IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ELIJAH R. MCCUTCHEON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CARMELA MCCUTCHEON, PLAINTIFF, vs. THI OF S.C. AT CHARLESTON, LLC D/B/A DRIFTWOOD REHABILITATION AND NURSING CENTER N/K/A RIVERSIDE HEALTH & REHAB DEFENDANT.	**C.A.NO: 2:11-cv-02861 DCN** **DEFENDANT THI OF SOUTH CAROLINA AT CHARLESTON, LLC D/B/A DRIFTWOOD REHABILITATION AND NURSING CENTER N/K/A RIVERSIDE HEALTH & REHAB MOTION TO DISMISS AND PETITION TO COMPEL ARBITRATION**

TO: CHRISTOPHER J. MCCOOL, ESQ, ATTORNEY FOR PLAINTIFFS:

PLEASE TAKE NOTICE that Defendant THI of South Carolina at Charleston, LLC d/b/a Driftwood Rehabilitation & Nursing Center n/k/a Riverside Health & Rehab (hereinafter "this Defendant" or "Driftwood"), by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Plaintiff has sued this Defendant for Negligence, Negligence per Se, Breach of Contract, Fraud and Misrepresentation, Violation of the South Carolina Unfair Trade Practices Act, Negligence-Wrongful Death and Negligence-Survivorship, pursuant to Carmela McCutcheon's residency at Driftwood. Prior to being admitted to Driftwood, Plaintiff entered into an Arbitration Agreement with the facility. (See Arbitration Agreement attached as Exhibit A.)

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, because the services and reimbursement thereof to be provided to Carmela McCutcheon upon her admission to the facility involved interstate commerce.

This Motion and Petition are supported by the attached Arbitration Agreement, affidavit of Jim Thomas, the statutory and case law of the State of South Carolina and the United States, the accompanying memoranda of law, and other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

Counsel for the Defendant Driftwood hereby affirms that we have consulted with opposing counsel in good faith to resolve the matter contained in this motion, and this consultation did not result in resolution of the matter.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: : /s/ *D. Jay Davis, Jr.*_____
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Charleston, South Carolina
Dated: November 1, 2011

Exhibit A

PLEASE READ CAREFULLY

HEALTH CARE CENTER - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

This Agreement is made between Driftwood Rehab + Nursing ("Health Care Center"), its agents, employees and servants, and Carmela B McCutchen ("Resident") or Elijah McCutchen ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

It is understood by Resident/Representative that he/she is not required to use the aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident.

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Health Care Center's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Health Care Center, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Media Rules.

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

I understand and agree that I am giving up and waiving my right to a jury trial.

This Agreement shall remain in effect for all care rendered at Health Care Center and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

Elijah McCutchen	4/17/08	Elijah McCutchen	
Resident/Representative Signature	Date	Printed Name of Resident/Representative	
P Detriest	4/17/08	PC Detriest AA	
Authorized Agent of Health Care Center	Date	Printed Name & Title	

White – Business File Canary – Resident/Representative