IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ESTATE OF JAMES ASMUS, By Its Executor, Joel S. Asmus, VICKI S. ASUMUS, individually, MORGAN L. DUTLER, individually, JOEL S. ASMUS, individually, and JEFFREY S. ASMUS, individually, **Plaintiffs,** **vs.** **CARE INITIATIVES d/b/a Southern Hills Specialty Care; and GEORGE FOTIADIS, M.D.,** **Defendants.**	**Case No. LACL149402** **ORDER DENYING DEFENDANT CARE INITIATIVES d/b/a SOUTHERN HILLS SPECIALTY CARE'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS**

I. INTRODUCTION

Before the Court is Defendant Care Initiatives d/b/a Southern Hills Specialty Care's Motion to Compel Arbitration and Stay Proceedings. After having considered the written and oral arguments advanced by the parties, the Court now enters its order on the motion.

II. BACKGROUND FACTS

On September 18, 2018, Plaintiff Vicki Asmus, acting as attorney-in-fact for James Asmus, executed an Admission Agreement for his admission to Southern Hills Specialty Care ("SHSC"). Separate from the Admission Agreement, also that same day, Ms. Asmus, again, as attorney-in-fact for James Asmus, executed an "Agreement to Voluntary Arbitrate Disputes" ("Arbitration Agreement"). The Arbitration Agreement states, in relevant part, as follows:

> I, James Asmus, hereby acknowledge that any controversy, dispute, claims or disagreement arising out of the care and services provided by SHSC ("Facility") or related to the Admission Agreement, shall be settled exclusively by binding arbitration, which shall be conducted in Des Moines, Iowa[.] This arbitration process shall follow procedures in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration.

Also relevant to the Court's analysis below, the Arbitration Agreement states as follows:

> All claims brought by or on behalf of the Resident, which directly or indirectly relate to the quality of care provided by the Facility or its employees, must first be substantiated by an independent medical reviewer licensed to practice medicine in the State of Iowa prior to being brought to arbitration. The independent medical reviewer must be mutually agreed upon by both parties. The reviewer's decision shall be final, binding, and unreviewable.

As noted by the parties in their briefing, Ms. Asmus was not required to sign the Arbitration Agreement on behalf of Mr. Asmus to have him admitted to SHSC.

Mr. Asmus passed away on December 21, 2018. On December 18, 2020, Plaintiffs filed their Petition at Law and Jury Demand asserting the following claims: Count I – Nursing Home Negligence; Count II – Res Ipsa Loquitor; Count III – Loss of Spousal Consortium; and Count IV – Loss of Parental Consortium. Defendant SHSC filed its Motion to Compel Arbitration and Stay Proceedings on January 22, 2021 ("Motion"). Plaintiffs resist Defendant SHSC's Motion. Defendant George Fotiadis, M.D., also resists Defendant SHSC's Motion, to the extent he resists a stay of the litigation against him.

III. CONCLUSIONS OF LAW

When a party moves to compel arbitration, the Court must determine (1) whether there is a valid arbitration agreement, and (2) whether the particular dispute falls within the terms of the agreement. *Union Ins. Co. v. Hull & Co., Inc.,* F. Supp.2d (S.D. Iowa 2011) 2011 WL 676922. Here, it is undisputed that the claims asserted by Plaintiffs fall within the terms of the Arbitration Agreement in that they are related to alleged deficiencies associated with the care and services provided by Defendant SHSC. Accordingly, the Court's analysis is focused on whether or not a valid arbitration agreement exists.

Iowa Code section 679A.1 provides that a written agreement to submit to arbitration an

existing controversy is valid, enforceable, and irrevocable unless grounds exist at law or in equity for the revocation of the written agreement. Iowa Code § 679A.1. General principles of contract law determine whether or not an arbitration agreement is enforceable. *Bryan v. Am. Express Fin. Advisors, Inc.,* 595 N.W.2d 482, 484 (Iowa 1999). Plaintiffs assert, first, that the Arbitration Agreement lacks consideration and, second, that it is substantially unfair and unconscionable. The Court will briefly address each argument.

"It is fundamental that a valid contract must consist of an offer, acceptance, and consideration." *Margeson v. Artis,* 776 N.W.2d 652, 655 (Iowa 2009). Offer and acceptance are also referred to as "mutual assent." *Estate of Cox by Cox v. Dunakey & Klatt, P.C.,* 893 N.W.2d 295, 304 (Iowa 2017). When there is a written contract signed by the parties, as there is here, the contract itself is objective evidence of the parties' mutual assent to the terms. *Wegner v. Schauer,* 909 N.W.2d 230 at *2 (Iowa Ct. App. 2017); *Ziskovsky v. Ziskovsky,* 843 N.W.2d 478 at *3 (Iowa Ct. App. 2014).

In addition to mutual assent, a valid contract requires consideration. "Generally, the element of consideration ensures the promise sought to be enforced was bargained for and given in exchange for a reciprocal promise or act." *Margeson,* 776 N.W.2d at 655. Plaintiffs acknowledge the written contract; however, assert it lacks consideration. In response, Defendant SHSC argues the Arbitration Agreement has consideration because both parties mutually agreed to submit future disputes to arbitration.

Mutual promises may constitute a consideration for, and will support, a contract. *Wilson v. Airline Coal, Co.,* 246 N.W.2d 753, 755 (Iowa 1933). In addition to the provisions cited above, the Arbitration Agreement specifically states "I have read this 'Agreement to Arbitrate Disputes' and understand and agree to its terms. The undersigned acknowledge that

each of them has read and understood this agreement, each of them voluntarily consent to all of its terms, and each of them has received a copy of the signed agreement." It is clear from this language that both Ms. Asmus, on behalf of Mr. Asmus, and a representative of Defendant SHSC read and agreed to be bound by the terms of the Arbitration Agreement. When both parties have agreed to be bound by arbitration, adequate consideration exists, and the arbitration agreement should be enforced. *Blair v. Scott Specialty Gases,* 283 F.3d 595, 603 (3d Cir. 2002) (internal citations omitted). Accordingly, Plaintiffs' first argument is without merit.

For their second argument, Plaintiffs assert that the Arbitration Agreement is substantially unfair and, therefore, unconscionable. Specifically, Plaintiffs point to the pre-arbitration independent review process contained within the Arbitration Agreement in support of their argument. The unconscionability of a contract may be raised as a defense to the contract. *Smith v. Harrison,* 325 N.W.2d 92, 94 (Iowa 1982). Iowa courts are to take into account the following factors in analyzing unconscionability: (1) assent; (2) unfair surprise; (3) notice; (4) disparity of bargaining power; and (5) substantive unfairness. *Home Fed. Sav. And Loan Ass'n of Algona v. Campney,* 357 N.W.2d 613, 618 (Iowa 1984). Because Ms. Asmus read, signed, and acknowledged her understanding of the Arbitration Agreement, the first three factors are not at issue. *See Faber v. Menard, Inc.,* 367 F.3d 1048, 1054 (8th Cir. 2004). Further, given Ms. Asmus was not required to sign the Arbitration Agreement in order for Mr. Asmus to be admitted to Defendant SHSC, there is no evidence of disparity in bargaining power. Thus, the only real issue is whether the terms of the Arbitration Agreement were substantively unfair.

A bargain is substantively unfair and, therefore, unconscionable "if it is such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other." *Id.* at 1053 (internal citations omitted). A provision will

be invalidated if it is a "nefarious provision, inimical to the public good." *Id.* Here, for the reasons discussed by Plaintiffs in their "Brief in Support of Plaintiffs' Resistance to Defendant Care Initiatives' Motion to Compel Arbitration and Stay Proceedings," the Court finds pre-arbitration independent review process renders the Arbitration Agreement unconscionable. Arbitration agreements, such as the Arbitration Agreement here, which limit a party's ability to vindicate his rights in the arbitral forum, are unenforceable. *See Id.* at 1052. As such, Defendant SHSC's Motion must be denied.

IV. RULING

IT IS THEREFORE ORDERED SHSC's Motion is **DENIED.**[1]

[1] In light of this Ruling, it is unnecessary for the Court to address Plaintiffs' Motion to Reopen Record on Defendant Care Initiatives' Motion to Compel Arbitration and Stay Proceedings.

State of Iowa Courts

Case Number	**Case Title**
LACL149402	ESTATE OF JAMES ASMUS ET AL VS CARE INITIATIVES ET AL
Type:	OTHER ORDER

So Ordered

Samantha Gronewald, District Court Judge
Fifth Judicial District of Iowa

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