IN THE SUPREME COURT OF THE UNITED STATES
No. 11-391
Vide 11-394

Marmet Health Care Center, Inc., et al. PETITIONERS

v.

Clayton Brown, as guardian for
and on behalf of Clarence Brown RESPONDENT

AND

Marmet Health Care Center, Inc. PETITIONER

v.

Jeffery Taylor, personal representative
of the Estate of Leo Taylor RESPONDENT

On Petition for a Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

RESPONDENTS' BRIEF IN OPPOSITION

Harry G. Deitzler
Hill, Peterson, Carper,
Bee & Deitzler, PLLC
NorthGate Business Park
500 Tracy Way
Charleston, WV 25311-1261
Telephone: 304-345-5667
Facsimile: 304-345-1519
Counsel for Clayton Brown

Michael J. Fuller, Jr.
Counsel of Record
James B. McHugh
D. Bryant Chaffin
McHugh Fuller Law Group
97 Elias Whiddon Rd.
Hattiesburg, MS 39402
Telephone: 601-261-2220
Facsimile: 601-261-2481
Counsel for Clayton Brown

Andrew Paternostro
Jeff D. Stewart
The Bell Law Firm PLLC
30 Capitol Street
P.O. Box 1723
Charleston, WV 25326
Telephone: 304-932-4225
Facsimile: 304-345-1715
Counsel for Jeffery Taylor

QUESTION PRESENTED

Should respondents be compelled to arbitrate their claims, even though no valid arbitration agreement exists between the parties and there are other independent and sufficient bases for denying arbitration?

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[1] In the *Marchio* case, the Court did not address or decide questions of unconscionability because the only issue before it on the certified question was preemption of the West Virginia statute, an issue it decided in favor of the nursing home. On remand, however, the Court's narrow as well as its broader unconscionability and unenforceability rulings may be applied to bar arbitration.

[2] AAA Healthcare Policy Statement, http://www.adr.org/sp. asp?id= 32192.

[3] Archive of AAA Healthcare Policy Statement, http://web.archive.org/ web/ 2006 0930010034/http://www.adr.org/sp.asp?id=21975.

[4] http://www.adrforum.com/main.aspx?itemID=609&hideBar=False&navID=162&news=3

[5] http://www.adrforum.com/newsroom.aspx?itemID=1528

[6] http://blogs.wsj.com/law/2009/07/20/in-settlement-arbitration-company-agrees-to-largely-stepasid e/tab/print/.

[7] Respondents note that although there was testimony by Sharon Marchio that she had her mother's "power of attorney", the only document that has been shown to exist is a "Combined Medical Power of Attorney and Living Will" that provides authority over decisions involving "heatlh care."

[8] This is similar for the *Taylor* and *Marchio* matters, where all wrongful death beneficiaries had not signed the arbitration agreements at issue.

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INTRODUCTION

Petitioners in this matter, like the Petitioner in Case No. 11-394 pending before this Court, seek review of a decision of the West Virginia Supreme Court of Appeals on whether state contract law defenses as applied to a particular set of facts are preempted by the Federal Arbitration Act (FAA). Petitioners concede that no other states have made similar determinations and that no federal appellate court or state court of last resort has ruled on whether the public policy underlying the West Virginia Court's ruling is preempted. In the absence of a conflict or of any indication that such public policy is common or that the issue presented is a frequently recurring one, Petitioners have failed to demonstrate that this case presents an issue of sufficient importance to merit this Court's review.

Moreover, Petitioners overlook that regardless of how this Court might resolve the preemption question sought to be presented, the underlying matters will still have to be litigated in court, because no valid agreements to arbitrate exist and numerous other independent and sufficient bases for denying arbitration exist. The lower court did not have to reach these issues because it held the arbitration agreements invalid, but if the case were remanded, the West Virginia Supreme Court of Appeals would have to address these issues and could not direct the Respondents' claims to arbitration. Petitioners also overlook that the West Virginia Court found the arbitration agreements unconscionable on alternative grounds, including a narrow holding focused on the particular circumstances under which the Respondents' allegedly assented to the arbitration agreements and the specific terms of those agreements. That narrow, fact-specific holding does not merit review in this Court and renders

Petitioners' challenge to the West Virginia Court's alternative holding as to the enforceability of arbitration agreements applicable to personal injury claims by nursing home patients largely irrelevant. In short, Petitioners' preemption argument will not keep them out of court no matter how it is resolved, and this Court should not devote its attention to an issue that, ultimately, will have so little impact on the course of the proceedings below or jurisprudence in general.

Finally, in resolving the preemption issue posed by Petitioner, the lower court considered the relevant decisions of this Court, including *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744, 179 L. Ed. 2d 742 (2011), *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) and *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520 (1987) and correctly recognized that those decisions hold that the FAA permits application to arbitration of generally applicable state-law contract principles but preempts application of state-law principles that apply distinctively to arbitration agreements. The Petitioners in this case and in No. 11-394 have not taken issue with the lower court's statement of the principles but only with their application to an unusual set of factual circumstances. Other recent decisions from the West Virginia Supreme Court of Appeals clearly set forth that the issue raised by Petitioners will not affect other more common factual situations in West Virginia, let alone be likely to influence other Courts' decisions in other states. Thus, this matter does not rise to the level of requiring this Court's attention, and Petitioners' respective requests for writs of certiorari should be denied.

STATEMENT AND FACTS OF THE CASE

This particular matter involves two civil tort actions in which the Respondents

alleged separate claims against the Petitioners as the owners, operators, and managers of Marmet Health Care Center ("Marmet") for injuries suffered by Clarence Brown and Leo Taylor, respectively, during their respective residencies at the facility. Both Clarence Brown and Leo Taylor were vulnerable adults, stricken with both mental and physical disabilities and in need of assistance with the most basic care, because Clarence Brown and Leo Taylor could not feed themselves, get a glass of water, or even turn and reposition themselves. *See* Photographs of Clarence Brown, attached as Appendix A.

Clarence Brown, at the age of 46, was admitted to Marmet Health Care Center on or about April 27, 1996 for the care he needed, and his family was assured that he would get that care. He remained a resident of the facility until May 16, 2007. During his residency, Clarence Brown suffered multiple pressure sores, dehydration, malnutrition, contractures, aspiration pneumonia, and infections. While the Petitioners assured Clarence Brown's family that they would provide the most basic of care; clearly they failed. When Clarence Brown was discharged from Petitioners' facility, he had multiple Stage III and Stage IV pressure sores going down to the bone and that required surgical intervention. *See* photographs, attached as Appendix B. Clarence Brown ultimately died as a result of these injuries on June 10, 2008. Eight years into his residency, on March 26, 2004, the nursing home had Mr. Brown's brother, Clayton Brown, sign an "Admissions Agreement" which contained a mandatory arbitration provision.

The initial Complaint in the *Brown* matter was filed on January 7, 2008, against the owners, operators, and managers of Marmet Health Care Center, Inc. Marmet

Health Care Center, Inc., Canoe Hollow Properties, LLC, and Robin L. Sutphin ultimately answered Respondent's Amended Complaint. On April 7, 2009, Petitioners Marmet Health Care Center, Inc., Canoe Hollow Properties, LLC, and Robin L. Sutphin served their Motion to Dismiss pursuant to the arbitration provisions of the Admission agreement regarding Clarence Brown. Following a hearing on the motion, the Circuit Court of Kanawha County, West Virginia, granted the motion despite several valid defenses to the contract at issue, as will be further clarified below.

Similarly, Leo Taylor was a resident of Marmet from February 8, 2006, through December 6, 2006. At the time of his admission, he suffered from advanced dementia and Alzheimer's disease. Leo Taylor's wife, who held a Medical Power of Attorney granting authority to make "any and all decisions regarding Leo Taylor's care, including nursing home care" signed an identical arbitration agreement to that found in the *Brown* matter. After Leo Taylor suffered injuries at Marmet, suit was brought against the Petitioners ("*Taylor*"). As in the *Brown* matter, the Circuit Court of Kanawha County, West Virginia, granted a motion to compel arbitration despite several valid defenses to the contract at issue.

Another case, *Sharon A. Marchio, et al. v. Clarksburg Nursing & Rehabilitation Center, Inc., et al.,* ("*Marchio*"), Case No. 11-394 before this Court, also involved a resident injured at a nursing home and a pre-injury arbitration agreement. In that case, the West Virginia Supreme Court of Appeals considered the following certified question on appeal:

> 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's 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.

The circuit court had answered the certified question "Yes," and ruled that the Federal Arbitration Act was preempted by the West Virginia Nursing Home Act, *W.Va.Code,* 16–5C–15(c), "insofar as the [Nursing Home Act] would require judicial consideration of claims brought under the [Act] and would lodge primary jurisdiction to hear cases under the [Act] in the Circuit Courts of West Virginia." This matter was consolidated by the West Virginia Supreme Court of Appeals with *Brown* and *Taylor* for purposes of appeal.

On June 29, 2011, the West Virginia Supreme Court of Appeals handed down its decision answering the certified question in *Marchio* and reversing the Circuit Courts' decisions in *Brown* and *Taylor*. *See Brown v. Genesis Healthcare Corp. et al.,* No. 35494*; Taylor v. MHCC Inc. et al.,* No. 35546*; Marchio v. Clarksburg Nursing &*

Rehabilitation Center Inc. et al., No. 35635, ___ S.E. 2d ___, 2011 WL 2611327 (W. Va. June 29, 2011). Notably, the Supreme Court of Appeals agreed with the circuit court and the petitioners in the *Marchio* matter, holding that West Virginia Code § 16–5C–15(c) is preempted by the Federal Arbitration Act. Instead, the Court proceeded under a more conventional and narrow contract analysis, examining the circumstances surrounding the execution of each contract and the fairness of the contracts as a whole. *See Brown, supra.* The Court recognized that various groups—including the American Arbitration Association—now refuse to arbitrate certain personal injury and wrongful death claims where the arbitration agreement was signed *before* negligence occurred and instead only arbitrate personal injury and wrongful death claims where the agreement was signed *after* negligence occurred, and the parameters of the liability and damages could be clearly understood by the parties. *Id.*

The Court determined that the arbitration clauses at issue involved a public service, that the nursing home industry is subject to stringent state and federal regulations, and that nursing homes are of "importance and practical necessity to the public." *Id.* By adopting the Nursing Home Act, the "West Virginia Legislature plainly intended for actions involving violations of the dignity and well-being of nursing home residents to be publicly aired in the courts." *Id.* Due to the facts and circumstances involved during the entry of the agreements at issue and the injuries and/or deaths involved, the Court determined that the matter at bar were most like pre-injury contracts immunizing one party from liability for negligence toward another party and were unconscionable as against public policy. However, while the legislature may have attempted to wholly prevent nursing homes from compelling residents to give up

their right to seek justice in a public forum, the Supreme Court of Appeals specifically held that “there is nothing in the law or public policy . . . that stops a resident, *after negligence has occurred,* and after the parameters of risk are better defined, from voluntarily entering into a contract separate and apart from the admission agreement to arbitrate any claims arising from the negligence.” *Id.* at fn. 157.

Alternatively, the Court held that the arbitration clauses signed by Respondents Brown and Taylor were unconscionable entirely apart from the public policy against pre-injury agreements exculpating defendants from liability for personal injuries. The Court focused on the circumstances of formation of the agreements in both cases and found them procedurally unconscionable as contracts of adhesion imposed on vulnerable patients who lacked a real choice as to whether to enter into them. The Court further found that they were substantively unconscionable because they imposed arbitration one-sidedly on the patients while reserving judicial remedies for the nursing homes, imposed significant fees on patients who sought to initiate arbitration, and were beyond the reasonable expectations that an ordinary person would have about the terms of a nursing home agreement.[1]

Additionally, the West Virginia Supreme Court found that the Circuit Court in the *Brown* matter “failed to state any findings of fact or conclusions of law that would assist in appellate review of the orders.” *Id.* The Court continued, stating, “[w]ithout factual or legal findings, this Court is greatly at sea without a chart or compass in making a determination as to whether the circuit court's decision was right or wrong.” *Id.* (citing *Workman v. Workmen's Compensation Com'r,* 160 W.Va. 656, 662, 236 S.E.2d 236, 240 (1977)). The Court of Appeals held that the Circuit Court “failed to offer any

substance to permit a meaningful review of the court's decision, and **for that reason alone both orders must be reversed**." *Id.,* emphasis added.

Moreover, while the Court did not come to a conclusion on this issue, the plaintiff in *Taylor* asserted that "there was no evidence that Mrs. Taylor had any authority to waive Mr. Taylor's rights—or the rights of his wrongful death beneficiaries—to pursue an action in court." *Brown v. Genesis Healthcare Corp. et al.*, ___ S.E. 2d ___, 2011 WL 2611327. The Court examined this issue and found support for the plaintiff's argument. *Id.* at fn. 168. Respondents submit that this argument, like the failure of the Court in *Brown* to include findings of fact or conclusions of law, was a valid and sufficient basis for reversal of the Circuit Court. Further, Respondents submit that the *Marchio* matter involved a similar lack of authority. However, since the *Marchio* matter involved only a specific certified question, such other issues were not before the West Virginia Supreme Court of Appeals including the issues raised by the Petitioners.

Following the West Virginia Appellate Court's decision, two separate Petitions were filed with this Court seeking a Writ of Certiorari regarding this opinion, the instant matter involving the *Brown* and *Taylor* Respondents and the exact same arbitration agreements, and the *Marchio* matter docketed as No. 11-394.

REASONS FOR DENYING THE WRIT

Contrary to the Petitioners' assertions, review by this Court is not necessary to ensure proper and uniform application of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, to determine if a claim is subject to arbitration, nor does the decision below present an irreconcilable conflict with this Court's precedents. Rather, this matter involves traditional principles of state contract interpretation and, under the FAA,

arbitration agreements are subject to generally applicable state law contract defenses. Although Petitioners focus on the West Virginia Court's statements about the unenforceability of nursing home arbitration agreements that purport to apply to personal injuries that have not yet occurred, they largely ignore the Court's alternative unconscionability analysis, which is sufficient to preclude arbitration in these cases regardless of the merit of Petitioners' argument that the Court's public policy rationale is preempted.

Moreover, regardless of any decision this Court might render with respect to the question presented by the Petitioners, the outcome with respect to the wrongful death claims involved in the three separate matters pending before the Court would remain the same, because other independent and sufficient bases for denying arbitration exist. That is, regardless of how this Court might resolve the preemption question Petitioners seek to present, Petitioners will still have to litigate with Respondents in court. This is so because the FAA recognizes contract law defenses to arbitration and further, "does not require parties to arbitrate when they have not agreed to do so." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 625 (1985).

Further, contrary to Petitioners' assertions, the opinion at issue is not likely to lead to challenges of arbitration agreements in other states or even in other contexts or factual situations within the state of West Virginia. In fact, the West Virginia Supreme Court of Appeals has recently upheld arbitration agreements in other matters as well as indicated general support for the arbitration of disputes. *See* State ex rel. AT & T Mobility, LLC v. Wilson, 226 W.Va. 572, 703 S.E.2d 543 (W.Va. 2010) (Standing alone, the lack of class action relief does not render an arbitration agreement unenforceable

on grounds of unconscionability); *Crihfield v. Brown,* 224 W.Va. 407, 686 S.E.2d 58 (W.Va. 2009) (Defendant's unilateral withdrawal from irrevocable, binding arbitration as provided by stock purchase agreement resulted in abandonment of claims against plaintiff for breach of the agreement and precluded any further arbitration or lawsuit relative to the claims); *State ex rel. Clites v. Clawges*, 224 W.Va. 299, 685 S.E.2d 693 (W.Va. 2009) (The arbitration agreement between the employer and employee was binding on the parties based on the limited record presented.); *McGraw v. American Tobacco Co.*, 224 W.Va. 211, 681 S.E.2d 96 (W.Va. 2009) (Affirmed Circuit Court order enforcing motion to compel arbitration pursuant to settlement agreement).

While the Court just recently affirmed a Circuit Court's denial of a motion to compel arbitration, it did so based upon the agreement being unconscionable and ambiguous. *See State ex rel. Richmond American Homes of West Virginia, Inc., et al. v. Sanders*, WV Supreme Court of Appeals No. 11-0770 (Nov. 21, 2011). Specifically, the agreement was found to exculpate the defendant from its misconduct and substantially impair the plaintiff's right to pursue remedies for losses, as it prohibited "special, indirect, or consequential damages". *Id.* at p. 24. Further, it attempted to eliminate warranties under the Magnuson-Moss Act and "all warranties of fitness, merchantability and habitability." *Id.* As for ambiguity, the Court found that the agreement referred to "court proceeding" five times throughout the document creating an ambiguity as to whether the plaintiffs retained their ability to vindicate their claims in court. *Id.* at 29. Further, the document discussed mediation before a "court proceeding". *Id.* at 29-30. In examining the document as a whole, the Court agreed with the Circuit Court that the document was unable to be enforced. This case, like the

instant matter, does not indicate an aversion to arbitration but instead a duty to examine each case based upon the facts and make an individual determination on the merits.

I. The West Virginia Supreme Court of Appeals applied established and routine principles of state contract law.

In *Allied-Bruce Terminix Co's, Inc. v. Dobson,* 513 U.S. 265, 281 (1995), this Court reiterated that "States may regulate contracts, *including arbitration clauses*, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' " (emphasis added). The West Virginia Supreme Court of Appeals applied this principle in rejecting Petitioners' preemption claims. Specifically, the West Virginia Court made the unremarkable observation that "[a]s a matter of general public policy, courts have repeatedly voided contracts through which one party has attempted to avoid responsibility for negligent conduct that causes a personal injury or wrongful death." *Brown*, --- S.E.2d ----.

Petitioners' challenge to the West Virginia court's ruling focuses almost entirely on the Courts' application of public-policy principles to hold that nursing home arbitration agreements that purport to apply to future claims of bodily injury are unenforceable by analogy to exculpatory agreements or anticipatory releases. In doing so, Petitioners' virtually ignore the West Virginia Court's expressly stated alternative ruling that the *Brown* and *Taylor* agreements were unconscionable under conventional West Virginia contract principles because the circumstances of their formation reflected procedural unconscionability, and their terms—in particular their one-sidedness as to

the obligation to arbitrate—were substantively unconscionable. As this Court has recently stated, the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746. The West Virginia Court's alternative unconscionability holding is precisely the type of contract law holding that the FAA does not preempt: It involves the application of ordinary principles of contract law that in no way discriminate against arbitration. *See Shotts v. OP Winter Haven, Inc.,* --- So.3d ----, 2011 WL 5864830 (Fla. 2011); *Gessa v. Manor Care of Florida, Inc.,* --- So.3d ----, 2011 WL 5864823 (Fla. 2011).

West Virginia's requirements that agreements not be procedurally unfair and that their substantive terms not be one-sided or non-mutual in no way "apply only to arbitration" or "derive their meaning from the fact that an agreement to arbitrate is at issue." Further, the factual circumstances here plainly justify application of these conventional contract-law principles. Under normal West Virginia contract-law standards, the arbitration agreements here are one-sided, non-mutual, and should not be enforced. In examining the arbitration clauses at issue, this Court need look no further than the provision allowing Petitioners to seek judicial redress over nonpayment of fees, but prohibiting Respondent from obtaining any type of judicial relief in the *Brown* and *Taylor* matters. Indeed, the agreement plainly reserves the Marmet Petitioners' right of access to the courts, while requiring Respondent to arbitrate any claims he might have. *See* Arbitration Agreement at issue in *Brown* and *Taylor*.

Many courts have invalidated purported contracts containing "non-mutual

arbitration provisions", requiring only the party with less economic bargaining power to submit claims to arbitration, because they are so "one-sided" as to be illusory or unconscionable. *See e.g., Dumais v. Am. Golf Corp.,* 299 F.3d 1216, 1219 (10th Cir. 2002) (where one party bears the "unfettered right to alter the arbitration agreement's existence or its scope" the agreement is illusory); and other cases cited in *Hollis et al*., *State Law,* 2003 J. Disp. Resol. at 483–89; *Ingle v. Circuit City Stores, Inc.,* 328 F.3d 1165, 1173 (9th Cir. 2003) (one-sided arbitration agreement is unconscionable and unenforceable); *Iberia Credit Bureau v. Cingular Wireless LLC, et al.,* 379 F.3d 159, 169–70 (5th Cir.2004) (one-sided arbitration clause unenforceable due to unconscionability); *Floss v. Ryan's Family Steak Houses, Inc.,* 211 F.3d 306, 315–16 (6th Cir. 2000) (arbitration agreement lacked mutuality and was therefore illusory and enforceable); *Simpson v. Grimes,* 849 So.2d 740, 749, (3d Cir. 2003) (accord). *See also Showmethemoney Check Cashers, Inc. v. Williams,* 342 Ark. 112, 27 S.W.3d 361, 366–67 (2000) (agreement lacked mutuality of obligation where consumer was bound by arbitration in every aspect, yet company could "proceed immediately to court to collect amounts due it"); *Taylor v. Butler,* 142 S.W.3d 277, 286–87 (Tenn. 2004) (contract held to be unconscionable and void because one party had to submit all claims to arbitration, but the other reserved a right to a judicial forum); *Ingle v. Circuit City Stores, Inc.,* 328 F.3d 1165, 1172–73 (9th Cir.2003) (arbitration clause failed because employer had "unilateral power to modify or terminate" it). The West Virginia Court's application of unconscionability principles to these contracts reflects a broad judicial consensus that similar applications of unconscionability law are not preempted, not an issue that requires consideration by this Court.

Because the alternative, fact-specific unconscionability holding is sufficient to resolve these cases in favor of the Respondents', the Court need not, and should not, address the court's discussion of the enforceability of nursing home contracts that purport to require arbitration of future personal-injury claims. Even if that alternative holding were outcome-dispositive, however, it would not merit review, as it reflects the lower court's conscientious effort to apply the teachings of this Court's decisions permitting the application of general contract principles to arbitration agreements.

II. It is impossible to conduct arbitration under the agreements at issue according to their own terms.

The arbitration clauses at issue fail because an integral part of the agreement to arbitrate is no longer available. In *Brown* and *Taylor*, the agreements to arbitrate states that a dispute arising between the parties "shall be submitted to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect." However, in 2003, the American Arbitration Association amended its rules to provide that it "no longer accept[s] the administration of cases involving individual patients without a post-dispute agreement to arbitrate."[2] The AAA continues to administer health-care arbitrations in which "businesses, providers, health care companies, or other entities are involved on both sides of the dispute." *Id.* The AAA stated that the policy was a part of its "ongoing efforts ... to establish and enforce standards of fairness for alternative dispute resolution...."[3]

The Senior Vice President of the AAA was quoted as follows:

> Although we support and administer pre-dispute arbitration in other case areas, we thought it appropriate to change our policy in these cases since medical problems can be life or death situations and require special consideration.

Id. See Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock, 14 So. 3d 695 (Miss. 2009) (Similar arbitration agreement that relied upon the AAA could not be rewritten and therefore could not be enforced); *Owens v. Nexion Health at Gilmer, Inc.,* 2007 WL 841114, at *3 (E.D.Tex. Mar.19, 2007).

The Court in *Moulds* looked to other states and how their courts have dealt with the AAA policy-change issue, finding that no other state court has held that an arbitration may go forward if the arbitration agreement requires AAA administration. *Moulds,* 14 So. 3d at 708-09 (citing *Mathews v. Life Care Ctrs. of Am., Inc.,* 217 Ariz. 606, 177 P.3d 867 (2008) (enforced agreement that required AAA arbitrators, but not AAA administration); *Hill v. NHC Healthcare/Nashville, LLC,* 2008 WL 1901198, at *16-16 (Tenn.Ct.App. Apr.30, 2008) (held agreement unconscionable, but did not reach on forum choice); *Owens v. Nat'l Health Corp.,* 263 S.W.3d 876 (Tenn. 2007) (court enforced agreement that called for either AAA or AHLA administration, but the court noted that AHLA would administer if ordered); *Blue Cross Blue Shield v. Rigas,* 923 So. 2d 1077 (Ala. 2005) (enforced agreement that required AAA rules, but not AAA administration)).

In *Brown* and *Taylor*, the arbitration agreements at issue clearly selects the AAA and its rules. Since the AAA is no longer available and does not support arbitration in cases involving individual patients without a post-dispute agreement to arbitrate, a material and integral term to the agreement at issue is unavailable and the contract should not be effectively rewritten to enforce arbitration.

Similarly, the arbitration agreement in the *Marchio* matter requires that claims "shall be resolved *exclusively* . . . in accordance with the Code of Procedure of the

National Arbitration Forum" ("NAF"). The NAF's rules require that arbitration pursuant to them "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." *See* NAF Code of Procedure at p. 1.[4] Like the AAA, however, the NAF no longer conducts arbitrations in matters such as *Marchio*.[5] In fact, the NAF has gone even further than the AAA and now refuses to conduct consumer arbitrations entirely.[6] The NAF's withdrawal from consumer arbitrations means that it is impossible for arbitration to be enforced according to the NAF's rules.

In *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 219 (Pa.Super. 2010), the Pennsylvania Superior Court examined other jurisdictions that had the opportunity to determine whether an arbitration agreement is enforceable in the absence of the NAF. Importantly, the Pennsylvania Court found that the "conclusion that the Agreement was unenforceable due to the NAF's unavailability is **supported by a majority of the decisions that have analyzed language similar to that in the Agreement**. *Id.,* emphasis added. The Court cited the following cases concluding that the NAF's participation in the arbitration process was an "integral part" of the agreement to arbitrate. *Carideo v. Dell, Inc.,* 2009 WL 3485933, at *6 (W.D.Wash. 2009) (collecting and discussing cases) ("[T]he court concludes that the selection of NAF is integral to the arbitration clause. The unavailability of NAF as arbitrator presents compounding problems that threaten to eviscerate the core of the parties' agreement. To appoint a substitute arbitrator would constitute a wholesale revision of the arbitration clause."), *Khan v. Dell, Inc.,* 2010 WL 3283529, at *4 (D.N.J. 2010) ("The plain language of this clause evinces the parties' intent to arbitrate exclusively before a particular arbitrator,

not simply an intent to arbitrate generally. The NAF is expressly named, the NAF's rules are to apply, and no provision is made for an alternate arbitrator. The language used is mandatory, not permissive."); *Ranzy v. Extra Cash of Tex., Inc.,* 2010 WL 936471 (S.D.Tex.2010), *aff'd by* 2010 WL 3377235 (5th Cir. 2010); *Carr v. Gateway, Inc.,* 395 Ill.App.3d 1079, 335 Ill.Dec. 253, 918 N.E.2d 598 (2009), *appeal granted* 235 Ill.2d 586, 338 Ill.Dec. 248, 924 N.E.2d 454 (2010); *see also John R. Ray & Sons v. Stroman,* 923 S.W.2d 80, 87 (Tex.Ct.App. 14th Dist.1996) ("It is true that the purpose of a severability clause is to allow a contract to stand when a portion has been held to be invalid. However, when the severed portion is integral to the entire contract, a severability clause, standing alone, cannot save the contract.").

As the Fifth Circuit explained in a decision concerning the NAF, but likewise applicable to the AAA:

> In order to determine whether the designation of the NAF as the sole arbitration forum is an integral part of the arbitration agreement, the court must employ the rules of contract construction to determine the intent of the parties. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.
>
> Here, the arbitration agreement plainly states that Ranzy 'shall' submit all claims to the NAF for arbitration and that the procedural rules of the NAF 'shall' govern the arbitration. Put differently, the parties explicitly agreed that the NAF shall be the exclusive forum for arbitrating disputes.... **[W]here the parties' agreement specifies that the laws and procedures of a particular forum shall govern any arbitration between them, that forum-selection clause is an 'important' part of the arbitration agreement**. Thus, a federal court need not compel arbitration in a substitute forum if the designated forum becomes unavailable.

Ranzy v. Tijerina, 393 Fed.Appx. 174 (5th Cir. 2010) (citations and some internal quotation marks omitted), emphasis added.

Because the Court below could have reached the same outcome by denying arbitration on these grounds - and would be required to address the issue and reach the same result even if this Court were to decide the preemption issue adversely and remand - this Court should deny the petition for certiorari on this independent basis.

III. The arbitration agreement is unenforceable due to other independent state contract law defenses.

The FAA places arbitration agreements on equal footing with other contracts. Arbitration depends on a valid contract, see *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943, 115 S. Ct. 1920 (1995); *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 648-49, 106 S. Ct. 1415 (1986), and this Court has repeatedly stated that "when deciding whether the parties agreed to arbitrate a certain matter … courts generally should apply ordinary state-law principles that govern the formation of contracts." *First Options,* 514 U.S. at 944; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 60-63 (1995); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 474 (1989) ("the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review").

a. There was no authority to enter into the arbitration agreement on behalf of the decedent.

In both the *Taylor* and *Marchio* matters, there was insufficient authority to enter into the arbitration agreements at issue. In both cases, there apparently existed Medical Powers of Attorney held by the individuals that signed the respective arbitration agreements.[7] However, in *Taylor*, the Circuit Court of Kanawha County specifically found that the arbitration provision was not required to admit Leo Taylor to

the facility. *See* Order, attached to *Brown* and *Taylor* Petition for Writ of Certiorari, para. 13. Further, the arbitration agreement in *Marchio* states that it "is not a precondition to the furnishing of services" and "may be rescinded with written notice . . . within 30 days of signature." *See* Arbitration Agreement, attached to *Marchio* Petition for Writ of Certiorari. Thus, the decision to arbitrate cannot be considered a "health care" decision and cannot be within the scope of a "medical" or "health care" limited power of attorney.

Many state Courts have adopted this position. *See Life Care Ctrs. of Am. v. Smith,* 298 Ga.App. 739, 681 S.E.2d 182, 183–85 (Ga.Ct.App.2009) (holding that the plain language of a healthcare power of attorney did not give daughter the right to sign away her mother's right to a jury trial); *Lujan v. Life Care Centers of America,* 222 P.3d 970 (Colo.Ct.App.2009) (health care proxy's decision to agree to arbitrate was unauthorized); *McNally v. Beverly Enters., Inc.,* 191 P.3d 363, No. 98,124, 2008 WL 4140635, at *1–2 (Kan.Ct.App. Sept.5, 2008) (per curiam) (holding that a healthcare power of attorney conferred by a resident to his wife explicitly limited the powers of the agent to those set out in writing in the document); *Tex. Cityview Care Ctr., L.P. v. Fryer,* 227 S.W.3d 345, 352–53 & n. 7 (Tex.App.2007) (determining that the medical power of attorney signed by the resident's daughter had not taken legal effect at the time the documents were signed and there was no evidence that the resident was even aware that her daughter had signed any documents on her behalf). *See also Dickerson v. Longoria*, 414 Md. 419, 995 A.2d 721 (Md. 2010); *Monticello Community Care Center, LLC v. Estate of Martin,* 17 So.3d 172 (Miss.Ct.App. 2009); *Moffett v. Life Care Centers of America,* 187 P.3d 1140 (Colo.App. 2008); *Blankfeld v. Richmond*

Health Care, Inc., 902 So.2d 296 (Fla.Dist.Ct.App. 2005).

Before a third party can bind a person to a contract, it is axiomatic that the third party must have appropriate legal authority to do so. Otherwise, the party cannot be bound by its terms. *See AT&T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (to require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the "first principle" of arbitration that "a party cannot be required to submit [to arbitration] any dispute which she has not agreed so to submit."); *Volt Info. Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). The Petitioners in *Taylor* and *Marchio* bear the burden of establishing that the respective individuals were agents and duly authorized to execute the arbitration agreements on behalf of the nursing home residents. Pursuant to West Virginia Law, "It is of course an elementary rule of law that a person dealing with an alleged agent is bound to ascertain his authority, and that, when [attempting to enforce an agreement] against the principal in respect of an act of such agent, the burden is upon the [party attempting to enforce the agreement] to establish, not only the fact of agency, but that the act upon which he relies was within the agent's authority." *Owens Bottle-Mach. Co. v. Kanawha Banking & Trust Co.,* 259 F. 838 (4th Cir. 1919). *See also Bluefield Supply Co. v. Frankel's Appliances, Inc.,* 149 W.Va. 622, 631-32, 142 S.E.2d 898, 906 (W.Va. 1965) ("The general rule is that the authority of an agent to perform the act in question must be proved. . . . The law indulges no presumption that an agency exists; on the contrary a person is legally presumed to be acting for himself and not as the agent of another person; and the burden of proving an agency rests upon him who alleges the existence

of the agency. It is also well established that a person who deals with an agent is bound at his own peril to know the authority of the agent.), citations omitted.

b. The FAA does not require Courts to force arbitration on parties who have not agreed to arbitrate.

These matters are based in claims for wrongful death. Pursuant to statute, these claims do not belong to the decedents who are the claimed parties to the arbitration clauses at issue. Instead, they belong to family members that never agreed or otherwise contracted to arbitrate their claims. *See* W. Va. Code § 55-7-6. Specifically, these damages belong to the "surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution after making provision for those expenditures." W. Va. Code § 55-7-6(b). Further, damages may be awarded for the following:

> (A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; (B) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (D) reasonable funeral expenses

W. Va. Code § 55-7-6(c)(1).

Contracts do not become super contracts and include non-parties simply because of the presence of an arbitration clause. Nothing in the FAA overrides normal rules of contract formation; the Act's goal was to put arbitration on a par with other contracts and eliminate any vestige of old rules disfavoring arbitration. Arbitration depends on agreement, see *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938,

943, 115 S. Ct. 1920 (1995); *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 648-49, 106 S. Ct. 1415 (1986), and this Court has repeatedly stated that "when deciding whether the parties agreed to arbitrate a certain matter … courts generally should apply ordinary state-law principles that govern the formation of contracts." *First Options,* 514 U.S. at 944; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 60-63 (1995); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 474 (1989) ("the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review"); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 447 (2003) (the contractual interpretation question of whether an arbitration clause permitted class actions in arbitration was "a matter of state law.…")

It is axiomatic that a party to a contract cannot bargain away a right he or she does not have. Indeed, Petitioners do not dispute the fact that the proceeds of a wrongful death claim do not belong to the decedent or the estate. Nor is there any contention that, for example, Clarence Brown's other wrongful death beneficiaries, specifically another brother, Harrison Brown, and two sisters, Peggy Larson and Carol Brown, ever entered into any agreement to arbitrate any claim. Thus, there is no denying in this case that their wrongful death claims are not subject to an arbitration agreement, and Petitioners have not asserted otherwise.[8] Regardless of the resolution of the preemption issues raised by the petition, therefore, these individuals' wrongful death claims cannot be referred to arbitration and the case against the nursing home will inevitably proceed in the trial court on the wrongful-death claim.

Other states have agreed with this reasoning. In *Peters v. Columbus Steel*

Castings Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), the Ohio Supreme Court examined a case in which an employee entered into a contract with his employer that required him to arbitrate any legal claims "regarding [his] employment." *Id.* at ¶2. By its express terms, the arbitration provision in *Peters* purported to apply to the employee's "heirs, beneficiaries, successors, and assigns." *Id.* The employee was fatally injured at work and his estate brought a survival action as well as a wrongful-death action. *Id.* at ¶3. The employer sought to compel arbitration of both claims and in response, the estate dismissed the survival claim and proceeded solely on the wrongful-death claim. *Id.* at ¶4. The Ohio court of appeals affirmed the trial court's denial of the motion to dismiss for arbitration, and the Ohio Supreme Court upheld that decision. *Id.* at ¶6.

In so holding, the Ohio Supreme Court explained that even though the claims were brought by the same "nominal party", a survival action is brought to compensate for injuries a decedent sustained before death but a wrongful-death action is brought on behalf of the decedent's beneficiaries for their damages arising from that death. *Id.* at ¶11. The Court noted that that there is no common-law wrongful-death action—only statutory rights that spring to life after a wrongful death. *Id.* at ¶9. Thus, "only signatories to an arbitration agreement are bound by its terms" and further, "[i]njured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves." *Id.* at ¶¶7 and 15 (quoting *Thompson v. Wing,* 70 Ohio St.3d 176, 183, 637 N.E.2d 917 (1994). The employee, therefore, "could not restrict his beneficiaries to arbitration of their wrongful-death claims, because he held no right to those claims; they accrued

independent to his beneficiaries for the injuries they personally suffered as a result of the death. *Id.* at ¶19. *See also Oahn Nguyen Chung v. StudentCity.com, Inc.*, Slip Copy, 2011 WL 4074297 at *2 (D..Mass. 2011) ("Because wrongful death is not derivative of the decedent's claim, it would be inconsistent with fundamental tenets of contract law to nonetheless hold that those beneficiaries, who did not sign an arbitration agreement, are bound by the decision of the decedent, whose estate holds no interest in this claim, to sign an arbitration clause.") *See Lawrence v. Beverly Manor,* 273 S.W.3d 525, 527–29 (Mo. 2009) (holding that a wrongful death lawsuit was not barred by an agreement to arbitrate the decedent's claims and claims derivative therefrom); *Sennett v. National Healthcare Corp.,* 272 S.W.3d 237 (Mo.App. 2008) (in wrongful death action, beneficiaries were not bound by arbitration agreement signed by patient); *Woodall v. Avalon Care Center-Federal Way, LLC,* 155 Wash.App. 919, 231 P.3d 1252 (Wash.App. Div. 1 2010) ("Heirs not required to arbitrate under agreement they did not sign.); *Grady v. Winchester Place Nursing & Rehab. Ctr.,* Slip Copy, 2009 WL 2217733 (Ohio App. 5 Dist. 2009).

Because the court below could have reached the same outcome by denying arbitration on this ground - and would be required to address the issue and reach the same result even if the Court were to decide the preemption issue adversely and remand - this Court should deny the petition for certiorari on this independent basis.

c. There was insufficient consideration for the document at issue.

In the *Brown* matter, despite being titled an "Admission Agreement", the document at issue was purportedly signed on March 26, 2004. As previously stated, Clarence Brown was in fact initially admitted to Petitioners' facility nearly eight years

prior on April 27, 1996. Further, he had resided at Petitioners' facility, without interruption, from October 10, 2003, through the date the "Admission Agreement" at issue was apparently signed. Petitioners failed to show, and in fact simply cannot show, that Mr. Brown was afforded any valuable consideration for the document at issue, as he was already a resident of Petitioners' facility and, unlike Defendants, gained nothing from its terms.

IV. The West Virginia Court's ruling is consistent with this Court's precedents.

The West Virginia Court noted that the line of cases that it found most analogous to nursing home arbitration clauses involves "pre-injury contracts immunizing one party from liability for negligence toward another party." *Id.* The Court cited to its prior decision in the 1991 case of *Murphy v. North American River Runners, Inc.,* 186 W.Va. 310, 412 S.E.2d 504 (1991). In that case, the plaintiff was injured while whitewater rafting when the commercial rafting guide engaged in a dangerous maneuver. The plaintiff brought suit against the whitewater rafting company, and the company defended the suit by producing a contract signed by the plaintiff wherein she agreed to accept the risk that she might be harmed while rafting.

In examining the contract signed by the plaintiff, the Court called it a "a pre-injury exculpatory agreement or anticipatory release." *Murphy,* at Syl pt 2. The Court concluded that when a plaintiff expressly and clearly "agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct," the plaintiff may not recover for the harm "*unless the agreement is invalid as contrary to public policy.*" *Id.* at 314-15, emphasis in original. "When such an express agreement is freely and fairly made, between parties who are in an equal bargaining position, *and there is no public*

interest with which the agreement interferes, it generally will be upheld." *Id.* at 315. The Court went on to find in *Murphy* that the pre-injury exculpatory agreement signed by the plaintiff was invalid as a matter of public policy, "because the Legislature had statutorily imposed standards of care upon the whitewater rafting industry for the protection of participants, and the agreement attempted to exempt the defendant from these statutory standards." *Id.* at 317-18.

Thus, the Court in *Brown* noted that agreements absolving public service entities from responsibility for their negligence will not be enforced by the courts. Only agreements absolving participants and proprietors from liability during hazardous recreational activities with no general public utility—such as skiing, parachuting, paintball, or horseback trail rides—will tend to be enforceable (but subject to willful misconduct or statutory limitations). *Id.* (citing *Schutkowski, supra*). Applying this analysis to the cases at bar, the Court determined that the contracts at issue warranted a wary examination.

Noting that several commercial entities, the AAA, AHLA, and NAF, as discussed above, no longer participate in arbitrations such as those at issue, the Court concluded that the arbitration clauses at issue "plainly involve a public service as defined in *Kyriazis, supra.*" Further, the Court stated:

> The nursing home industry is subject to stringent state and federal regulations, and nursing homes are of importance and practical necessity to the public. Furthermore, by adopting the Nursing Home Act, the West Virginia Legislature plainly intended for actions involving violations of the dignity and well-being of nursing home residents to be publicly aired in the courts. Only by having to publicly account for their misfeasance or malfeasance is a defendant likely to mend his, her, or its ways. For that reason, the Legislature attempted to wholly prohibit nursing homes from compelling residents to give up their right to seek justice in a public forum.

Brown, --- SE 2d ---. Importantly, the Court did note that "[t]here is nothing in the law or public policy, however, that stops a resident, *after negligence has occurred,* and after the parameters of risk are better defined, from voluntarily entering into a contract separate and apart from the admission agreement to arbitrate any claims arising from the negligence." *Id.* at fn. 157, emphasis in original.

Based on this determination, the Court held that, as a matter of public policy under West Virginia law, "an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." *Brown*, --- S.E.2d ----. Because this public policy is state law contract defense based upon and analogous to a public policy applied to other contracts not related to arbitration, preemption is not required by the FAA. The rule stated in *Casarotto* and *Perry v. Thomas*, 482 U.S. 483 (1987), is that state law is applicable and is not preempted by the Federal Arbitration Act if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.

Thus, the reasoning of the West Virginia Supreme Court of Appeals is consistent with this Court's express holding in *Casarotto* that "[c]ourts may not … invalidate arbitration agreements under state laws applicable only to arbitration provisions." 517 U.S. at 686. Recognizing the "liberal federal policy favoring arbitration agreements," *Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 81 (2000), state law is not entirely displaced from the FAA preemption analysis. Under § 2, "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning

the validity, revocability, and enforceability of contracts generally." *Thomas,* 482 U.S. at 492 n. 9 (1987). In other words, in enacting the FAA "Congress [only] 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.* (quoting *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 511 (1974)). In short, the West Virginia Court's ruling is consistent with this Court's precedents, and it is well established that state law governs the enforceability of contracts, so long as the state law does not disfavor arbitration clauses as compared to other contract terms.

In a final attempt to suggest the existence of a conflict of state supreme court authority, Petitioners cite rulings of the Mississippi, Texas, and Florida Supreme Courts, as well as others, on a different issue - whether contracts between nursing homes and their residents involve interstate commerce sufficiently to trigger application of the FAA. *See Marchio* Petition at pp. 23-25. The decision below, however, did not even suggest that the FAA was inapplicable for that reason, and, indeed, assumed its applicability. This case simply does not present that question and cannot be a basis for review. In the end, this case involves only the views of one state appellate court on preemption of a state public policy.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari are not worthy of this Court's attention and should be denied.

Respectfully submitted, this the 5th day of December 2011,

By: /s/ Michael J. Fuller, Jr.
Michael J. Fuller, Jr.
James B. McHugh
D. Bryant Chaffin

McHugh Fuller Law Group, PLLC
97 Elias Whiddon Rd.
Hattiesburg, MS 39402
Telephone: 601-261-2220
Facsimile: 601-261-2481

and

Harry G. Deitzler
Hill, Peterson, Carper, Bee & Deitzler, PLLC
NorthGate Business Park
500 Tracy Way
Charleston, WV 25311-1261
Telephone: 304-345-5667
Facsimile: 304-345-1519
Counsel for Respondent Clayton Brown

and

Andrew Paternostro
Jeff D. Stewart
The Bell Law Firm PLLC
30 Capitol Street
P.O. Box 1723
Charleston, WV 25326
Telephone: 304-932-4225
Facsimile: 304-345-1715
Counsel for Respondent Jeffery Taylor

CERTIFICATE OF SERVICE

I hereby certify that on the _5th_ of December 2011, I served the foregoing upon all counsel of record by facsimile and by depositing true and correct copies in the U.S. Mail, postage prepaid, and addressed to:

Shawn P. George, Esq.
George & Lorensen, PLLC
1526 Kanawha Blvd. E
Charleston WV 25311
Counsel for Petitioner Marmet Health Care, Inc., et al.

Frank E. Simmerman, Jr., Esq.
Chad L. Taylor, Esq.
Simmerman Law Office, PLLC
254 East Main Street
Clarksburg, WV 26301
Counsel for Respondent Sharon A. Marchio

Andrew J. Pincus, Esq.
Counsel of Record
Archis A. Parasharami, Esq.
Brian J. Wong, Esq.
Mayer Brown, LLP
1999 K Street, NW
Washington, DC 20006

and

Mark A. Robinson, Esq.
Flaherty, Sensabaugh
& Bonasso, PLLC
200 Capitol Street
Charleston, WV 25301
Counsel for Petitioner Clarksburg Nursing Home and
Rehabilitation Center, LLC, dba Clarksburg Continuous Care
Center, et al

/s/ Michael J. Fuller, Jr.
Counsel for Respondent Clayton
Brown and on behalf of Counsel for
Respondent Counsel for Jeffery Taylor