract. App. 28; *see Estate of Eckstein ex rel. Luckey v. Life Care Ctrs. of Am., Inc.*, 623 F. Supp. 2d 1235, 1238 (E.D. Wash. 2009) ("the Court can simply appoint an alternate forum" in part, because "the Agreement includes a clear severability clause"). In

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2010 PA Super. 199 (Pa. 2010); *Amundsen v. Wright*, 240 P.3d 16 (Okla. Ct. App. 2010); *Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435 (S.C. 2009); *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds*, 14 So. 3d 695 (Miss. 2009).

addition, the NAF Code also provides for severance of any unenforceable provisions (Rule 48.C), as well as the selection of arbitrators "on mutually agreeable terms" (Rule 21.A(1)) or "by mutual agreement" (Rule 5.E) and for the "[p]arties [to] modify or supplement the[ ] rules" (Rule 1.D) or "agree to other procedures" (Rule 1.A). *See Green*, 724 F.3d at 790.

However, although the parties' agreements included multiple severance clauses (in the Arbitration Agreement, the Admission Agreement and the NAF Code, as well as the inclusion of the FAA as the governing law), the *Miller* court used the integral part test as a means to void the entire agreement. *Miller*, 746 S.E.2d at 688. Based on the conclusion that the NAF's availability was "integral" to the agreement, the *Miller* court refused to apply the severance clauses that the parties had included to protect the agreement. *Id*. Similarly, the Eleventh Circuit's decision in this case also ignores the multiple contractual severance clauses. (Slip Op. at 3). Thus, the court's decision, like the state court decisions in *Miller* and *Sunbridge*, runs afoul of the FAA by relying on the integral part test as a basis to frustrate the parties' contractual intent, as suggested by the severance clauses, that the failure of any one term should not interfere with the overriding agreement to arbitrate. *See Green*, 724. A similar outcome would not have occurred in a non-arbitration context, given Georgia's strong preference for enforcing severance clauses to maintain contractual validity. *See, e.g.*,

*Grove v. Sugar Hill Inv. Assocs., Inc.*, 466 S.E.2d 901, 906 (Ga. Ct. App. 1995) ("Under Georgia law where the parties express an intent to frame a severable contract, the invalid portion does not render other provisions of the contract void.").

*Miller* and *Sunbridge* also refused to enforce the arbitration agreements based on a misreading of the arbitration agreement and the NAF Code. *Miller* held that Rule 1.A designated NAF as the exclusive arbitral forum that could apply the NAF Code of Procedure in an arbitration, but that rule actually only states that the NAF will administer the NAF Code – it says nothing about who must conduct the arbitration under that Code. *Miller*, 746 S.E.2d at 688; *Wright v. GGNSC Holdings LLC*, 808 N.W.2d 114, 120 (S.D. 2011) ("although a substitute arbitrator may not *administer* the NAF Code, a competent substitute arbitrator can *apply* the NAF's rules of procedure that public codes cover"). Further, the NAF cannot prevent an independent arbitrator from using its generally-available code of procedure because no law gives the NAF "a right to control how the owner of a copy [of its code] uses the information it contains." *Green*, 724 F.3d at 789-90. *Sunbridge* incorrectly assumed that the NAF Code had been "cancelled," and therefore Rule 48.E allowed the plaintiff in that case to seek "other legal remedies." *Sunbridge*, 757 S.E.2d at 160. But the NAF Code has not been cancelled and remains available for use even today. In sum, both state courts relied on (incorrect) facts to modify the terms of the agreement and, in

doing so, both courts treated the arbitration agreements differently than they would other contracts.

By relying exclusively on state-law decisions that violated this Court's clear directives in *Concepcion* and *Casarotto*, Congress's intent in enacting the FAA, and the text of the FAA itself, the court below rewarded the improper ongoing state court hostility to arbitration and reinforced a judicial error reflected in the conflicting decisions of the Circuit Courts of Appeals. Absent this Court's intervention, decisions like this one that conflict with this Court's prior precedent are certain to be repeated.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 15-10603
Non-Argument Calendar

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D.C. Docket No. 1:14-cv-00069-JRH-BKE

BEVERLY ENTERPRISES INC., GOLDEN GATE NATIONAL SENIOR CARE, LLC, GGNSC HOLDINGS, LLC, GGNSC CLINICAL SERVICES, LLC, GGNSC ADMINISTRATIVE SERVICES, LLC, GGNSC AUGUSTA WINDERMERE, LLC, d.b.a. Golden LivingCenter-Windermere,

Plaintiffs-Appellees,

versus

JUDY CYR, as Administrator of the Estate of Frankie Campbell, JUDY CYR, in her Representative Capacity on Behalf of the Children of Frankie Campbell,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Georgia

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(July 31, 2015)

Before ED CARNES, Chief Judge, MARCUS, and WILLIAM PRYOR, Circuit Judges.

PER CURIAM:

Plaintiffs (collectively "Golden Gate") operate a nursing facility called GoldenLiving Center-Windermere. Defendant Judy Cyr, acting as attorney-in-fact for her mother Frankie Campbell, signed Golden Gate's arbitration agreement on Campbell's behalf when Campbell was admitted into Windermere. After Campbell died in Windermere's care, Cyr sued Golden Gate in state court under Georgia's wrongful death statute on her own behalf and on behalf of Campbell's other children. *See* Ga. Code §§ 51-4-2 & 51-4-3 (2010). Golden Gate then filed this action in the federal district court seeking enforcement of the arbitration agreement and moving to compel arbitration. The district court ordered that all of Cyr's claims be arbitrated. This is her appeal of that order, which we review *de novo*. *See In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1293 (11th Cir. 2014).

The arbitration agreement Golden Gate drafted contains a provision stating that disputes "shall be resolved exclusively by binding arbitration . . . in accordance with the National Arbitration Forum [NAF] Code of Procedure, which is hereby incorporated into this agreement." That code provides that "[i]n the event of a cancellation of this Code, any Party may seek legal and other remedies regarding any matter upon which an Award or Order has not been entered." R. 48, NAF Code of Procedure (2006). In 2009, after a suit by the Minnesota Attorney

General, the NAF agreed it would no longer "[i]n any manner participate in" any consumer arbitration (including the type of arbitration at issue here) filed on or after July 24, 2009 – effectively canceling the code of procedure. *See Sunbridge Retirement Care Assocs., LLC. v. Smith*, 757 S.E.2d 157, 160 (Ga. Ct. App. 2014). The parties to this case, by incorporating the code into their arbitration agreement, agreed that they could pursue "legal and other remedies" if the code was cancelled. That is what Cyr is doing.

In arguing for arbitration, Golden Gate relies on our decision in *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217 (11th Cir. 2000), but that reliance is misplaced. We held in *Brown* that when the forum chosen for arbitration is unavailable, the Federal Arbitration Act provides for substitution of another arbitrator unless choice of forum "is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern." *Id.* at 1222 (quotation marks omitted); *see* 9 U.S.C. § 5. First, *Brown* is factually distinguishable. Although it also involved the NAF, which was unavailable as a forum for reasons only hinted at in the opinion, the *Brown* decision predated the consent decree in which the NAF agreed not to participate in consumer arbitration of the type at issue here and which Georgia courts have recognized cancels the NAF code. *See Sunbridge*, 757 S.E.2d at 160.

Second, the NAF code is "integral" to the agreement in this case because the agreement explicitly incorporates the NAF code, making the code an

essential part of the agreement. The Georgia Court of Appeals has already held as much, interpreting this very agreement against this very plaintiff. *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 685-89 (Ga. Ct. App. 2013). We are not persuaded by Golden Gate's attempts to disown the language it drafted.

Golden Gate argues that we should disregard the holdings of *Sunbridge* and *Miller* because they are "specifically related to arbitration, not just contracts in general," which, according to Golden Gate, means that those holdings run afoul of the federal presumption in favor of arbitrability. We are not persuaded. The underlying arbitration agreement is a contract, and that contract is governed by state law. *See Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367-68 (11th Cir. 2005). The Georgia Court of Appeals in *Miller* and *Sunbridge* applied general Georgia contract law principles to contracts that happened to be arbitration agreements. *See Miller*, 746 S.E.2d at 684 ("In deciding the validity of . . . an [arbitration] agreement, therefore, we apply the usual rules of Georgia law regarding the construction and enforcement of contracts."); *Sunbridge*, 757 S.E.2d at 159-60 (applying rule from *Miller*). The federal presumption in favor of arbitrability does not prevent that.

We **VACATE** the district court's order compelling arbitration and **REMAND** the case for further proceedings consistent with this opinion.

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION**

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|---|---|---|
| BEVERLY ENTERPRISES, INC., GOLDEN GATE NATIONAL SENIOR CARE, LLC, GGNSC HOLDINGS, LLC, GGNSC CLINICAL SERVICES, LLC, GGNSC ADMINISTRATIVE SERVICES, LLC, AND GGNSC AUGUSTA WINDERMERE, LLC D/B/A GOLDEN LIVING CENTER – WINDERMERE, | * | CV 114-069 |
| Plaintiffs, | * | |
| v. | * | |
| JUDY CYR, as Administrator of the Estate of Frankie Campbell, and in her Representative Capacity on Behalf of the Children of Frankie Campbell, | * | |
| Defendant. | * | |

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**ORDER**

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(Filed Jan. 29, 2015)

Before the Court is Defendant's motion to dismiss Plaintiffs' complaint to compel arbitration. (Doc. no. 7.) For the reasons set forth herein, the motion is

**DENIED** and Defendant is **DIRECTED** to arbitrate her claims.

## I. INTRODUCTION

This is a dispute about an arbitration agreement between a nursing facility in Augusta, Georgia, and one of its residents. After the death of the resident, and the commencement of a tort action by one of the decedent's daughters in state court, the Facility and several other related entities filed a complaint in this Court to compel arbitration.

### A. Factual Background

On April 26, 2008, Ms. Frankie Campbell ("Campbell") designated Ms. Judy Cyr ("Cyr"), her daughter, as her attorney in fact pursuant to a general power of attorney. (Compl., Ex. A.) On June 30, 2008, Campbell was admitted to Golden LivingCenter – Windermere ("the Facility"), a skilled nursing facility in Augusta, Georgia, operated by Plaintiff GGNSC Augusta Windermere, LLC d/b/a Golden LivingCenter – Windermere. (Compl. ¶ 14.)

Upon Campbell's admission to the Facility on June 30, 2008, Cyr signed an arbitration agreement as Campbell's authorized representative pursuant to the power of attorney. (Compl., Exs. A, B.) The arbitration agreement provides in pertinent part:

> [A]ny and all claims, disputes, and controversies . . . arising out of, or in connection

> with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration . . . in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this Agreement. . . .

*Id.* The reference in this paragraph to the National Arbitration Forum Code of Procedure ("N.A.F. Code") is the only reference in the arbitration agreement to the National Arbitration Forum ("N.A.F.") or its Code of Procedure. This is also the only place in the agreement where the topic of an arbitration forum is mentioned. The N.A.F. Code, which is incorporated into the agreement, provides that

> [t]his Code shall be administered only by the National Arbitration Forum or by any entity or individual providing administrative services by agreement with the National Arbitration Forum.

(Def.'s Mot. to Dis. at 5.) In other words, the agreement incorporates the N.A.F. Code by reference, and the N.A.F. Code selects the N.A.F. as the forum for arbitration. However, the N.A.F. no longer administers consumer arbitrations. (Pls.' Br. in Supp. of Compl. at 13-16; Def.'s Mot. to Dis. at 5-10.)

With regard to who must arbitrate their claims, the agreement

> shall inure to the benefit of and bind the parties, their successors, and assigns, including without limitation . . . all persons whose

> claim is derived through or on behalf of the Resident, including any parent, spouse, sibling, child. . . .

(Compl., Ex. B.)

The arbitration agreement has a signature line for the resident and a signature line for an "authorized representative" in the event that the resident is unable to consent or sign. (*Id.*) Cyr's signature appears on both lines. (*Id.*) The document prompts the authorized representative, if there is one, to describe his/her "Relationship to Resident." (*Id.*) Next to that prompt appears the handwritten letters "POA." (*Id.*) It seems reasonable to infer that "POA" stands for "power of attorney" because the parties agree that Cyr signed the agreement on Campbell's behalf pursuant to a power of attorney.

Campbell resided at the Facility from June 30, 2008 until her death on February 2, 2012. (Def.'s Mot. to Dis. at 1.) During her residency, Cyr asserts that Campbell sustained injuries including pressure sores, weight loss, contractures, falls, infections, and ultimately death. (*Id.*) On August 7, 2012, Cyr was appointed administrator of Campbell's estate. (Compl. ¶ 19; Ex. C.)

### B. Procedural History

1. The State Court Action

On January 13, 2014, Cyr filed a complaint in Wayne County Superior Court, Georgia, against the

Facility, several other related entities, and Ms. Angie Denison ("Denison") alleging negligence in the care and treatment of Campbell. (Compl., Ex. C.) Cyr alleged that Denison was the administrator of the Facility during Campbell's residency. (*Id.*) Cyr brought the action as administrator of Campbell's estate and in her representative capacity on behalf of Campbell's children. (*Id.*)

The defendants in the state court action asserted in part as a defense that Cyr had filed that complaint in violation of an arbitration agreement. However, Cyr states that the defendants did not file a motion to compel arbitration nor did they attempt to enforce the arbitration agreement in the context of the state court proceedings. (Def.'s Mot. to Dis. at 2.) Denison filed a motion to dismiss asserting that she was not, and never had been, the administrator of the Facility. (*Id.*) The state court action is still pending.

2. The Complaint in this Court to Compel Arbitration

On March 21, 2014, the defendants in the state court action, minus Denison, ("Plaintiffs") filed a complaint in this Court against Cyr ("Defendant") to compel arbitration based on diversity jurisdiction. (Compl. ¶ 8.) Defendant is a resident of the state of Georgia while Plaintiffs are incorporated and have their principal places of business in other states. (*Id.* ¶¶ 1-7) Denison, like Defendant, is a Georgia resident and is not joined as a Plaintiff in this diversity suit to

compel arbitration. (Pls.' Reply Br. in Supp. of Compl. at 8; Denison Affidavit.)

On June 6, 2014, Defendant filed a motion to dismiss arguing that the arbitration agreement is unenforceable because the N.A.F. is unavailable as a forum, that Defendant's wrongful death claims are not subject to arbitration, and that Denison – or the correct administrator – is an indispensable, non-diverse party. Defendant also argues that the Court should abstain from exercising jurisdiction in light of the parallel state court action and that discovery is needed.

## II. DISCUSSION

### A. Standard for Motions to Dismiss

In considering a motion to dismiss, courts must accept as true all facts alleged in the complaint and construe all reasonable inferences in the light most favorable to the plaintiff. *See Hoffman-Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir. 2002). Courts, however, need not accept the complaint's legal conclusions as true, only its well-pled facts. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

A complaint also must "contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Id.* at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff is required to plead "factual content that allows the court to draw the reasonable inference that

the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

### B. The Federal Arbitration Act ("F.A.A.")

The arbitration agreement provides that it "shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. §§ 1-16." (Compl., Ex. B.) The Federal Arbitration Act ("F.A.A.") allows a suit to compel arbitration "under a written agreement for arbitration." 9 U.S.C. § 4. A district court must compel arbitration if there is a valid agreement to do so. *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992) (citing 9 U.S.C. §§ 2 & 3.) In the face of an agreement to arbitrate, the party resisting arbitration must identify enough evidence in the record to make its denial of a valid agreement colorable. *Id.* at 855. "Federal policy requires [courts] to construe arbitration clauses generously, resolving all doubts in favor of arbitration." *Becker v. Davis*, 491 F.3d 1292, 1305 (11th Cir. 2007), *abrogated on other grounds by Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009); *see Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1253 (11th Cir. 2009) ("The F.A.A. creates a strong federal policy in favor of arbitration.").

"The F.A.A. reflects the fundamental principle that arbitration is a matter of contract" and "places arbitration agreements on an equal footing with other contracts." *Rent-A-Center, W., Inc. v. Jackson*, 561

U.S. 63, 67 (2010). Thus, in construing arbitration agreements, courts apply state-law principles relating to contract formation, interpretation and enforceability. *See Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005) ("In determining whether a binding agreement arose between the parties, courts apply the contract law of the particular state that governs the formation of contracts.") However, district courts may apply only state law governing "contracts generally and not arbitration agreements specifically." *Jenkins v. First Am. Cash Advance of Georgia, LLC*, 400 F.3d 868, 875 (11th Cir. 2005) (quoting *Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir. 2002)).

### C. The Unavailability of the National Arbitration Forum

Defendant argues that no valid arbitration agreement exists because an integral part of the agreement – the chosen forum for arbitration – is no longer available. Plaintiffs respond that the reference to the N.A.F. in the agreement may be severed because it is not integral, and the remainder of the agreement should be enforced.

If a forum selection clause is integral to an arbitration agreement, and the forum is unavailable, then arbitration cannot be compelled. *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1350 (11th Cir. 2014) (citing *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000)). The failure of the chosen

forum precludes arbitration whenever the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern. *Brown*, 211 F.3d at 1222 (holding that choice of forum was not integral where the arbitration agreement incorporates the N.A.F. Code by reference, and the N.A.F. Code selects the N.A.F. as the forum for arbitration). To decide whether the forum selection clause is integral, courts consider how important the term was to one or both of the parties at the time they entered into the agreement. *Inetianbor*, 768 F.3d at 1350 (citing *Brown* and holding that choice of forum was integral where there were multiple references throughout the text of the arbitration agreement to the forum's procedural rules and the chosen forum for arbitration).

The arbitration agreement here is similar to the one in *Brown* in that the text of both agreements select the N.A.F. Code but do not explicitly select the N.A.F. as the arbitral forum. The agreement incorporates the N.A.F. Code by reference, and the N.A.F. Code selects the N.A.F. as the forum. Under *Brown*, structuring an agreement in such fashion is insufficient evidence that the choice of the N.A.F. as the forum was an integral part of the agreement rather than an ancillary logistical concern. This is not a case, like *Inetianbor*, where there are several explicit references in the text of the agreement regarding the chosen forum for arbitration. Here, the forum is not once mentioned in the text of the agreement.

Defendant relies on two recent decisions of the Georgia Court of Appeals to support her argument that the selection of the N.A.F. as the forum was important and therefore the N.A.F.'s unavailability precludes arbitration in this case. *See Miller v. GGNSC Atlanta*, 746 S.E.2d 680, 686 (Ga. App. 2013) (unavailability of the N.A.F. as arbitral forum rendered agreement impossible to enforce); *see also Sunbridge Ret. Care Associates, LLC v. Smith*, 757 S.E.2d 157 (Ga. App. 2014) (availability of the N.A.F. as an arbitral forum was integral to arbitration agreement; therefore, the unavailability of the N.A.F. and the N.A.F. Code rendered arbitration agreement impossible to enforce).

There seems to be a conflict between the law announced in the state courts in *Miller* and *Smith* and the holdings of the United States Court of Appeals for the Eleventh Circuit in *Brown* and clarified in *Inetianbor* on whether the unavailability of the N.A.F. renders an agreement like the one here unenforceable. *Miller* and *Smith* would strike this agreement in its entirety and allow Defendant to proceed with her lawsuits. *Brown* and *Inetianbor* would only strike the forum selection clause and would direct Defendant to arbitrate her claims through a substitute arbitrator.

The F.A.A. "allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically." *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007). The law in *Miller* and

*Smith* is specifically related to arbitration, not just contracts in general. Under the F.A.A., that law cannot invalidate this arbitration agreement. More importantly, this case falls squarely under *Brown*. Thus, the Court holds that the unavailability of the N.A.F. does not destroy this arbitration agreement; it merely renders the forum selection clause unenforceable.

### D. Severance of the Forum Selection Clause and Substitution of an Alternate Arbitrator

Plaintiffs argue that the Court should sever the forum selection clause, enforce the arbitration agreement as though the N.A.F. is not referenced in any manner, and designate a substitute arbitrator pursuant to Section 5 of the F.A.A.

As for the severance issue, the agreement contains a severance clause, which states that

> [i]n the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective.

(Compl., Ex. B.) Pursuant to this provision, the Court hereby **SEVERS** the unenforceable forum selection clause from the arbitration agreement – due to the unavailability of the N.A.F. – and finds that the remainder of the agreement is effective.

As for naming a substitute arbitrator, the F.A.A. gives guidance for such circumstances. It states that

> [I]f for any [ ] reason there shall be a lapse in the naming of an arbitrator . . . , or in filling a vacancy, then upon application of either party to the controversy the court shall designate and appoint an arbitrator. . . .

9 U.S.C. § 5. Here, Plaintiffs ask the Court to name a substitute arbitrator. The Court **DIRECTS** the parties to jointly designate and appoint a substitute arbitrator, and inform the Court of the appointment, within fourteen days of this Order. Pursuant to Section 5 of the F.A.A., the Court "shall designate and appoint an arbitrator" if the parties prove unable to do so. *See* 9 U.S.C. § 5.

### E. Defendant's Wrongful Death Claims

Defendant signed the arbitration agreement as Campbell's "authorized representative" pursuant to a power of attorney. As Defendant correctly notes, nowhere does the arbitration agreement indicate that Defendant signed the document in any individual capacity, nor does it indicate that she had any authority to sign on behalf of Campbell's other children. Defendant argues that, by not signing, she and her siblings did not consent to arbitrate their wrongful death claims.

Consent to arbitrate is an essential component of an enforceable arbitration agreement. *Hogsett v. Parkwood Nursing & Rehab. Ctr., Inc.*, 997 F. Supp. 2d 1318, 1328 (N.D. Ga. 2014) (citing *Ashburn Health Care Ctr., Inc. v. Poole*, 648 S.E.2d 430, 431 (Ga. App. 2007)). However, the fact that Defendant did not sign the arbitration agreement in her individual capacity and the fact that her siblings did not sign the agreement in any capacity prove to be of little import here for two reasons.

First, the language of the arbitration agreement itself clearly binds the resident's children without requiring the children's consent or signature.

> [The arbitration agreement] shall inure to the benefit of and bind the parties, their successors and assigns, including without limitation . . . all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, sibling, child. . . .

(Compl., Ex. B.) As a matter of contract interpretation, the Court finds that Campbell, through her authorized representative, obligated her children to submit their derived wrongful death claims to arbitration.

Second, if an arbitration agreement is enforceable as to a decedent and the decedent's estate, then it is also enforceable as to any individual wrongful death claims brought by the decedent's survivors, regardless of whether any of those survivors signed

the arbitration agreement. *Hogsett*, 997 F. Supp. 2d at 1328 ("As a wrongful death claim is a derivative claim that takes on all defenses available against the decedent, if the decedent was unable to prevail in a tort claim based on the conduct that led to her death, then her survivors would likewise be estopped."); *Thi of Georgia at Shamrock, LLC v. Fields*, 2013 WL 6097569, *3 (S.D.Ga. Nov. 18, 2013) ("[T]he Georgia wrongful death statute essentially places a beneficiary in the same shoes as the decedent; thus, a beneficiary is bound by the decedent's promise to arbitrate."); *Wade v. Watson*, 527 F. Supp. 1049, 1052 (N.D.Ga. 1981) ("Although it is true that the action created by the wrongful death statute is different from the cause of action which [the decedent] would have possessed had he lived, any defense which would have been good against [the decedent] is good against his representatives in a wrongful death action. Since the original statute of 1850 [the Supreme Court of Georgia] has consistently held that no recovery could be had unless the deceased in his lifetime could have maintained an action for damages for the injury to him, and that any defenses good as against the deceased would be good as against the action brought by the beneficiaries."). Accordingly, to the extent that the arbitration agreement is valid and enforceable, the wrongful death claims of Campbell's children are subject to arbitration.

### F. Indispensable Parties

Defendant argues that the complaint must be dismissed pursuant to Federal Rule of Civil Procedure 19 because Plaintiffs manufactured diversity jurisdiction by failing to join a non-diverse indispensable party, namely the administrator of the Facility. Rule 19 states a two-part test for determining whether a party is indispensable. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1279 (11th Cir. 2003). First, the Court must ascertain under the standards of Rule 19(a) whether the person in question is one who should be joined if feasible. *Id.* "If the person should be joined but cannot be (because, for example, joinder would divest the court of jurisdiction), then the Court must inquire whether, applying the factors enumerated in Rule 19(b), the litigation may continue." *Id.*

In the state court action, Defendant named Denison as the administrator. Denison then informed that court that she is not, and never has been, the administrator. Defendant "seeks to discover the correct administrator" and argues that "Ms. Denison is a Georgia resident, as would any other appropriate administrator(s), most likely, and their joinder would destroy diversity jurisdiction." (Def.'s Mot. to Dis. at 19.) Joinder of the administrator would only destroy diversity jurisdiction if the administrator is in fact a non-diverse party. Defendant cannot state with any degree of certainty whether that is the case. Apparently, Defendant does not know who the administrator was during her mother's stay at the Facility or in

which state he/she resides. The Court declines the invitation to dismiss a complaint or even take up a Rule 19 analysis based on the "most likely" residence of a yet to be identified person.

### G. Abstention

Defendant asks this Court to abstain from exercising jurisdiction in this case in light of the parallel state court action. Where there are parallel federal and state proceedings, federal courts consider six factors in determining whether abstention is appropriate:

> (1) the order in which the courts assumed jurisdiction over property; (2) the relative inconvenience of the fora; (3) the order in which jurisdiction was obtained and the relative progress of the two actions; (4) the desire to avoid piecemeal litigation; (5) whether federal law provides the rule of decision; and (6) whether the state court will adequately protect the rights of all parties.

*Jackson-Platts v. General Elec. Capital Corp.*, 727 F.3d 1127, 1141 (11th Cir. 2013) (*citing Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 818-20 (1976)). No single factor is dispositive, and federal courts are required to weigh the factors with a heavy bias favoring the exercise of federal jurisdiction. *Id.; First Franklin Fin. Corp. v. McCollum*, 144 F.3d 1362, 1364 (11th Cir. 1998) (*per curiam*) ("[D]ismissal is warranted in light of a concurrent state court action only when a balancing of relevant factors,

heavily weighted in favor of the exercise of jurisdiction, shows the case to be exceptional." (internal quotation marks omitted)).

Here, the parties agree that the *Colorado River* factors should be applied to resolve the abstention issue, but disagree whether those factors weigh in favor of abstention. The first factor asks if one court assumed jurisdiction over property before the other court. *Jackson-Platts*, 727 F.3d at 1141. Where there is no real property at issue, this factor does not favor abstention. *Id.* The parties here agree that this factor weighs against abstention because there is no real property before the state court.

The second factor concerns the inconvenience of the federal forum and focuses primarily on the physical proximity of the federal forum to the evidence and witnesses. *Id.* Under this factor, Defendant argues that she did not anticipate federal litigation, but she does not argue that the federal forum is geographically inconvenient. As Plaintiffs observe, the federal forum is located in Augusta, Georgia, where Defendant resides, where the Facility is located and where the arbitration agreement at issue was executed. The second factor weighs against abstention because the federal forum is not inconvenient.

Under the third factor, the Court asks which forum acquired jurisdiction first. *Id.* at 1142. "What matters is not so much the chronological order in which the parties initiated the concurrent proceedings, but the progress of the proceedings and whether

the party availing itself of the federal forum should have acted earlier." *Id.* In January 2014, Defendant filed the state court action. Two months later, Plaintiffs sought relief in this Court. Although the state court action is still pending, very little has transpired there since Plaintiffs filed their complaint here. Therefore, this factor does not weigh in favor of abstention. *See McCollum*, 144 F.3d at 1365 (this factor weighs against dismissal when no activity has occurred in state proceeding before the filing of the federal petition); *see also Jackson-Platts*, 727 F.3d at 1142 (noting that this factor does not counsel in favor of dismissal when state court action is no further along than the federal case).

The fourth factor addresses the potential for piecemeal litigation. Defendant contends that piecemeal litigation is a danger here and therefore the Court should not exercise jurisdiction. Contrary to Defendant's assertion, this factor has "no force" in a case like this. *See McCollum*, 144 F.3d at 1364. This matter is before the Court due to a complaint to compel arbitration and therefore no protracted federal litigation would result from the Court's exercise of jurisdiction over the instant complaint. *See id.* ("The federal proceeding has only two possible outcomes: an order compelling arbitration, or an order refusing to compel arbitration and dismissing the petition. No piecemeal litigation of the merits can occur either way, and even if arbitration results, that is piecemeal litigation that the parties and federal policy have

together made mandatory."). Therefore, the fourth factor weighs against abstention.

The parties agree that the fifth factor, the law to be applied, weighs against abstention because this action was brought pursuant to the Federal Arbitration Act. The sixth and final factor concerns whether the state court can adequately protect the parties' rights. *Jackson-Platts*, 727 F.3d at 1143. Plaintiffs could seek relief in state court by filing a motion to compel arbitration there. But the mere fact that Plaintiffs could obtain relief from the state court does not justify refusing to exercise jurisdiction here. *See id.*(agreeing with the general observation regarding the adequacy of the state forum, but concluding that the fact that both fora are adequate to protect the parties' rights merely renders this factor neutral); *see also Ambrosia Coal & Constr. Co. v. Pages Morales*, 368 F.3d 1320, 1334 (11th Cir. 2004) ("This factor will only weigh in favor or against abstention when one of the fora is inadequate to protect a party's rights."). Here, this factor does not favor abstention because it appears that both fora are adequate.

On balance, the *Colorado River* factors clearly do not weigh in favor of abstention in this case.

### H. The Need for Discovery

Defendant argues that, if all of her other arguments fail, that she be entitled to conduct discovery prior to the Court issuing a final order for the limited purpose of determining the validity of the arbitration

agreement. Section 4 of the Federal Arbitration Act calls for "an expeditious and summary hearing, with only restricted inquiry into factual issues." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983). Here, Defendant states that discovery is needed, but does not point to facts that place the making of the agreement in issue (*e.g.*, blank signature line, evidence of fraud or coercion). Defendant briefly mentions that depositions would be taken, but does not identify who would be deposed or what information she hopes to discover from them. Therefore, the Court finds that granting Defendant's request for discovery prior to the Court's issuance of a final order in this case would simply frustrate the "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Id.*

## III. CONCLUSION

Upon the foregoing, Defendant's motion to dismiss (doc. no. 7) is hereby **DENIED.** Defendant is **ORDERED** to submit to arbitration her currently pending claims against Plaintiffs in the State Court of Wayne County.

**IT IS FURTHER ORDERED** that the parties shall jointly designate and appoint a substitute arbitrator, and inform the Court of that appointment, within **fourteen (14)** days of the date of this Order. If the parties fail to do so, the Court shall appoint a substitute arbitrator.

The Clerk is directed to **CLOSE** this case. Either party may move to reopen the case if it becomes necessary.

**ORDER ENTERED** at Augusta, Georgia, this 29th day of January, 2015.

/s/ J. Randal Hall
Honorable J. Randal Hall
United States District Judge
Southern District of Georgia

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 15-10603-DD

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BEVERLY ENTERPRISES INC.,
GOLDEN GATE NATIONAL SENIOR CARE, LLC,
GGNSC HOLDINGS, LLC,
GGNSC CLINICAL SERVICES, LLC,
GGNSC ADMINISTRATIVE SERVICES, LLC,
GGNSC AUGUSTA WINDERMERE, LLC,
d.b.a. Golden LivingCenter-Windermere,

Plaintiffs-Appellees,

versus

JUDY CYR,
as Administrator of the Estate of Frankie Campbell,
JUDY CYR,
in her Representative Capacity on Behalf
of the Children of Frankie Campbell,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Georgia

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ON PETITION(S) FOR REHEARING
AND PETITION(S) FOR REHEARING EN BANC

(Filed Sep. 21, 2015)

BEFORE: ED CARNES, Chief Judge, MARCUS, and WILLIAM PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
CHIEF JUDGE

Resident Name: Frankie Campbell Res. No. 74418

**RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION – READ CAREFULLY)**

This Arbitration Agreement is executed by Windmere (the "Facility") and Frankie Campbell ("Resident" or "Resident's Authorized Representative", hereafter collectively referred to as "Resident") in conjunction with an agreement for admission and for the provision of nursing facility services (the "Admission Agreement") by Facility to Resident. The parties to this Arbitration Agreement acknowledge and agree that upon execution, this Arbitration Agreement becomes part of the Admission Agreement, and that the Admission Agreement evidences a transaction involving interstate commerce governed by the Federal Arbitration Act. It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which

is hereby incorporated into this Agreement[1], and not by a lawsuit or resort to court process. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

This agreement to arbitrate includes, but is not limited to, any claim for payment, nonpayment, or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, warranty, or any alleged breach, default, negligence, wantonness, fraud, misrepresentation, suppression of fact, or inducement. However, this agreement shall not limit the Resident's right to file a grievance or complaint with the Facility or any appropriate government agency from requesting an inspection from such an agency, or from seeking review under 42 C.F.R. section 431.200 et seq. of a decision to transfer or discharge the Resident.

The parties agree that damages awarded, if any, in an arbitration conducted pursuant to this

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[1] Information about the National Arbitration Forum, including a complete copy of the Code of Procedure, can be obtained from the Forum at 800-474-2371, by fax at 651-604-6778 or toll-free fax at 866-743-4517, or on the internet at http://www.arbforumcom.

Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credit against, or limitations on, such damages. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective.

It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator, or heir of the Resident. The parties further intend that this agreement is to survive the lives or existence of the parties hereto.

All claims based in whole or part on the same incident, transaction, or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose and should reasonably have been discovered prior to the date upon which notice of arbitration is given to the Facility or received by the Resident and such claim is not presented in the arbitration proceeding.

**THE PARTIES UNDERSTAND AND AGREE THAT THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES, AND THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES.**

The Resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) that execution of this Arbitration Agreement is not a precondition to admission or to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice to the Facility from the Resident within thirty days of signature. If not rescinded within thirty days, this Arbitration Agreement shall remain in effect for all subsequent stays at the Facility, even if the Resident is discharged from and readmitted to the Facility.

The undersigned certifies that he/she has read this Arbitration Agreement and that it has been fully explained to him/her, that he/she understands its contents, and has received a copy of the provision and that he/she is the Resident, or a person duly

authorized by the Resident or otherwise to execute this agreement and accept its terms.

Date: 6/30/08

Signature: Judy M. Cyr
(Resident)

Witness: _____

If the resident is unable to consent or sign this provision because of physical disability or mental incompetence or is a minor and an authorized representative is signing this provision, complete the following:

Date: 6/30/08

Relationship to Resident: POA

Signature: Judy M. Cyr
(Authorized representative)

Witness: Kay Powell

For Facility:

Date: 6-30-08

Authorized Representative Signature:
Kay Powell

Print Name and Title: Kay Powell, FBOC