IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

SHARON A. MARCHIO, Executrix of the Estate of Pauline Virginia Willet,

Plaintiff/Appellant,

v. **WV Supreme Court Docket No.: 35635**

CLARKSBURG NURSING & REHABILITATION CENTER, INC., a West Virginia Corporation, d/b/a Clarksburg Continuous Care Center, SHEILA K. CLARK, Executive Director of Clarksburg Nursing & Rehabilitation Center, Inc., d/b/a Clarksburg Continuous Care Center, JOHN/JANE DOE #1, and JENNIFER MCWHORTER,

Defendants/Appellees.

APPELLEES' RESPONSE BRIEF TO APPELLANT SHARON A. MARCHIO'S BRIEF FOR REVIEW OF CERTIFIED QUESTION

From the Circuit Court of Harrison County
Civil Action No.: 08-C-334-3
The Honorable James A. Matish, Judge

ORAL PRESENTATION REQUESTED

Respectfully submitted by:

CLARKSBURG NURSING & REHABILITATION CENTER, INC., a West Virginia Corporation, d/b/a Clarksburg Continuous Care Center, SHEILA K. CLARK, Executive Director of Clarksburg Nursing & Rehabilitation Center, Inc. d/b/a Clarksburg Continuous Care Center, JOHN/JANE DOE #1, and JENNIFER MCWHORTER

Mark A. Robinson (WV Bar ID #5954)
Ryan Brown (WV Bar ID #10025)
FLAHERTY SENSABAUGH BONASSO PLLC
Post Office Box 3843
Charleston, WV 25338-3843
(304) 345-0200

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Now come the Defendants, Clarksburg Nursing & Rehabilitation Center, Inc., a West Virginia Corporation, d/b/a Clarksburg Continuous Care Center, Sheila K. Clark, and Jennifer McWhorter (hereinafter collectively referred to as "Clarksburg Nursing"), by counsel, Mark A. Robinson, Ryan A. Brown and the law firm of Flaherty Sensabaugh Bonasso, PLLC, and responds to the *Brief of Appellant Sharon A. Marchio for Review of Certified Question ("Appellant's Brief")* regarding the previously answered certified question set forth in the *Order and Certification* of the Honorable James A. Matish, Judge of the 15th Judicial Circuit, entered February 24, 2010. For reasons more fully appearing below, Clarksburg Nursing asserts that Judge Matish's crafting of the certified question and answer and opinion set forth in the February 24, 2010, Order fully and properly framed the certified question relating to the arbitration agreement entered into between the Plaintiff and Clarksburg Nursing, and also properly applied prevailing case law to the facts of this case, including *Preston v. Ferrer,* 552 U. S. 346, 128 S. Ct. 978 (2008).

TYPE OF PROCEEDING AND NATURE OF RULING IN THE CIRCUIT COURT OF HARRISON COUNTY

Plaintiff, Sharon A. Marchio, Executrix of the Estate of Pauline Virginia Willett, commenced this civil litigation by filing her Complaint against Clarksburg Nursing on or about July 7, 2008. The civil action filed by Plaintiff in this case alleges certain violations pursuant to W.Va. Code §16-5C-1, *et seq.*, also known as the "West Virginia Nursing Home Act" ("NHA"). Specifically, it is alleged that Clarksburg Nursing's negligence caused Ms. Willett to suffer pressure sores, infections, pain, suffering, and death. *See Complaint*, ¶ 28. Plaintiff additionally alleges that as a result of "Defendants' delay in seeking physician intervention with resulting delay in diagnosing and treating Ms. Willett's conditions, she never recovered from these

afflictions and ultimately expired in the morning of July 6, 2006 at UHC." *Complaint*, ¶ 16. Finally, Plaintiff alleges that "Defendants are liable to the Plaintiff...for the injuries which contributed to the ultimate death suffered by Pauline Willett as they deprived her of the rights and benefits established for her well-being by way of the applicable state rules and regulations." *Complaint*, ¶ 26.

Prior to Ms. Willet's admission to Clarksburg Nursing on May 27, 2006, an arbitration agreement was signed by Plaintiff on May 25, 2006. *See Arbitration Agreement*, attached as **Exhibit A**. Based on this arbitration agreement, Clarksburg Nursing moved the Circuit Court of Harrison County to dismiss Plaintiff's complaint and to compel arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. *See Defendants' Motion to Dismiss and Motion to Compel Arbitration.* On October 3, 2008, the Circuit Court held a hearing on Clarksburg Nursing's motion to dismiss the complaint and compel arbitration. The Circuit Court reserved ruling on this issue by an Order entered November 17, 2008. *See Order of November 17, 2008.*

On November 12, 2008, Clarksburg Nursing filed a second motion to dismiss arguing that the West Virginia Medical Professional Liability Act ("MPLA"), *W.Va. Code* § 55-7B-1 *et seq*, supersedes the NHA and provides the exclusive remedy for Plaintiff's allegations against Clarksburg Nursing. *See Defendants' Clarksburg Nursing & Rehabilitation Center, Inc.'s, and Sheila K. Clark Answer and Motion to Dismiss Plaintiff's Complaint.* A hearing on Clarksburg Nursing's second motion to dismiss was held on January 29, 2009. The Circuit Court again reserved ruling on this issue.

On September 21, 2009, the Circuit Court entered an *Order Setting Deadline for Parties' Submission of Proposed Certified Questions to the Court.* On October 2, 2009, Clarksburg

Nursing filed its proposed certified questions with the Circuit Court. On October 5, 2009, Plaintiff filed her single proposed certified question with the Circuit Court.

On February 24, 2010, by Order, the Circuit Court concluded that only the following certified question was appropriate to submit to the West Virginia Supreme Court of Appeals:

> Is West Virginia Code § 16-5C-15(c), which provides in pertinent part that "[a]ny waiver by a resident or his or her representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy," preempted by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, when a nursing home resident's representative has executed an arbitration agreement as part of the nursing home's admission documents and the arbitration agreement contains the following terms and conditions:
>
> a. the arbitration agreement applies to and binds both parties by its terms;
>
> b. the arbitration agreement contains language in upper case typescript stating as follows: "THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY."; and
>
> c. the resident representative is specifically advised that she has the right to seek legal counsel concerning the arbitration agreement, the execution of the arbitration agreement is not a pre-condition to admission to the nursing home facility, and the arbitration agreement may be rescinded by the resident through written notice to the facility within thirty (30) days of signing the arbitration agreement.

__X__ Yes

_____ No

See Order and Certification; see also Order Answering Certified Question.

STATEMENT OF FACTS

Pauline Willett was ninety-four (94) years old and suffered from Alzheimer's dementia, ischemic cardiomyopathy, a previous heart attack, hypertension, chronic obstructive pulmonary disease, asthma, osteoarthritis, and osteoporosis. Prior to May 21, 2006, Ms. Willet resided with her daughter, the Plaintiff, who was Ms. Willett's principle caregiver. On May 21, 2006, Ms. Willet was admitted to United Hospital Center ("UHC") in Clarksburg, West Virginia, for treatment of severe diarrhea, abdominal cramps, and uncontrolled diabetes.

Due to Plaintiff's own health concerns, Plaintiff was no longer able to care for Ms. Willett and decided to admit Ms. Willet to Clarksburg Nursing upon Ms. Willett's discharge from UHC. Pursuant to this decision, on May 25, 2006, Plaintiff completed various admissions documents and executed an arbitration agreement related to Ms. Willett's care at Clarksburg Nursing.

On May 27, 2006, Ms. Willett was admitted to Clarksburg Nursing. Upon her admission, Ms. Willett was noted to weigh less than 100 pounds, suffered from a decubitus ulcer to her right buttocks, and suffered from a fungal infection to her groin area. Ms. Willett's medical records indicate that Ms. Willett had previously suffered from an irritation to her groin area, decubitus ulcers, and chronic urinary tract infections while Plaintiff was her primary care giver.

Because of Ms. Willett's significant comorbidities, her health continued to decline during her residency at Clarksburg Nursing. Despite her declining health, on the morning of July 3, 2006, Ms. Willett met with Rev. Jim Caton who gave Ms. Willett communion. *Deposition of Rev. Jim Caton*, p.10-11, attached as **Exhibit B**. Rev. Caton stated that Ms. Willett did not having any trouble breathing that morning because if she had not been physically or mentally ready for communion, he would not have given it to her. *Deposition of Rev. Jim Caton*, p.10-11.

After eating her lunch that same day, Ms. Willett vomited. Ms. Willett's physician ordered that a chest x-ray be performed, most likely because elderly patients who vomit can aspirate materials into their lungs. An x-ray was performed that afternoon which showed material in Ms. Willett's lungs. Based on the x-ray results, Ms. Willett's physician, Dr. Hess, ordered medication to increase the amount of air in Ms. Willett's lungs and to treat respiratory infection. Within an hour of receiving the x-ray results, Ms. Willett's family requested that she be transferred to UHC. Ms. Willett's physician complied with this request. Approximately five (5) hours after Ms. Willett's transfer to UHC it was documented that Ms. Willett had suffered a heart attack. On Ms. Willett's certificate of death, respiratory arrest is listed as the immediate cause of death. Listed as a significant condition contributing to Ms. Willett's death is "acute MI," otherwise known as a heart attack. Ms. Willett had been treating with a physician for many years for her heart conditions.

As stated previously, Plaintiff filed her complaint against Clarksburg Nursing alleging that its actions or inactions violated various provisions of the NHA. Specifically, Plaintiff has alleged that while at Clarksburg Nursing, Ms. Willet suffered weight loss, urinary tract infections, worsening decubitus ulcers, a fungal infection of the groin area, diarrhea, dehydration, pneumonia, septicemia, renal failure, congestive heart failure, and an acute myocardial infarction. *See generally Complaint.* Plaintiff alleges that as a result of "Defendants' delay in seeking physician intervention with resulting delay in diagnosing and treating Ms. Willett's conditions, she never recovered from these afflictions and ultimately expired in the morning of July 6, 2006 at UHC." *Complaint*, ¶ 16. Finally, Plaintiff alleges that "Defendants are liable to the Plaintiff...for the injuries which contributed to the ultimate death suffered by

Pauline Willett as they deprived her of the rights and benefits established for her well-being by way of the applicable state rules and regulations." *Complaint*, ¶ 26.[1]

In order to fully understand the Court's decision to craft the certified question as it did, it is first necessary to briefly review the subject Arbitration Agreement, signed by Ms. Marchio on May 25, 2006 in her capacity as power of attorney for Ms. Willett. This Arbitration Agreement is a simple two page document that was signed prior to Ms. Willett's admission to Clarksburg Nursing. *See Arbitration Agreement*. It specifically notes that it is the exclusive form of resolution of any claims between the parties, including acts which constitute breach of contract, misrepresentation, negligence, malpractice, "or any other claim based on any departure from accepted standards of medical or healthcare or safety whether sounding in tort or in contract." *Id.* The Arbitration Agreement further notes that it shall not limit the resident's "right to file a grievance or complaint, formal or informal, with the facility or any appropriate state or federal agency." *Id.*

For purposes of Judge Matish's certified question, he noted that the subject Arbitration Agreement contained the following terms and conditions: (1) the Agreement applies and binds *both parties* by its terms; (2) the Agreement contains language in upper case type script stating: THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL

[1] Although not necessarily a part of this proceeding, it should be noted that the allegations, while on their face claim violations of the NHA, clearly allege breaches of health professional standards of care, which would trigger the application of W.Va. Code §55-7B-1 *et seq.*, also known as the "West Virginia Medical Professional Liability Act." It remains Clarksburg Nursing's position that if allegations against a healthcare provider involve tortious acts or omissions committed by the health care provider "within the context of the rendering of 'health care' as defined by W. Va. Code § 55-7B-2(e)(2006)(Supp.2007), ***the Act applies regardless of how the claims have been pled.***" *Blankenship v. Ethicon*, 221 W.Va. 700, at 703 (2007)(emphasis added). Plaintiff cannot avoid the application of the MPLA by simply pleading NHA claims when Clarksburg Nursing qualifies as a healthcare provider under the MPLA and Plaintiff has alleged that Clarksburg Nursing failed to properly provide healthcare services to Ms. Willet.

RIGHT TO HAVE ANY CLAIM DECIDED IN THE COURT OF LAW BEFORE A JUDGE AND A JURY; and (3) the resident or the resident's representative is advised that they have the right to seek legal counsel concerning the Arbitration Agreement and the execution of the Arbitration Agreement is not a pre-condition to admission to the nursing home facility (meaning that it need not be signed in order for the resident to be placed in the facility), and that the Arbitration Agreement may be rescinded by the resident or the resident's representative through written notice to the facility within thirty days of signing the Arbitration Agreement. *Order Answering Certified Question*, 4-5.

By its terms, this Arbitration Agreement applied to both parties and did not require completion in order for Ms. Willett to be placed at Clarksburg Nursing. Further, the document contained clear, concise language in capital letters stating that the signator to the Agreement understood and agreed that entering into this Arbitration Agreement resulted in waiving the constitutional right to have a claim decided in the Court of law before a Judge and jury. Finally, the agreement allows for a unilateral rescission by the resident (a right not held by the nursing home) to pull out of the agreement within thirty days of signing it. Ms. Willett signed this document on May 25, 2006.

As set forth *infra,* Judge Matish's certified question and his answer should be upheld by this Court because it appropriately applies binding case law enacted by the United States Supreme Court relating to arbitration agreements such as that in this case.

STANDARD OF REVIEW

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.,* 197 W. Va. 172, 475 S.E.2d 172 (1996).

ARGUMENT

THE CIRCUIT COURT PROPERLY ANSWERED THE CERTIFIED QUESTION AND THE FEDERAL ARBITRATION ACT REQUIRES THE ENFORCEMENT OF THE ARBITRATION AGREEMENT ENTERED INTO BETWEEN PLAINTIFF AND CLARKSBURG NURSING.

Prior to Ms. Willet's admission to Clarksburg Nursing on May 27, 2006, an arbitration agreement was signed by Plaintiff on May 25, 2006, that stated it would be governed by the FAA.[2] The FAA was enacted in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 288-289 (2002). The FAA "embodies a 'strong federal public policy in favor of enforcing arbitration agreements,' and is designed to 'ensure judicial enforcement of privately made agreements to arbitrate.'" *Adkins v. Labor Ready, Inc.*, 185 F.Supp.2d 628, 633 (S.D.W.Va. 2001) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217-219 (1985)). The FAA "provides that written arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686 (1996) (citing 9 U.S.C. § 2).

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Supreme Court of the United States held that Section 2 of the FAA applies in state courts as well as federal courts and withdraws the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. Stated another way, when presented with a valid arbitration agreement, the act leaves no place for the exercise of discretion by a court, but instead

[2] "This Arbitration Agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. §§ 1-16." *See Arbitration Agreement.*

mandates that the court shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. *Adkins*, 185 F.Supp.2d at 633.

In West Virginia, "a valid, written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." *See* Syl. Pt. 5, *McGraw v. The American Tobacco Company*, 681 S.E.2d 96 (W.Va. 2009). Additionally, "[i]t is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract." Syl. Pt. 3, *Clites v. Clawges*, 685 S.E.2d 683 (W. Va. 2009). Finally, a circuit court's order compelling arbitration will only be reversed if the "circuit court's legal determination leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court's order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate." Syl. Pt. 4, *McGraw*, 681 S.E.2d 96.

It is important to note that Plaintiff neither denies that she voluntarily entered into the Arbitration Agreement, nor does she deny that she had the authority to enter into the Arbitration Agreement. At no point has Plaintiff alleged that the Arbitration Agreement is invalid due to general contract defenses of fraud, duress, unconscionability, or capacity. Instead, Plaintiff has argued that the NHA, and specifically W.Va. Code §16-5C-15, prohibits nursing home residents or their legal representatives from entering into arbitration agreements with nursing home facilities. W.Va. Code §16-5C-15 states, "Any waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing,

shall be null and void as contrary to public policy." As such, Plaintiff's position is that W.Va. Code § 16-5C-15 invalidates the subject arbitration agreement.

Clarksburg Nursing has countered by arguing that Plaintiff's position fails for two reasons. First, the Arbitration Agreement entered into between Clarksburg Nursing and Plaintiff does not waive Plaintiff's right to commence an action under the NHA. As stated in *Preston v. Ferrer*, "[b]y agreeing to arbitrate a statutory claim, a party *does not forgo the substantive rights afforded by the statute*, it only submits to their resolution in an arbitral . . . forum." *Preston v.* 128 S.Ct. at 987 (2008); *citing Mitsubishi Motors, Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (emphasis added). Just as in *Preston*, Plaintiff has relinquished no substantive rights under the NHA. Nevertheless, under the arbitration agreement that she signed, Plaintiff "cannot escape resolution of those rights in an arbitral forum." *Preston*, 128 S.Ct. at 987.

Second, "the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* Therefore, Plaintiff is prevented from successfully arguing that W.Va. Code §16-5C-15 requires claims under the NHA to be adjudicated only in circuit court. Any such interpretation that W.Va. Code §16-5C-15 prevents arbitration agreements in nursing homes would necessarily require preemption of W.Va. Code §16-5C-15 by the Federal Arbitration Act. *See* Syl. Pt. 2, *Morgan v. Ford Motor Company*, 680 S.E.2d 77 (W.Va. 2009) ("'The Supremacy Clause of the United States Constitution, Article VI, Clause 2, invalidates state laws that interfere with or are contrary to federal Law,'" *citing* Syl. Pt. 1, *Cutright v. Metropolitan Life Ins. Co.* 201 W.Va. 50, 491 S.E.2d 308 (1997)).

Under West Virginia law, federal preemption is disfavored "in the absence of exceptionally persuasive reasons warranting application." *Morgan*, 680 S.E.2d at 83. The U.S.

Supreme Court's recent decision of *Preston v. Ferrer* explicitly validates arbitration agreements like that in this action. Indeed, as the U.S. Supreme Court noted from the very outset of its opinion in *Preston*, "As this Court recognized in *Southland Corp.* v. *Keating*, 465 U. S. 1 (1984), the Federal Arbitration Act (FAA or Act), 9 U. S. C. §1 *et seq.* (2000 ed. and Supp. V), establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston*, 128 S.Ct. at 981. The overriding principle enunciated in *Preston* is that arbitration agreements are a federal creation with broad, national application. States are thus preempted from enacting laws intended, whether explicitly or impliedly, from voiding arbitration agreements.

In addition to Defendant's previous reliance on *Preston*, the West Virginia Supreme Court addressed these specific issues in *Clites*, a decision that was just handed down on October 13, 2009. In *Clites*, the plaintiff was hired as a customer representative and signed an arbitration agreement during her employee orientation. *Clites*, 685 S.E.2d at 696. After the plaintiff was terminated from her employment, she filed suit against her former employer alleging that her termination was in retaliation for having filed a sexual harassment complaint. *Id.* Plaintiff's cause of action was brought pursuant to the West Virginia Human Rights Act, W.Va. Code 55-11-1, *et seq.* *Id.* The defendant employer filed a motion to dismiss arguing that the plaintiff was legally required to arbitrate her dispute pursuant to the arbitration agreement plaintiff signed during her employee orientation. *Id.* The circuit court held that the arbitration agreement was valid and enforceable and that the terms of the arbitration agreement were not unreasonably favorable as to render the agreement unconscionable. *Clites*, 685 S.E.2d at 697.

On appeal, the *Clites* Court discussed the issues of preemption and whether the arbitration agreement was unconscionable. The *Clites* Court first addressed the preemption issue:

> The Supreme Court of the United States has interpreted 9 U.S.C. § 2 (1947) to be an express declaration by the Congress favoring arbitration of disputes "notwithstanding any state substantive or procedural policies to the contrary" and that "[t]he effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, 24 (1983). The Supreme Court has further held that there was ". . . nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law" and that the "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Southland Corporation v. Keating*, 465 U.S. 1, 11, 16 (1984). *See also Perry v. Thomas,* 482 U.S. 483 (1987)(FAA pre-empted provision of California Labor Law which stated that wage collection actions may be maintained without regard to existence of any private agreement to arbitrate).

Clites, 685 S.E.2d at 698-699. The *Clites* Court then stated that the "Supreme Court has also held that the FAA extends to statutory claims such as the Petitioner's Human Rights Act causes of action." *Clites*, 685 S.E.2d at 699; *citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum.") *Id.*

The second issue that the *Clites* Court addressed was whether the contract was unconscionable under state law. The *Clites* Court found that the arbitration agreement was a contract of adhesion but that contracts of adhesion are not necessarily invalid. *Clites*, 685 S.E.2d at 700. Next the Court examined whether the arbitration agreement was thrust upon the plaintiff in a manner in which she was unwary and taken advantage of. *Id.* In ultimately determining the arbitration agreement not to be unconscionable, the *Clites* Court specifically noted that the plaintiff was presented the arbitration agreement along with other documents during an

orientation with fellow employees that lasted between 1 ½ to 2 hours. *Clites*, 685 S.E.2d at 701.

In the matter at hand, Plaintiff met with a representative of the facility during the admission of her mother, Ms. Willett. *Deposition of Sharon Marchio*, p.60, attached as **Exhibit C**. Plaintiff was Ms. Willett's power of attorney and entered into the admission agreements on Ms. Willet's behalf. *Id.* at 62. Plaintiff testified that the facility representative went through all the documents and Plaintiff signed the documents. *Id.* Plaintiff even admitted that she didn't ask any questions about the documents but felt that the facility representative would have answered any that she may have. *Id.* at 60-61. Furthermore, the arbitration agreement in question allowed the Plaintiff the opportunity to rescind the agreement within 30 days.

Just as in *Clites*, the arbitration agreement in the matter at hand was not thrust upon Plaintiff in a manner in which she was unwary and taken advantage of. Plaintiff is a competent individual who conducts other business such as owning her own home, buying an automobile, obtaining home and automobile insurance, and banking. *Id.* at 64-65. Additionally, Plaintiff coordinates fund-raising for a fraternal organization in which she schedules the dinner meeting, organizes the paperwork, makes the invitations, and conducts an audit every six months. *Id.* at 8-9. There is no room for doubt that Ms. Willett is a competent adult that is legally capable of entering into contracts.

I. PLAINTIFF'S CLAIM THAT WEST VIRGINIA CODE § 16-5C-15(C) IS A GENERAL CONTRACT DEFENSE IS INCORRECT.

Plaintiff's first argument is that West Virginia Code § 16-5C-15(c) is a legitimate state law contract defense and invalidates the subjects arbitration agreement. *Appellant's Brief*, pg. 10. Simply put, Plaintiff's theory that the NHA invalidates the subject arbitration agreement is

incorrect because West Virginia Code § 16-5C-15(c) is not a general contract defense as required by United States Supreme Court precedent.

In *Southland Corp. v. Keating*, the United States Supreme Court noted that the FAA established a "broad principle of enforceability." *Southland Corp.,* 465 U.S. at 11. In construing the FAA broadly, the Supreme Court has found that the FAA preempts any state anti-arbitration law related to matters involving commerce. However, Section 2 of the FAA "declares that state law may be applied '*if* that law arose to govern the issues concerning the validity, revocability, and enforceability of contracts generally.'" *Doctor's Associates, Inc.*, 517 U.S. at 686-687 (citing *Perry v. Thomas*, 482 U.S. 483, 492 (1987)). "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." *Id.* at 687.

However, what state courts ***may not*** do is single out arbitration provisions for suspect status and "invalidate arbitration agreements under state law applicable only to arbitration provisions." *Id.* By enacting Section 2 of the FAA, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Id.* Therefore, state courts may not decide that:

> [A] contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on unequal 'footing,' directly contrary to the Act's language and Congress's intent.

Id. at 686.

West Virginia Code § 16-5C-15(c) states in part, "Any waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy." West Virginia Code § 16-5C-15(c) cannot be categorized as "a generally applicable contract defense, such as fraud, duress, or

unconscionability." *Doctor's Associates, Inc.*, 517 U.S. at 687. For example, an individual could not use West Virginia Code § 16-5C-15(c) as the basis to rescind an agreement to purchase land or an automobile. However, generally applicable contract defenses, such as fraud, duress, or unconscionability could be used to rescind the sale of land, the purchase of an automobile, or even arbitration agreements. Therefore, Plaintiff's argument that West Virginia Code § 16-5C-15(c) is a legitimate contract defense and invalidates the arbitration agreement can simply be dismissed.

This same issue was addressed in *Fosler v. Midwest Care Center II, Inc.*, 911 N.E.2d 1003 (Ill. App. 2 Dist. 2009). In *Fosler*, the plaintiff filed a complaint against the defendant long-term care facility. The defendant filed a motion to dismiss arguing that an arbitration agreement entered into by both parties contained provisions that any dispute arising from the plaintiff's stay would be resolved through arbitration, as governed by the FAA. *Id.* at 1005. Plaintiff responded that certain judicial forum provisions of the Illinois Nursing Home Care Act nullify a resident's waiver of the right to commence an action in circuit court. *Id.* at 1005.

In addressing plaintiff's argument that the Illinois Nursing Home Care Act provides a generally applicable contract defense, The *Fosler* court stated:

> We acknowledge that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Casarotto*, 517 U.S. at 687, 134 L. Ed. 2d at 909, 116 S. Ct. at 1656. However, Illinois's public policy in favor of providing a judicial forum from claims under the nursing Home Care Act ***addresses a specific contract matter--dispute resolution--which places that contract term on unequal footing among the other contract terms.*** See *Casarotto*, 517 U.S. at 686, 134 L. Ed. 2d at 908, 116 S. Ct. at 1658. ("The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA's] language and Congress's intent"), quoting *Allied-Brude Terminix Cos.*, 513 U.S. at 281, 130 L.ED. 2d at 769, 115 S.Ct. at 843.
>
> . . .

> Illinois public policy favors arbitration as a means of resolving disputes, generally (710 ILCS 5/2 (a)(West 2002)), and yet sections *3--606* and *3--607* of the Nursing Home Care Act manifest a contrary public policy in favor of providing nursing home residents a judicial forum, including a trial by jury. The incongruity illustrates how sections *3--606* and *3--607* did not "ar[i]se to govern issues concerning the validity, revocability, and enforceability of contracts *generally*." (Emphasis added.) *Perry*, 482 U.S. at 493 n.9, 96 L. Ed. 2d at 437 n.9, 107 S. Ct. at 2527 n.9. One could argue that sections *3--606* and *3--607* are not directed toward "any contract" (see 9 U.S.C. § 2 (2000)), because ***they apply only to a contract between a nursing home and its resident: two parties defined narrowly by statute***.

Fosler, 911 N.E.2d at 1013 (emphasis added).

Similarly, in *Rainbow Health Care Center, Inc., v. Crutcher*, 2008 U.S. Dist. Lexis 6705 (N.D.Okla.)(2008), the Oklahoma State Department of Health ("OSDH") argued that Rainbow Healthcare Center, Inc.'s arbitration agreement in its admission documents violated Oklahoma's Nursing Home Care Act.[3] *Rainbow Health Care Center, Inc.*, 2008 U.S. Dist. Lexis 6705, 2. The act provided that a nursing home resident could not waive his or her right to a jury trial in an action brought pursuant to the Act. *Id.* The OSDH claimed that Rainbow Healthcare Center, Inc.'s arbitration agreements amounted to a waiver of a resident's right to a jury trial in violation of the act. *Id.*

The United States District Court for the Northern District of Oklahoma found that the Oklahoma statute only "invalidated arbitration agreements in a specific type of contracts--those involving nursing home care" *Rainbow Health Care Center, Inc.*, 2008 U.S. Dist. Lexis 6705, 7. Thus, the United States District Court for the Northern District of Oklahoma held that Oklahoma's Nursing Home Care Act was not a generally applicable contract defense that may be applied to invalidate arbitration agreements.

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[3] "Any party to an action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect." Okla. Stat. tit. 63, § 1-1939(E).

The United States District Court for the Northern District of Oklahoma further concluded:

> Despite the myriad of arguments presented by the parties in their cross-motions, this case can be resolved with the resolution of two issues: (1) whether Rainbow' s admission agreement evidences a transaction involving interstate commerce, and (2) if so, whether Congress has enacted any laws withdrawing Rainbow' s admission agreement from the FAA's coverage. Having determined Rainbow' s admission agreement evidences a transaction involving interstate commerce, and having determined that Congress has not withdrawn Rainbow's admission agreement from the FAA's coverage, the Court must conclude that Okla. Stat. tit. 63, § 1-1939(E)'s prohibition of arbitration agreements in nursing home admission agreements is preempted by the FAA. In enacting the FAA, Congress expressed a national policy favoring enforcement of arbitration agreements, and there is nothing to suggest that Congress ever intended to carve out an exception to that broad policy allowing the state of Oklahoma to *disfavor* arbitration agreements in nursing home admission agreements.

Rainbow Health Care Center, Inc., 2008 U.S. Dist. Lexis 6705, 24-25 (emphasis in original).

Appellees therefore assert that use of W.Va. Code §16-5C-15 as a basis to defeat an arbitration agreement fails because it is not a general contract defense. Rather, the language in this code section attempts to defeat arbitration agreements, an action prohibited pursuant to *Preston.*

II. THE UNITED STATES SUPREME COURT HAS HELD THAT STATE ANTI-WAIVER STATUTES ARE PRE-EMPTED BY THE FEDERAL ARBITRATION ACT.

Plaintiff argues that other courts have held that anti-waiver statutes in the nursing home context invalidate arbitration agreements. *Appellant's Brief*, pg. 12. Plaintiff' argument relies almost exclusively on an Order (hereinafter referred to as the "*Luttrell Order*")[4] from the Circuit Court of Jefferson County denying a motion to compel arbitration and *Carter v. SSC Odin Operating Co., LLC*, 885 N.E.2d 1204 (Ill. App. 5 Dist. 2008).

[4] The *Luttrell Order* was attached as Exhibit 3 to *Appellant's Brief.*

In doing so, the Plaintiff has ignored three important factors. First, there have been numerous anti-waiver statues in various contexts also that have been ruled to be preempted, not the least of which is *Preston*, 128 S.Ct. 978. *See also Southland Corp. v. Keating*, 465 U.S. 1 (1984); *see also Perry v. Thomas,* 482 U.S. 483 (1987); *see also Spirit & Sanzone Distributors Co, Inc., v. Salamanca-Area Beverage Company Inc.*, 2008 U.S. Dist. Lexis 20064 (S.D.N.Y. 2008)(citing *Preston*, the United States District Court held that New York State's ABC law that contained anti-waiver and pro-judicial forum language were preempted by the FAA.) Second, several federal and statue courts have ruled that anti-waiver statutes in nursing home contexts are pre-empted by the FAA. *See Fosler v. Midwest Care Center II, Inc.*, 911 N.E.2d 1003 (Ill. App. 2 Dist. 2009); *see also Rainbow Health Care Center, Inc., v. Crutcher*, 2008 U.S. Dist. Lexis 6705 (N.D.Okla.)(2008); *see also* Footnote 14, *Bales v. Arbor Manor*, 2008 U.S. Dist. Lexis 99215 (2008). Third, there are significant flaws in the *Luttrell Order* regarding legal reasoning and the current status of the law.

A. The Recent United States Supreme Court Case of *Preston v. Ferrer* Held that the Federal Arbitration Act Supersedes State Laws Lodging Primary Jurisdiction in Another Forum, Whether Judicial or Administrative.

Appellant does not even address *Preston v. Ferrer*, until page 20 of her brief when she dismisses it as "fact specific," which it clearly is not. *Preston* involved "a contract between respondent Alex E. Ferrer, a former Florida trial court judge who appeared as 'Judge Alex' on a Fox television network program, and petitioner Arnold M. Preston, a California attorney who rendered services to persons in the entertainment industry." *Preston*, 128 S.Ct. at 981-982. Attempting to recover fees allegedly due under the contract, "Preston invoked the parties' agreement to arbitrate 'any dispute ... relating to the terms of [the contract] or the breach,

validity, or legality thereof ... in accordance with the rules [of the American Arbitration Association].'" *Id.* at 982.

Preston's demand for arbitration was countered by Ferrer's petition to the California Labor Commissioner charging that the contract was invalid and unenforceable under the California Talent Agencies Act. *Id.* Ferrer also filed suit in the Los Angeles Superior Court, seeking a declaration that the controversy between the parties was not subject to arbitration. *Id.* The Superior Court of Los Angeles County, denied arbitration and granted Ferrer's motion to stay the action pending proceedings before the Labor Commission. *Id.* The California Court of Appeals affirmed the Superior Court's decision. *Id.*

The United States Supreme Court of Appeals reversed the California Court of Appeal's decision to deny arbitration. In overruling the lower state court, the *Preston* court held that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* at 987.

It the matter at hand, Plaintiff argues the NHA, and specifically W.Va. Code §16-5C-15, prohibits nursing home residents or their legal representatives from entering into arbitration agreements with nursing home facilities. W.Va. Code §16-5C-15 states, "Any waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy."

However, any argument by Plaintiff that the NHA prohibits Plaintiff's claims from being decided by arbitration fails for two reasons. First, the arbitration agreement entered into between Clarksburg Nursing and Plaintiff does not waive Plaintiff's right to commence an action under the NHA. As stated in *Preston*, "[b]y agreeing to arbitrate a statutory claim, a party *does not*

forgo the substantive rights afforded by the statute, it only submits to their resolution in an arbitral . . . forum." *Preston*, 128 S.Ct. at 987 (citing *Mitsubishi Motors, Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (emphasis added). Just as in *Preston*, Plaintiff has relinquished no substantive rights under the NHA. Nevertheless, under the arbitration agreement that she signed, Plaintiff "cannot escape resolution of those rights in an arbitral forum." *Preston*, 128 S.Ct. at 987.

Second, "the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* Therefore, Plaintiff is prevented from successfully arguing that W.Va. Code §16-5C-15 requires claims under the NHA to be adjudicated only in circuit court. Any such interpretation that W.Va. Code §16-5C-15 grants exclusive jurisdiction of NHA claims to circuit court would necessarily require preemption of W.Va. Code §16-5C-15 by the FAA.

Preston clearly and distinctively establishes a strong national public policy favoring arbitration of disputes when such an arbitration clause appears in a contract. The broad, substantive syllabus point set forth by Justice Ginsberg and her opinion, in which all but one of the Justices joined, establishes the national policy declared under the FAA favoring arbitration and that, when parties agree to arbitrate all questions arising under the contract, the FAA supersedes state laws "lodging primary jurisdiction in another forum, whether judicial or administrative." *Preston,* 128 S.Ct. at 987. The overriding principle enunciated in *Preston*, then, is that arbitration agreements under the FAA are a federal creation with broad, national application. States are then preempted from enacting laws intended, whether explicitly or impliedly, from voiding such arbitration agreements.

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Supreme Court considered whether the FAA preempted the California Franchise Investment Law, which required judicial consideration of claims brought under that statute. In finding that the state statute directly conflicted with the FAA and was thus preempted, the *Southland* Court stated:

> [A] party may assert general contract defenses such as fraud to avoid enforcement of and arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity 'for the revocation of *any* contract' but merely a ground that exits for the revocation of *arbitration provisions in contracts subject to the California Franchise Investment Law*.'

Southland, 465 U.S. at 16 n.11 (emphasis in original).

An additional example of the FAA preempting an anti-waiver statute is *Perry v. Thomas*, 482 U.S. 483 (1987). In *Perry*, the United States Supreme Court held that the FAA preempted a California statute that provided a judicial forum for actions for the collection of wages "without the regard to the existence of any private agreement to arbitrate." *Perry*, 482 U.S. at 484. The California statute in question was arguably a manifestation of California state public policy in favor of a judicial forum for resolving a certain type of dispute, and *Perry* held that the FAA preempted the California statute. *Perry*, 482 U.S. at 489. Neither the *Luttrell Order* or *Carter* reconcile how the alleged public policy underlying the California statutes in both *Perry* and *Preston* are different from the alleged public policy favoring a judicial forum in NHA context.

B. The *Luttrell Order* Relied Upon by the Plaintiff Does Not Correctly Interpret the Current State of the Law.

In the *Luttrell Order*, the Circuit Court of Jefferson County held that as long as a state law does not specifically single out arbitration agreements, state law governs. *Luttrell Order*, pg. 4. (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-687 (1996). Additionally,

the Circuit Court of Jefferson County held that W.Va. Code §16-5C-15 "does not apply 'only' to arbitration, and arbitration is not 'singled out.'" *Luttrell Order*, pg. 7. (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-687 (1996).

However, the *Luttrell Order* misinterpreted the holding of *Doctor's Associates, Inc.* The United States Supreme Court in *Doctor's Associates, Inc.* held that state courts may not single out arbitration provisions for suspect status. *Doctor's Associates, Inc.*, 517 U.S. at 687. By enacting Section 2 of the FAA, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Id.* Therefore, state courts may not decide that:

> [A] contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on unequal 'footing,' directly contrary to the Act's language and Congress's intent.

Id. at 686. Clearly, in the matter at hand Plaintiff is attempting to achieve what the United States Supreme Court held that state courts may not do. Plaintiff is attempting to place suspect status and invalidate only the arbitration agreement and not the various other admission agreements that related to price, service, and credit.[5]

This same argument was put forward by the plaintiff in *Fosler*. The *Fosler* court recognized that the Illinois Nursing Home Care Act did not explicitly bar arbitration, while other anti-arbitration statutes that have been pre-empted by the FAA did explicitly bar arbitration. *Fosler,* 911 N.E.2d at 1011. The *Fosler* court correctly found the distinction to be inconsequential because both types of statues operated the same whether or not they actually mentioned the word "arbitration." *Fosler,* 911 N.E.2d at 1011. Just like the Illinois Nursing

[5] The FAA "embodies a 'strong federal public policy in favor of enforcing arbitration agreements,' and is designed to 'ensure judicial enforcement of privately made agreements to arbitrate.'" *Adkins v. Labor Ready, Inc.*, 185 F.Supp.2d 628, 633 (S.D.W.Va. 2001) (*citing Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217-219 (1985)).

Home Care Act, the West Virginia NHA is "'pro-judicial forum' legislation [that] is the functional equivalent of 'anti-arbitration' legislation, which is preempted by Section 2 of the FAA." *Fosler,* 911 N.E.2d at 1012.

The *Luttrell Order* also incorrectly determined that W. Va. Code § 16-15C-15 creates a generally applicable contract law defense. This is clearly incorrect and has been addressed previously in this brief. *See Southland,* 465 U.S. at 16 n.11; *see also Fosler,* 911 N.E.2d at 1013.

Finally, the *Luttrell Order* incorrectly held that the defendant nursing home did not have a sufficient nexus to intestate commerce, and therefore the FAA did not apply. *Luttrell Order,* pg. 17-20. The *Luttrell Order* cited the "commerce in fact" test adopted by the United States Supreme Court in *Allied-Bruce Terminix Companies v. Dobson,* 513 U.S. 265 (1995). *Luttrell Order,* pg. 18. However, the Luttrell Order failed to cite *Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 56-57 (2003), which broadened the effect of the FAA as implemented through Congress' Commerce Clause and which was decided eight years after *Allied-Bruce Terminix Companies.*

As further evidence of improperly cited case law, the Jefferson Court cited *Bruner v. Timberland Manor Ltd. Partnership,* 155 P.3d 16 (Okla. 2006), for the proposition that nursing homes have a *de minimus* impact on interstate commerce. *Luttrell Order,* pg. 19. However, *Bruner* is easily distinguishable based on the fact that the parties selected Oklahoma law to govern the arbitration provisions and not the FAA. *See Rainbow Health Care Center, Inc.,* 2008 U.S. Dist. Lexis 6705, 15-16. In the case at hand, the arbitration contract signed by Plaintiff specifically declares that the FAA controls.

The *Luttrell Order* failed to address the overwhelming amount of case law that holds nursing homes have a sufficient nexus with interstate commerce. For example, many federal

district courts and states such as Alabama (*Briarcliff Nursing Home, Inc., v. Turcotte*, 894 So.2d 661 (2004)), Mississippi (*Vicksburg Partners v. Stephens*, 911 So.2d 507 (2005)), and Massachusetts (*Miller v. Cotter*, 863 N.E.2d 537 (2007)), have found a nexus between nursing homes and interstate commerce because of the influx of goods from out of state entities that flow into nursing homes as well as the payments received by nursing homes from federal entities such as Medicare and Medicaid. Judge Matish also noted such a nexus between nursing homes and interstate commerce. *Order Answering certified Question*, pg. 12-13.

Judge Matish further noted in his *Order Answering certified Question* that Plaintiff's reliance on the *Lutrell Order* and the *Carter v. SSC Odin* case is misplaced because neither case discussed the application of *Preston. Order Answering Certified Question*, pg. 8. Therefore, the Court should give little weight to the *Luttrell Order* due to its failure to address the United States Supreme Court's decision of *Preston v. Ferrer*, the incorrect interpretation of United States Supreme Court case law, its reliance on foreign case law that conflicts with United States Supreme Court case law, its reliance on case law that is easily distinguishable, and its preference of ignoring the majority view that arbitration agreements in health care settings are enforceable.

In summary, this Court is required by the Federal Arbitration Act and *Preston v. Ferrer*, 128 S.Ct. 978 (2008), to uphold Judge Matish's *Order Answering the Certified Question*. As stated above, the *Preston* court held that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* at 987. Such is the case here.

CONCLUSION

Wherefore, Defendants, Clarksburg Nursing & Rehabilitation Center, Inc., a West Virginia Corporation, d/b/a Clarksburg Continuous Care Center, Sheila K. Clark, and Jennifer McWhorter, by counsel, Mark A. Robinson, Ryan A. Brown and the law firm of Flaherty Sensabaugh Bonasso, PLLC, respond to the *Appellant's Brief* regarding the previously answered certified question set forth in the *Order and Certification* of the Honorable James A. Matish, Judge of the 15th Judicial Circuit, entered February 24, 2010. For reasons more fully appearing above, these Defendants/Appellees assert that Judge Matish's crafting of the certified question and answer and opinion set forth in the February 24, 2010 Order fully and properly framed the certified question relating to the Arbitration Agreement entered into between the Plaintiff and the Defendants, and also properly applied prevailing case law to the facts of this case, including *Preston v. Ferrer,* 128 S. Ct. 978 (2008).

TABLE OF AUTHORITIES

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CLARKSBURG NURSING & REHABILITATION CENTER, INC., SHEILA K. CLARK, JOHN/JANE DOE #1, and JOHN/JANE DOE #2, AND JENNIFER MCWHORTER

By Counsel:

Mark A. Robinson (WV Bar ID #5954)
Ryan A. Brown (WV State Bar ID #10025)
FLAHERTY SENSABAUGH BONASSO PLLC
P.O. Box 3843
Charleston, West Virginia 25338-3843
(304) 345-0200

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

SHARON A. MARCHIO, Executrix of the Estate of Pauline Virginia Willet,

Plaintiff/Appellant,

v. **WV Supreme Court Docket No.: 35635**

CLARKSBURG NURSING & REHABILITATION CENTER, INC., a West Virginia Corporation, d/b/a Clarksburg Continuous Care Center, SHEILA K. CLARK, Executive Director of Clarksburg Nursing & Rehabilitation Center, Inc., d/b/a Clarksburg Continuous Care Center, JOHN/JANE DOE #1, and JENNIFER MCWHORTER,

Defendants/Appellees.

CERTIFICATE OF SERVICE

I, Mark A. Robinson, do hereby certify that I have served the foregoing **APPELLEES' RESPONSE BRIEF TO APPELLANT SHARON A. MARCHIO'S BRIEF FOR REVIEW OF CERTIFIED QUESTION** upon the following counsel of record postage pre-paid via U.S. Mail, this 3rd day of August, 2010 addressed as follows:

Frank E. Simmerman, Jr. (WV Bar ID# 3403)
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Counsel for Plaintiff

Mark A. Robinson (WV Bar ID #5954)
Ryan A. Brown (WV State Bar ID#: 10025)
FLAHERTY SENSABAUGH BONASSO PLLC
P.O. Box 3843
Charleston, West Virginia 25338-3843

EXHIBITS

ON

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