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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY CIVIL DIVISION

TRICIA ANN WALTER, as Personal Representative of the ESTATE of NORINE C. WALTER,

Plaintiff,

v. CASE NO.:13-CA-009015

SUNRISE SENIOR LIVING SERVICES INC., d/b/a BRIGHTON GARDENS OF TAMPA; JAI LARMAN, Administrator; and CARLA RUSSO, Director of Nursing,

Defendants.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO STRIKE PLAINTIFF'S JURY TRIAL DEMAND

Plaintiff, Tricia Ann Walter, as personal representative of the Estate of Norine C. Walter, through counsel, hereby responds to the Motion To Strike Plaintiff's Jury Trial Demand ("Motion To Strike"). The Court should deny the Motion To Strike for three reasons. First, Ms. Walter's tort claims do not arise out of or relate to the residency agreements of August 22, 2011 or January 9, 2012, and the readmission agreements of February 1, 2012 and March 3, 2012 did not incorporate those agreements by reference. This issue presents a pure question of law. Second, the jury trial waiver clause was not entered into knowingly and voluntarily because Ms. Walter was under duress and subject to undue influence, it is a procedurally and substantively unconscionable provision in adhesion contracts, and it was a product of fraud in the inducement. These issues require an evidentiary hearing, at which Ms. Walter will make the necessary evidentiary showings. Third, even if the Court were to ultimately grant the Motion To Strike, the Court should still exercise its discretion to impanel an advisory jury at any bench trial.

To resolve the Motion To Strike, Ms. Walter suggests the Court should first convene a motion hearing and second, only if necessary, convene an evidentiary hearing. The motion hearing will determine the pure legal questions whether Ms. Walter's tort claims arise out of or relate to the residency agreements of August 22, 2011 or January 9, 2012, and whether the readmission agreements of February 1, 2012 and March 3, 2012 incorporate those agreements by reference. If the Court concludes those residency and readmission agreements did not, the Court can deny the Motion To Strike without further proceedings. If, however, the Court concludes they did, then the Court will need to convene an extensive evidentiary hearing to determine whether Ms. Walter entered into the jury trial waiver clause knowingly and voluntarily without duress or undue influence, whether it is a procedurally and substantively unconscionable provision in adhesion contracts, and whether it was a product of fraud in the inducement. Moreover, before such an evidentiary hearing is held, the parties would also need to conduct discovery, including depositions of the signatories and witnesses to the residency and readmission agreements and other hospital staff, including one or more corporate representatives.

BACKGROUND

Sunrise Senior Living Services, Inc. admitted and discharged Ms. Walter several times via residency agreements and readmission agreements.

A. On August 22, 2011, Sunrise And Ms. Walter Enter Into A Residency Agreement, And She Is Subsequently Discharged

On August 22, 2011, Sunrise admitted Ms. Walter for orthopedic aftercare. *See* Interdisciplinary Discharge Summary of February 9, 2012 (attached hereto as Exhibit "A") at 1. The parties entered into a residency agreement. *See* Residency Agreement of August 22, 2011 (attached hereto as Exhibit "B") at 1. But Sunrise provided Ms. Walter with only the first page of that agreement. *See* Client's Copy of Residency Agreement of August 22, 2011 (attached hereto

as Exhibit "C"). The residency agreement of August 22, 2011 contained a jury trial waiver clause, which states in relevant part:

> **WAIVER OF TRIAL BY JURY:** THE PARTIES TO THIS AGREEMENT HEREBY KNOWINGLY AND UNCONDITIONALLY WAIVE ALL RIGHT TO A TRIAL BY JURY IN ANY LAWSUIT OR COUNTERCLAIM THAT MAY BE FILED BY EITHER PARTY IN CONTRACT, TORT, EQUITY, OR BY STATUTE *ARISING OUT OF OR RELATED TO THIS AGREEMENT AND/OR ANY SERVICES OR CARE PROVIDED BY THE COMMUNITY TO THE RESIDENT*. . . .

Residency Agreement of August 22, 2011 (Ex. B) at 4.

In part, the residency agreement also provides "the nursing Facility may ***terminate this Residency Agreement***" and "discharge or transfer you immediately" if "it is necessary for your welfare and your needs cannot be met at the Nursing Facility." *Id.* at 3 (emphasis added). On December 30, 2011, Sunrise discharged Ms. Walter to a hospital due to recurrent hypertension and dehydration. *See* Interdisciplinary Discharge Summary of February 9, 2012 (Ex. A) at 1.

B. On January 9, 2012, Sunrise And Ms. Walter Entered Into A Residency Agreement, And She Is Subsequently Discharged

On January 9, 2012, Sunrise admitted Ms. Walter for an ankle problem. *See* Interdisciplinary Discharge Summary of March 17, 2012 (attached hereto as Exhibit "D") at 1. The parties entered into the residency agreement of January 9, 2012, on which Sunrise now relies. *See* Residency Agreement of January 9, 2012 (attached hereto as Exhibit "E"). This residency agreement also contained a jury trial waiver clause, which states in relevant part:

> **WAIVER OF TRIAL BY JURY:** THE PARTIES TO THIS AGREEMENT HEREBY KNOWINGLY AND UNCONDITIONALLY WAIVE ALL RIGHT TO A TRIAL BY JURY IN ANY LAWSUIT OR COUNTERCLAIM THAT MAY BE FILED BY EITHER PARTY IN CONTRACT, TORT, EQUITY, OR BY STATUTE *ARISING OUT OF OR RELATED TO THIS AGREEMENT AND/OR ANY SERVICES OR CARE PROVIDED BY THE COMMUNITY TO THE RESIDENT*. . . .

Id. at 4 (emphasis added). Once again, Sunrise provided Ms. Walter with only the first page of the residency agreement. *See* Client's Copy of Residency Agreement of January 9, 2012 (attached hereto as Exhibit "F").

In part, the residency agreement also provides "the nursing Facility may ***terminate this Residency Agreement***" and "discharge or transfer you immediately" if "it is necessary for your welfare and your needs cannot be met at the Nursing Facility." Residency Agreement of January 9, 2012 (Ex. E) at 3 (emphasis added). Sunrise then discharged Ms. Walter to a hospital on January 27, 2012 due to low blood pressure and dysrhythmia. *See* Interdisciplinary Discharge Summary of March 17, 2012 (Ex. "D").

C. On February 1, 2012, Sunrise And Ms. Walter Entered Into A Readmission Agreement

On February 1, 2012, Sunrise admitted Ms. Walter, this time for hypertension, atrial fibrillation (i.e., irregular heartbeat), and ankle problems. *See* Interdisciplinary Discharge Summary of April 5, 2012 (attached hereto as Exhibit "G") at 1. Sunrise and Ms. Walter entered into a readmission agreement, which states, "The Facility and the Resident and/or Agent/Guarantor agree to abide by all the terms and conditions of the Admission Agreement entitled [*sic*] into them on 1/9/12, date of initial admission agreement signature." Readmission Agreement of February 1, 2012 (attached hereto as Exhibit "H") at 1. Sunrise did not attach or provide Ms. Walter with a copy of the residency agreements of August 22, 2011 or January 9, 2012. *See id.* On February 20, 2012, Ms. Walter was discharged to a hospital due to emesis (i.e., vomiting), abdominal discomfort, and low blood pressure. *See* Interdisciplinary Discharge Summary of April 5, 2012 (Ex. "G") at 1.

D. On March 3, 2012, Sunrise And Ms. Walter Entered Into A Readmission Agreement

On March 3, 2012, Sunrise admitted Ms. Walter for nursing care, medications, and assisted daily living. *See* Interdisciplinary Discharge Summary of September 6, 2012 (attached hereto as Exhibit "I") at 1. Sunrise and Ms. Walter entered into a readmission agreement, which states, "The Facility and the Resident and/or Agent/Guarantor agree to abide by all the terms and conditions of the Admission Agreement entitled [*sic*] into them on 1/9/12, date of initial admission agreement signature." Readmission Agreement of March 3, 2012 (attached hereto as Exhibit "J") at 1. Sunrise did not attach or provide Ms. Walter with a copy of the residency agreements of August 22, 2011 or January 9, 2012. *See id.* On August 4, 2012, Sunrise discharged Ms. Walter to a hospital due to her altered mental state and slurred speech. *See* Interdisciplinary Discharge Summary of September 6, 2012 (Ex. "I") at 1.

E. On August 7, 2012, Ms. Walter Died

On August 7, 2012, Ms. Walter died due to complications with septic shock, urinary tract infection, hemorrhagic shock, coagulopathy, acute blood loss anemia, respiratory failure, and hypoglycemia. *See* Amended Complaint ¶ 17.

ARGUMENT

In the Motion To Strike, Sunrise asks the Court to enforce the jury trial waiver clause because, it contends, Ms. Walter knowingly, voluntarily, and intelligently accepted it, and the clause is conspicuous rather than unconscionable, unfair, or against public policy. *See* Motion To Strike at 3. In that regard, Sunrise relies on cases that involved experienced businessmen and a formerly board-certified lawyer to argue it does not matter whether the jury trial waiver clause was offered on a take-it-or-leave-it basis to Ms. Walter (a layperson) or that she failed to read it. *See* Motion To Strike at 3 (citing *Allyn* v. *W. United Life Assurance Co.*, 347 F. Supp. 2d 1246,

1254 n.38 (M.D. Fla. 2004), and *Peterson* v. *Fla. Bar*, 720 F. Supp. 2d 1351, 1360 (M.D. Fla. 2010)).

These arguments are incorrect. First, they overlook that the jury trial waiver clause was no longer in effect because Ms. Walter's tort claims do not arise from or relate to the admission agreements of August 22, 2011 or January 9, 2012. *See infra* Argument I.A.1 & I.A.2. Moreover, the readmission agreements of February 1, 2012 and March 3, 2012 did not incorporate by reference the jury trial waiver clause of those admission agreements. *See infra* Argument I.A.3. Additionally, the jury trial waiver clause was not entered into knowingly and voluntarily because Ms. Walter was under duress and subject to undue influence, it is a procedurally and substantively unconscionable provision in adhesion contracts, and it was a product of fraud in the inducement. *See infra* Argument I.B, I.C, & I.D. Finally, even if the Court were to ultimately grant the Motion To Strike, the Court should still exercise its discretion to impanel an advisory jury at any bench trial. *See infra* Argument II.

I. THE JURY TRIAL WAIVER CLAUSE IS UNENFORCEABLE

"The right of trial by jury shall be secure to all and remain inviolate." Fla. Const. art. I, § 22; *accord* Fla. R. Civ. P. 1.430(a). Nevertheless, "[t]he right to a trial by jury may be waived in civil cases by litigants." *Amquip Crane Rental, LLC* v. *Vercon Constr. Mgmt.*, 60 So. 3d 536, 539 (Fla. 4th DCA 2011) (citations omitted). For example, courts may give effect to knowing and voluntary jury trial waivers, but that usually occurs when the parties to the contract are "both experienced" in that particular industry, *Cent. Inv. Assocs.* v. *Leasing Serv. Corp.*, 362 So. 2d 702, 704 (Fla. 3d DCA 1978), or are "experienced businessmen," *Credit Alliance Corp.* v. *Westland Machine Co.*, 439 So. 2d 332, 333 (Fla. 3d DCA 1983).

Even in such circumstances, however, "'[w]aiver of the right to a jury trial is to be strictly construed and not to be lightly inferred.'" *Id.* In other words, "[q]uestions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions." *Hollywood, Inc.* v. *City of Hollywood*, 321 So. 2d 65, 71 (Fla. 1975); *accord Amquip Crane Rental, LLC*, 60 So. 3d at 539.

Although jury trial waivers may be enforced even though one of the contract parties did not read it, such a waiver is enforceable only when the parties are "experienced businessmen," not laymen. *Credit Alliance Corp.* v. *Westland Machine Co.*, 439 So. 2d 332, 333 (Fla. 3d DCA 1983).[1] And even in that circumstance, a party who fails to read a contract may still show facts or circumstances that demonstrate he or she was effectively prevented from actually reading the document. *Manning* v. *Interfuture Trading, Inc.*, 578 So. 2d 842, 845 (Fla. 4th DCA 1999). The determination whether a waiver has actually occurred is generally a question of fact. *Hill* v. *Ray Carter Auto Sales*, 745 So. 2d 1136, 1138 (Fla. 1st DCA 1999) (when a party disputes the existence or validity of the arbitration agreement, a trial court should hold an evidentiary hearing). As such, an evidentiary hearing will be necessary to determine whether the jury trial waiver clause is enforceable. *See id.*

A. The Jury Trial Waiver Clause Was Not In Effect When Ms. Walter Died

The admissions agreements terminated each time Sunrise discharged Ms. Walter. For that reason, the jury trial waiver clause was not in effect when Ms. Walter died. Instead, at most, the jury trial waiver clause governed only Ms. Walter's stays with Sunrise from August 22, 2011 through December 30, 2011 and January 9, 2012 through January 27, 2012. But Ms. Walter's

[1] For that reason, Sunrise has misplaced its reliance on *Allyn* v. *W. United Life Assurance Co.*, 347 F. Supp. 2d 1246, 1254 n.38 (M.D. Fla. 2004), and *Peterson* v. *Fla. Bar*, 720 F. Supp. 2d 1351, 1360 (M.D. Fla. 2010). *Allyn* involved experienced businessmen, and *Peterson* involved a formerly board-certified lawyer. Ms. Walter, in contrast, was a layperson.

claims do not "arise out of" or "relate to" the admissions agreement of August 22, 2011 or January 9, 2012 or those particular stays, so—unless the readmission agreements of February 1, 2012 or March 3, 2012 incorporated by reference the jury trial waiver clause of the admission agreements[2]—the jury trial waiver clause is irrelevant to these proceedings.

1. Ms. Walter's Claims Do Not Arise Out Of Or Relate To The Admission Agreements Of August 22, 2011 Or January 9, 2012

Ms. Walter's claims for wrongful death sound in tort, not contract. Specifically, Ms. Walter has stated claims for (1) nonlethal negligence in violation of § 400.022, *Fla. Stat.*, (2) lethal negligence in violation of § 400.022, *Fla. Stat.*, (3) wrongful death in violation of § 400.022, *Fla. Stat.*, (4) breach of fiduciary duty,[3] and (5) violation of § 415.1111, *Fla. Stat.* *See* Amended Complaint ¶¶ 19-72. None of these claims requires the parties or the Court to interpret the terms of the residency agreement. Accordingly, Ms. Walter's tort claims cannot be characterized as arising out of or relating to the residency agreement.

In this regard, it is helpful to recognize there are two types of jury trial waiver clauses: narrow and broad. *Jackson* v. *Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013). Narrow clauses typically waive jury trial rights for all claims "arising out of" a contract. *Id.* "This type of provision limits [jury trial waiver] to those claims that have a direct relationship to a contract's terms and provisions." *Id.* But broad clauses commonly waive jury trial rights for all claims "arising out of or relating to" a contract. *Id.* "The addition of the words 'relating to' broadens the scope of [a waiver] provision to include those claims that are described as having a 'significant relationship' to the contract—regardless of whether the claim is founded in tort or

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[2] For reasons explained below, the readmission agreements of February 1, 2012 and March 3, 2012 did not incorporate by reference the admission agreements of August 22, 2011 or January 9, 2012. *See infra* Argument I.A.3.

[3] "Breach of fiduciary duty is . . . a well-established cause of action in tort." *First Equity Corp.* v. *Watkins*, 1999 Fla. App. LEXIS 10077, at *3 (Fla. 3d DCA 1999).

contract law." *Id.* As such, the question here is whether Ms. Walter's tort claims have a "significant relationship" (i.e., a "contractual nexus") to the residency agreement.

"A 'significant relationship' between a claim and an arbitration provision does not necessarily exist merely because the parties in the dispute have a contractual relationship." *Id.* Instead, a "significant relationship" exists only "if there is a 'contractual nexus' between the claim and the contract." *Id.* A "contractual nexus," in turn, exists only if resolution of the claim "requires either reference to, or construction of, a portion of the contract." *Id.* "More specifically, a claim has a nexus to a contract and arises from the terms of the contract if it emanates from an inimitable duty created by the parties' unique contractual relationship." *Id.* But there is no nexus if the claim "pertains to the breach of a duty otherwise imposed by law or in recognition of public policy, such as a duty under the general common law owed not only to the contracting parties but also to third parties and the public." *Id.* In short, "the mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement." *Seifert* v. *U.S. Home Corp.*, 750 So. 2d 633, 638 (Fla. 1999).

Applying those principles here, there is no "significant relationship" or "contractual nexus" between Ms. Walter's tort claims and the admission agreements of August 22, 2011 or January 9, 2012. Her tort claims' resolutions do not require reference to or construction of any portion of the admission agreements. That is because none of her claims emanates from any contractual duty created by the admission agreements. Instead, the claims all turn on statutory and common law duties that would exist even if the admission agreements had never existed. Accordingly, Ms. Walter's claims cannot be characterized as "arising out of or relating to" the admission agreements.

2. Ms. Walter's Claims Do Not Arise Out Of Or Relate To Any Services Or Care Provided By The Community To Her From August 22, 2011 Through December 30, 2011 Or January 9, 2012 Through January 27, 2012

Nor do Ms. Walter's claims arise out of or relate to any "services or care" Sunrise provided to her from August 22, 2011 through December 30, 2011 or January 9, 2012 through January 27, 2012.

"The contracting parties' intent is determined from within the four corners of the document and construed in accordance with the agreement's plain meaning." *Prestige Valet, Inc.* v. *Mendel*, 14 So. 3d 282, 283 (Fla. 2d DCA 2009). "If a contract is clear, complete and unambiguous, there is no need for judicial construction." *Hunt* v. *First Nat'l Bank*, 381 So. 2d 1194, 1197 (Fla. 2d DCA 1980). To the extent there is any ambiguity in these provisions, however, this Court must construe the admission agreements against the drafter (i.e., Sunrise). *City of Homestead* v. *Johnson*, 760 So. 2d 80, 84 (Fla. 2000) ("An ambiguous term in a contract is to be construed against the drafter.").

The admission agreement expressly provides "the nursing Facility may ***terminate this Residency Agreement***" and "discharge or transfer you immediately" if "it is necessary for your welfare and your needs cannot be met at the Nursing Facility." Residency Agreement (Ex. E) at 3 (emphasis added). By its plain terms, the jury trial waiver clause governed only Ms. Walter's stay that commenced on January 9, 2012. *See id.* at 4 ("ARISING OUT OF OR RELATED TO THIS AGREEMENT AND/OR ANY SERVICES OR CARE PROVIDED BY THE COMMUNITY TO THE RESIDENT"). When Sunrise discharged Ms. Walter to a hospital on January 27, 2012 due to low blood pressure and dysrhythmia, *see* Interdisciplinary Discharge Summary of March 17, 2012 (Ex. D) at 1, the admission agreement and the jury trial waiver clause contained therein "immediately" "terminate[d]," Residency Agreement (Ex. E) at 3.

3. The Readmission Agreements Did Not Incorporate By Reference The Jury Trial Waiver Clause

The readmission agreements of February 1, 2012 and March 3, 2012 did not incorporate by reference the jury trial waiver clause of the admission agreement of January 9, 2012.

"Where a written contract refers to and sufficiently describes another document, that other document or so much of it as is referred to, ***may*** be regarded as a part of the contract and therefore is properly considered in its interpretation." *Collins* v. *Nat'l Fire Ins. Co.*, 105 So. 2d 190, 194 (Fla. 2d DCA 1958) (emphasis added). In contrast, "where a contract expressly provides that it is ***subject to*** the terms and conditions of other contracts which are definitely specified, such other contracts ***must*** be considered in determining the intent of the parties to the transaction." *Id.* at 194-95 (emphases added).

But "[t]he doctrine of incorporation 'requires that there must be some expression in the incorporating document . . . of an intention to be bound by the collateral document.'" *Affinity Internet, Inc.* v. *Consol. Credit Counseling Servs.*, 920 So. 2d 1286, 1288 (Fla. 4th DCA 2006) (quoting *Temple Emanu-El of Greater Fort Lauderdale* v. *Tremarco Indus., Inc.*, 705 So. 2d 983, 984 (Fla. 4th DCA 1998), and citing *Kantner* v. *Boutin*, 624 So. 2d 779, 781 (Fla. 4th DCA 1993))). "'A mere reference to another document is not sufficient to incorporate that other document into a contract, particularly where the incorporating document makes no specific reference that it is 'subject to' the collateral document.'" *Affinity Internet, Inc.*, 920 So. 2d at 1288 (quoting *Temple Emanu-El of Greater Fort Lauderdale*, 705 So. 2d at 984, and citing *Kantner*, 624 So. 2d at 781); *accord Jenkins* v. *Eckerd Corp.*, 913 So. 2d 43, 51 (Fla. 1st DCA 2005) ("[i]ncorporation by reference . . . requires more than simply making reference to another document").

Accordingly, even when a contract "does state that it is subject to the collateral document, that simple statement, with nothing more, is insufficient to bind" a contracting party. *Affinity Internet, Inc.*, 920 So. 2d at 1288. Rather, a contract must contain "clear language evidencing an intention of the parties to incorporate the terms of the collateral document." *Id.* Absent such language, and particularly when "the collateral document [was] not attached to the contract" and the contracting party "was never at any time subsequent to the signing of the contract given a copy of the collateral document or the information contained therein," the collateral document is not incorporated by reference. *Id.* In such circumstances, appellate courts routinely conclude contracts did not incorporate by reference collateral documents or agreements. *E.g.*, *id.*; *Jenkins*, 913 So. 2d at 51 (K&B Lease "contains no language which indicates an intent to be bound by the terms of the Delchamps lease or to make its terms a part of the K&B Lease"); *Temple Emanu-El*, 705 So. 2d at 983-84 (contract did not incorporate warranty's arbitration clause by reference).

For example, *St. Augustine Pools* v. *James M. Barker, Inc.*, 687 So. 2d 957 (Fla. 5th DCA 1997), is illustrative. There, a subcontractor entered into a contract with a general contractor that provided in paragraph 16, "This Agreement is subject to the General Contract between the Owner and General Contractor. Subcontractor acknowledges that he is familiar with the General Contract and the General Conditions thereof and agrees to comply with all applicable provisions thereof." *Id.* at 958. The general contract, in turn, contained an arbitration clause. *Id.* But, "[w]hen read as a whole, paragraph 16 indicates that the general contract is referenced solely to make the subcontractor aware of its duties and requirements." *Id.* As such, "[t]he subcontractor does not have a duty or requirement to arbitrate any disagreements." *Id.*

Applying those principles here, the readmission agreements of February 1, 2012 and March 3, 2012 did not incorporate by reference the jury trial waiver clause of the admission agreement of January 9, 2012. Both readmission agreements merely state, "The Facility and the Resident and/or Agent/Guarantor agree to ***abide by*** all the terms and conditions of the Admission Agreement entitled [*sic*] into them on 1/9/12, date of initial admission agreement signature." Readmission Agreement of February 1, 2012 (Ex. "G") at 1 (emphasis added); Readmission Agreement of February 1, 2012 (Ex. "I") at 1 (emphasis added). The readmission agreements did not attach the admission agreement January 9, 2012—which, incidentally, was never provided to Ms. Walter. *See Affinity Internet, Inc.*, 920 So. 2d at 1288. Nor did the readmission agreements state they were "subject to" the admission agreement of January 9, 2012. Rather, the readmission agreements used the phrase "abide by." Ordinarily, "abide by" means "[t]o ***act*** in accordance with or in conformity to." BLACK'S LAW DICTIONARY 4 (7th ed. 1999) (emphasis added). Accordingly, as in *St. Augustine Pools*, at most all the readmission agreements did was to "make [Sunrise and Ms. Walter] aware of [their] duties and requirements" from the admission agreement of January 9, 2012, 687 So. 2d at 958, with respect to how they would "***act***" during the term of that readmitted residency toward each other. The readmission agreements, therefore, did not incorporate by reference the jury trial waiver clause. *See St. Augustine Pools*, 687 So. 2d at 958 (emphasis added); *see also Affinity Internet, Inc.*, 920 So. 2d at 1287-89; *Jenkins*, 913 So. 2d at 51; *Temple Emanu-El*, 705 So. 2d at 983-84; *Kantner*, 624 So. 2d at 780-81.

B. Ms. Walter Did Not Enter Into The Jury Trial Waiver Clause Knowingly And Voluntarily

Ms. Walter did not enter into the jury trial waiver clause knowingly and voluntarily because, when she executed the admissions agreements, she was under duress and subject to undue influence.

1. The Nursing Home Industry's Use Of Jury Trial Waivers In Residency Agreements Undermines The Traditional Contract Paradigm Of Assent And Freedom To Bargain

One of the requirements of an enforceable contract is voluntary assent, which "follows from the premise that contractual liability is consensual." E. ALLAN FARNSWORTH, CONTRACTS § 3.1 at 110 (3d ed. 1999). As such, Florida law commonly recognizes that "[c]ontracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement." *Okeechobee Resorts, L.L.C.* v. *E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014). The recognition of that freedom of contract is no surprise, because "[t]raditional contract law was designed for a paradigmatic agreement that had been reached by two parties of equal bargaining power by a process of free negotiation." FARNSWORTH, *supra*, § 4.26 at 295-96. "Today, however, in routine transactions the typical agreement consists of a standard printed form that has been prepared by one party and assented to by the other with little or no opportunity for negotiation." *Id.* § 4.26 at 296. But "[d]angers are inherent in standardization," because "it affords a means by which one party may impose terms on another unwitting or even unwilling party." *Id.*

In the nursing home context, the traditional contract paradigm regarding assent and freedom to bargain does not hold true. For example, the nursing home industry commonly uses jury trial waivers in residency agreements, but such adhesion contracts, which are entered into by parties of vastly disparate bargaining power and personal circumstances, are fraught with peril:

> The ability of nursing homes to include [jury trial waivers] in nursing home admission contracts is possible for a number of reasons. First, the severe disparity in bargaining power between nursing homes and persons in need of their services places residents in an extremely dependent position. Second, the critical need for services almost always overshadows any other consideration. Third, the admission process is easily abused and in such a way that many rights afforded patients are either extinguished or effectively diminished.

> This occurs in a number of ways. Often the resident is simply too infirm or vulnerable to make an informed choice. The actual mechanics of admission also serve to interfere with residents making informed choices. Further, nursing homes too often neither explain nor even mention the presence of [a jury trial waiver] clause. Finally, the circumstances and manner in which patients or their representatives are asked to sign the contract combined with the stress of the admission process impedes the making of informed and consensual choices.

Robert Hornstein, *The Fiction of Freedom of Contract—Nursing Home Admission Contract Arbitration Agreements: A Primer on Preserving the Right of Access to Court under Florida Law*, 16 ST. THOMAS L. REV. 319, 320-21 (2003).

"Studies indicate that the admission process is routinely abused: residents and families receive inadequate information about services and costs, the home puts unlawful and unduly restrictive provisions in the agreement and few sign the contract understanding their implications." Maureen Armour, *A Nursing Home's Good Faith Duty to Care: Redefining a Fragile Relationship Using the Law of Contract*, 39 ST. LOUIS U. L.J. 217, 226 n.37 (1994). In short, "[t]o suggest that nursing home residents have consented to such clauses or otherwise freely contracted away their right of access is to ignore the harsh realities of the marketplace, the coercive nature of the nursing home admission process, the vulnerability of persons in need of nursing home care, and the enormous disparity in bargaining power that exists between nursing homes and their residents." Hornstein, *supra*, at 337.

2. Ms. Walter Was Under Duress

Duress renders a contract "voidable." *Tyson* v. *State*, 83 Fla. 7, 9 (Fla. 1922). "Duress is a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition." *Cooper* v. *Cooper*, 69 So. 2d 881, 883 (Fla. 1954); *accord Mullan* v. *Bishop of Diocese of Orlando*, 540 So. 2d 174, 176 (Fla. 5th DCA. 1989) (citation and punctuation

omitted). "[I]n order to set aside an act based on duress, it must be shown: (a) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will, *and* (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side." *Cooper*, 69 So. 2d at 883 (emphasis in original); *see also* FARNSWORTH, *supra*, § 4.16 at 264 ("The requirements for a showing of duress by threat can be grouped under four headings. First, there must be a threat. Second, the threat must be improper. Third, the threat must induce the victim's manifestation of assent. Fourth, it must be sufficiently grave to justify the victim's assent."). To void a contract for duress, a litigant must prove he or she was under duress when he or she entered into the contract by clear and convincing evidence. *See Beeks* v. *Beeks*, 66 Fla. 256, 257 (Fla. 1913) (marriage contract). "What constitutes duress is [a] matter of law; whether duress existed in a particular transaction is [a] matter of fact." *Burton* v. *McMillan*, 52 Fla. 469, 480 (Fla. 1906) (citation omitted). Accordingly, an evidentiary hearing is required to determine whether Ms. Walter was under duress. *See id.*

At the evidentiary hearing, Ms. Walter will demonstrate by clear and convincing evidence that, at the time she entered into the admissions and readmissions contracts, she was under duress caused by Sunrise's improper and coercive conduct.

3. Ms. Walter Was Subject To Undue Influence

"In contrast to the common law notion of duress, the essence of which was simple fear induced by threat, the equitable concept of undue influence was aimed at the protection of those affected with a weakness, short of incapacity, against improper persuasion, short of misrepresentation or duress, by those in a special position to exercise such persuasion." FARNSWORTH, *supra*, § 4.20 at 273. "Two elements are commonly required: first, a special relation between the parties; second, improper persuasion of the weaker by the stronger." *Id.*

"The rule seems to be well settled that undue influence, justifying the setting aside of will, deed, or other contract, must be such as to dethrone the free agency of the person making it and rendering his act the produce of the will of another instead of his own." *In re Estate of Donnelly*, 137 Fla. 459, 469 (Fla. 1938) (citation and punctuation omitted). "To constitute 'undue influence,' the mind must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influences of persons in close confidential relations with him, that he is not left to act intelligently, understandingly, and voluntarily, but subject to the will or purpose of another." *Id.* at 482. "[T]he burden of proof rests with the party claiming undue influence, and such proof must be clear and convincing." *Freedman* v. *Freedman*, 345 So. 2d 834, 835 (Fla. 3d DCA 1977) (citing *Courington* v. *Courington*, 120 So. 2d 64, 65 (Fla. 2d DCA 1960). Because undue influence presents a question of fact, an evidentiary hearing is required. *See In re Estate of Donnelly*, 137 Fla. at 469; *Freedman*, 345 So. 2d at 835.

At the evidentiary hearing, Ms. Walter will demonstrate by clear and convincing evidence that, at the time she entered into the admissions and readmissions contracts, Sunrise was in a position of close confidential relations with her, and she was subject to undue influence from Sunrise's persuasion, pressure, artful or fraudulent contrivances, or insidious influences.

C. The Jury Trial Waiver Clause Is A Procedurally And Substantively Unconscionable Provision In Adhesion Contracts

"Florida courts may properly decline to enforce a contract on the ground that it is unconscionable. To support a determination of unconscionability, however, the court must find that the contract is both procedurally unconscionable and substantively unconscionable." *Powertel, Inc.* v. *Bexley*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999); *accord Belcher* v. *Kier*, 558 So. 2d 1039, 1040 (Fla. 2d DCA 1990). "The procedural component of unconscionability relates to the manner in which the contract was entered and it involves consideration of such issues as

the relative bargaining power of the parties and their ability to know and understand the disputed contract terms." *Powertel, Inc.*, 743 So. 2d at 574. "In contrast, the substantive component focuses on the agreement itself. [A] case is made out for substantive unconscionability by showing that 'the terms of the contract are unreasonable and unfair.'" *Id.* (citation omitted).

"[A]n adhesion contract is defined as a 'standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis without affording [the] consumer a realistic opportunity to bargain and under such conditions that [the] consumer cannot obtain [the] desired product or services except by acquiescing in the form contract.'" *Powertel*, 743 So. 2d at 574 (quoting BLACK'S LAW DICTIONARY (6th ed. 1990)). "A determination that a contract is unconscionable [is] reviewable [on appeal] by the de novo standard." *Id.* at 573. Nevertheless, a trial court commits error when it determines unconscionability without an evidentiary hearing. *Food Assocs., Inc.* v. *Capital Assocs., Inc.*, 491 So. 2d 345, 346 (Fla. 4th DCA 1986) ("it was error for the trial court to deny appellants an evidentiary hearing and to conclude, in the absence of same, that the lease was not unconscionable as a matter of law").

In the nursing home admissions contract context, typical indications of an unconscionable contract include evidence that (1) "the Admission Contract was presented on a 'take-it-or-leave-it' basis," (2) "had [the patient] requested to amend that document in some material respect, such a request would have been denied," and (3) "[the patient] could not have obtained a satisfactory placement . . . except by acquiescing to the terms of the contract." *Gainesville Health Care Ctr., Inc.* v. *Weston*, 857 So. 2d 278, 281 (Fla. 1st DCA 2003); *see also Sullivan* v. *Ajax Navigation Corp.*, 881 F. Supp. 906, 910 (M.D.N.Y. 1995) (in evaluating jury waiver clauses, "courts have consistently examined the following factors: negotiability of the

contract terms, disparity in bargaining power between the parties, the business acumen of the party opposing the waiver, and the conspicuousness of the jury waiver provision").

At the evidentiary hearing, Ms. Walter will demonstrate that the Jury trial waiver clause was a procedurally and substantively unconscionable provision in adhesion contracts.

D. The Jury Trial Waiver Clause Was A Product Of Fraud In The Inducement

"In a system of contract law based on supposedly informed assent, it is in the interest of society as well as of the parties to discourage misleading conduct in the bargaining process." FARNSWORTH, *supra*, § 4.9 at 241. The doctrine of fraud in the inducement vindicates that policy concern. *See id.* More specifically, fraud in the inducement exists in the following situation:

> Suppose someone offers to sell you a particular emerald for $ 5,000 and, in order to induce you to buy it, represents to you that it is "top quality" and that it has not been filled. You buy it based on the factual representation that the stone is unfilled but later you learn that it, in fact, had been filled. If the seller knew the emerald had been filled but lied in order to trick you into agreeing to buy it, you have a cause of action for fraud (in the inducement) with all its attendant remedies.

La Pesca Grande Charters, Inc. v. *Moran*, 704 So. 2d 710, 713 (Fla. 5th DCA 1998). A litigant can establish fraud in the inducement if he or she can prove by clear and convincing evidence that (1) there was a "misrepresentation of a material fact," (2) the "representor of the misrepresentation, knew or should have known of the statement's falsity," (3) the representor had intent "that the representation w[ould] induce another to rely and act on it," and (4) there was "injury to the party acting in justifiable reliance on the representation." *Lou Bachrodt Chevrolet, Inc.* v. *Savage*, 570 So. 2d 306, 308 (Fla. 4th DCA 1990). "It is axiomatic that fraudulent inducement renders a contract voidable, not void." *Mazzoni Farms* v. *E. I. Dupont De Nemours & Co.*, 761 So. 2d 306, 313 (Fla. 2000). Because fraud in the inducement presents a question of fact, an evidentiary hearing is necessary. *Lou Bachrodt Chevrolet, Inc.*, 570 So. 2d at 308.

At the evidentiary hearing, Ms. Walter will demonstrate, by clear and convincing evidence, that the jury trial waiver clause was a product of fraud in the inducement.

II. EVEN IF THE JURY TRIAL WAIVER CLAUSE IS ENFORCEABLE, THE COURT SHOULD STILL IMPANEL AN ADVISORY JURY AT ANY BENCH TRIAL

Even if a trial court strikes a jury trial demand, it may still impanel an advisory jury. *Vista Ctr. Venture* v. *Unlike Anything*, 603 So. 2d 576, 578-79 (Fla. 5th DCA 1992); *Gelco Corp.* v. *Campanile Motor Serv.*, 677 So. 2d 952, 953 (Fla. 3d DCA 1996). That is because "even with an advisory jury the trial court is the trier of both law and fact and it is the trial court's ultimate findings and judgment alone which are subject to review." *Vista Ctr. Venture*, 603 So. 2d at 579. Notably, the denial of a motion to strike jury trial demand is reviewable only on direct appeal of a final judgment, not on nonfinal order review, *see* Fla. R. App. P. 9.130, or certiorari review, *see Parkway Bank* v. *Fort Myers Armature Works*, 658 So. 2d 646, 648-50 (Fla. 2d DCA 1995) (dismissing, for lack of jurisdiction, a petition for writ of certiorari regarding a trial court's denial of a motion to strike jury trial demand).

An advisory jury would assist the Court in making credibility determinations, particularly because the trial will likely turn on competing factual witnesses, a battle of the experts, and determining the appropriate measure of compensatory and punitive damages. Additionally, an advisory jury will assist appellate review on direct appeal of a final judgment, because if the Court were to mistakenly grant the Motion To Strike, and the Second District were to vacate the final judgment and remand for a new trial, the Second District could simply direct this Court to enter final judgment consistent with the advisory verdict instead of putting this Court, the Second District, and the parties through the time and expense of a second trial and a second appeal.

CONCLUSION

Plaintiff asks the Court to deny the Motion To Strike as a matter of law, without an evidentiary hearing, because Ms. Walter's tort claims do not arise from or relate to the admission agreements, and the readmission agreements did not incorporate by reference the jury trial waiver clause in them. Alternatively, Plaintiff asks the Court to convene an evidentiary hearing and deny the Motion To Strike because it was not entered into knowingly and voluntarily, it is a procedurally and substantively unconscionable provision in adhesion contracts, and it was a product of fraud in the inducement. Finally, if the Court grants the Motion To Strike, Plaintiff asks the Court to impanel an advisory jury at a bench trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Service this 27 day of **March, 2015** to **Ronald E. Bush, Esquire** of Bush, Graziano, Rice & Platter, P.A. (eserve@bgrplaw.com, tdomi@bgrplaw.com).

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