2012 WL 11955486 (Okl.Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Oklahoma.
Oklahoma County

Johnnie L. BOLER,

v.

SECURITY HEALTH CARE LLC et. al.

No. CJ20118333.
October 26, 2012.

**Plaintiff's Response in Opposition to Defendants' Motion to Stay Proceedings, Compel Arbitration, and Request for Evidentiary Hearing**

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Judge Patricia Parrish.

**COME NOW** Plaintiff Johnnie L. Boler, as Personal Representative of the Estate of Cleo Boler, deceased ("Plaintiff") [1], files his Response in Opposition to Defendants' Motion to Stay Proceedings, Compel Arbitration, and Request for Evidentiary Hearing, and respectfully shows and alleges the following:

## I. SUMMARY OF ARGUMENTS

Regardless of whether the FAA applies, the Court cannot arbitrate Plaintiffs newly added wrongful death claim, which in Oklahoma is an entirely independent claim. Plaintiff, Ms. Boler's personal representative asserting that claim, has never agreed to arbitrate anything. Further, this is not the same case as Bruner. Nor is it the same as Moses or any of the other nursing home arbitration cases the Court has previously addressed. Plaintiff has deposed key personnel associated with related to GLC-Norman, where Cleo Boler resided, and has adduced evidence that GLC-Norman's management company, Amity Care, LLC, and a related DME company, CareSource, are the only two firms under the Grace umbrella actually transacting with non-Oklahoma firms or entities. GLC-Norman, itself, engages in virtually no such activity. In reality, this is a better case than Bruner and the others to defeat application of the FAA. The alleged arbitration agreement between GLC-Norman and Ms. Boler simply does not satisfy all of the Citizens Bank factors and must be rejected based on 64 O.S. §1-1939 (D, E) and Bruner. The Marmet case should have no bearing on the Court's ruling. Finally, the arbitration agreement in issue must be rejected because it was executed in an unconscionable way, and Defendants cannot assert it anyway because they acquiesced to the licensure requirements in Oklahoma.

## II. PROPER PROCEDURE FOR RESOLVING MOTION TO COMPEL ARBITRATION

In its *Rogers* decision, the Oklahoma Supreme Court described thusly the proper procedure for adjudicating motions to compel arbitration, especially when the existence of a valid written arbitration agreement is disputed:
In Oklahoma state courts, the [Oklahoma Uniform Arbitration Act ("OUAA")] determines how proceedings on an application to compel arbitration shall be conducted so long as the OUAA does not frustrate the purposes underlying the FAA. *See Volt,* 489 U.S. at 476 ("There is no federal policy favoring arbitration under a certain set of procedural rules..."); *Southland Corp. v. Keating,* 465 U.S. 1, n. 10, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984); *Jack B. Anglin Co., Inc. v. Tipps,* 842 S.W.2d 266, 268, 36

Tex. Sup. Ct. J. 205 (Tex. 1992). When there is a written agreement to submit a controversy to arbitration and one party denies the existence of the agreement, the court shall proceed summarily in deciding the issue. 15 O.S.2001, § 803; see 9 U.S.C. § 4 (If the making of arbitration agreement is at issue, "the court shall proceed summarily to the trial thereof."); Tex. Civ. Prac. & Rem. Code Ann. § 171.021 (West 2005) (If the existence of an agreement to arbitrate is at issue, "the court shall summarily determine that issue.").

Section 815 of the OUAA provides that an application to compel arbitration "shall be heard in the manner... for making and hearing of motions in actions." Proceedings on motions are addressed in rule 4 of the Rules for District Courts of Oklahoma, 12 O.S.Supp. 2002. ch. 2, app. (ORDC). Under rule 4 of the ORDC, the party seeking to compel arbitration must present a statement of the law and facts showing an enforceable agreement to arbitrate the issues presented by the petition. *Id.* at rule 4(c). The application to compel arbitration must be supported by affidavits, pleadings, stipulations, and other evidentiary materials which are verified by a person having knowledge of their accuracy. Id. Alternatively, counsel may submit a verified statement of what the proof will show and then present the proof at the hearing. *Id.* The moving party must also submit a concise brief including a list of authorities on which it relies. *See id.* Within fifteen days after the application is served, a party opposing the application to compel arbitration must file a brief or list of authorities and, if appropriate, verify the facts supporting its position. *Id.*

Either party may request a hearing. The decision to grant a hearing will be in the discretion of the district court. *See id.* at rule 4(d). However, if the existence of an agreement to arbitrate is controverted, then the better procedure is for the district court to conduct an evidentiary hearing before entering an order.

*Rogers v. Dell Computer Corp.*, 2005 OK 51, P15-17, 138 P.3d 826, 830. Here, Defendants have alleged a valid written agreement exists to submit to arbitration the issue of whether Ms. Boler was neglected and injured. Plaintiff denies the existence of any such valid written agreement and is submitting the facts herein, at least in part, to controvert the existence of an agreement to arbitrate. Plaintiff is prepared to offer evidence at any hearing that is conducted to further prove and support these facts.

But Plaintiff believes the Court can largely resolve Defendants' motion without having to address written-contract formation. First, regardless of Defendants' arbitration arguments, it is improper to arbitrate the wrongful death claim now initiated by Plaintiff. Second, the Court can simply examine the Oklahoma Supreme Court's December 2006 *Bruner* decision. Defendants' entire motion to compel arbitration, ostensibly based on *Marmet*, is actually premised on an argument that the FAA applies to the alleged arbitration agreement here. But even a cursory examination of *Bruner* and the record in this case regarding GLC-Norman's lack of interstate activity will reveal Defendants are simply re-urging what has already been decided in Burner, will enlighten the Court as to why the FAA *does not* apply, and will demonstrate why the Court is bound to follow *Bruner*. Because the FAA does not apply, it is unnecessary to refer to and analyze *Marmet* at all, and, more importantly, it is unnecessary to devote judicial and party resources to conducting an evidentiary hearing regarding issues related to the contract defenses [2] that Plaintiff advances.

**III. LIST OF EXHIBITS/EVIDENCE IN SUPPORT OF RESPONSE**

1. Oklahoma Supreme Court's *Bruner* decision.

2. Certified copy of *Bruner* district court briefing and evidence, which includes "Defendant's Special Entry of Appearance and Motion to Dismiss, or, In the Alternative, Motion to Compel Arbitration and Stay Proceedings With Brief In Support" and evidence attached to it, which further includes the Affidavit of Susan Evers, N.H.A.

3. Entire version of what Defendants refer to as "Admission Agreement" (pp. 1-28)

4. Affidavit of Judy Little (daughter of Cleo Boler)(to be supplemented, due to Ms. Little' s illness). [3]

5. Parties' briefing related to *Marmet* Petition for Writ of *Certiorari*

6. Supreme Court of West Virginia's opinion from which the Marmet appeal arose

7. Plaintiffs Second Amended Petition

8. Josh Wood Deposition Excerpts

9. Debbie Coleman Jones Deposition Excerpts

10. Michael Dimond Deposition Excerpts

**IV. STATEMENT OF FACTS IN SUPPORT OF RESPONSE**

1. This is a nursing home neglect case involving allegations that Cleo Boler, an **elderly** Oklahoma citizen, was subject to neglect, was injured, and endured horrific pain and suffering while residing at Grace Living Center - Norman ("GLC-Norman"). *See generally* **Plaintiffs Exh. "7",** Plaintiffs Second Amended Petition. GLC-Norman is a "dba" for Security Health Care, Inc. **Plaintiffs Exh. "8", J.** Wood Depo. Excerpts, at p. 18, lines 2-4.

2. Plaintiff, as personal representative of Ms. Boler's estate, brings a survival action on behalf of Ms. Boler's estate under 12 O.S. §1051. **Exh. "7",** Plaintiffs Second Amended Petition.

3. Ms. Boler passed away on June 17, 2012. **Plaintiff's Exh. "4"** (J. Little Aff.) Plaintiff alleges Ms. Boler's death can be linked to and was caused by Defendants' acts and omissions occurring while Ms. Boler was residing at GLC-Norman. **Exh. "7",** Plaintiffs Second Amended Petition. Accordingly, Plaintiff also asserts a wrongful death action against Defendants and seeks the full array of compensatory and punitive damages available under 12 O.S. §1053. *Id.*

4. Cleo Boler was admitted to GLC - Norman on January 18, 2010 and resided there until January 26, 2012. **Defendants' Motion, Exh. "5"** (J. Wood aff.)

5. Ms. Boler was originally admitted to GLC-Norman after having been hospitalized at Norman Regional Hospital. Norman Regional called GLC-Norman while Ms. Boler was hospitalized. A man from GLC-Norman came to see Ms. Boler in her hospital room. Based on her conversation with him, Ms. Boler elected to reside at GLC-Norman. **Plaintiff's Exh. "4"** (J. Little Aff.)

6. Judy Little, Ms. Boler's daughter, accompanied Ms. Boler during the January 18, 2010 admission into GLC-Norman. *Id.*

7. Under the Oklahoma Nursing Home Care Act ("ONHCA"), 63 O.S. §1-1901, et seq., a requirement exists that a nursing facility like GLC-Norman execute a written contract between it and any resident, which is a "a person or his guardian or responsible party...." 63 O.S. §1-1921(A). The written contract must contain several statutorily defined terms or conditions, including a description of the resident's rights. 63 O.S. §1-1921(F). Further, the ONHCA permits a private right of action to enforce its terms. 63 O.S. §1-1939 (A, B). The ONHCA expressly prohibits arbitration provisions of the type Defendants are now attempting to rely upon. 64 O.S. §1-1939 (D,E).

8. At the time of her January 18, 2010 admission, Cleo Boler was aware of her surroundings, lucid, able to carry on coherent conversations with friends and relatives, and was able to make medical decisions for herself. **Plaintiff's Exh. "4"** (J. Little Aff.)

9. Ms. Boler's competence is also shown by the fact that only seven days prior to her admission into GLC-Norman - on January 11, 2010 -- she executed a written "Durable Power of Attorney" appointing daughter Judy Little to be her attorney-in-fact. *Id.,* **Attach. "A."**

10. Ms. Boler did not participate in the admissions process at all. Instead, Judy Little, attempting to act within the scope of her appointment as Ms. Boler's attorney-in-fact, handled Ms. Boler's admission into GLC-Norman. This includes executing all of the paperwork presented to her as part of the admissions process. *Id.* Judy Little *did not* execute that paperwork in her personal capacity. *Id.*

11. During the admissions process Ms. Little never heard Ms. Boler tell anyone at GLC-Norman that Ms. Little had Ms. Boler's authority to handle the admission of Ms. Boler into GLC-Norman. *Id.*

12. During the admissions process, a lady at GLC-Norman (maybe named "Debbie") placed a large stack of papers in front of Ms. Little and told her she must sign all of them. *Id.* The lady at GLC-Norman did not explain to Ms. Little any of the admissions paperwork in the stack. *Id.*

13. The document entitled "Dispute Resolution Provision/Agreement" was apparently within that stack of papers presented to Ms. Little, because Ms. Little's signature is on that document, at the page labeled "Page 21 of 28." *Id.; see also* **Plaintiff's Exh. "3".** Again, Ms. Little did not execute any of the admissions paperwork, including the "Dispute Resolution Provision/ Agreement," in her personal capacity. *Id.*

14. It is a requirement that the resident or his or her representative sign the "Dispute Resolution Provision/Agreement." Absent a signature on that document, the resident will not be admitted into GLC-Norman. It is non-negotiable. **Plaintiffs Exh. "8"** (J. Wood Depo. Excerpts, p. 87, lines 11-19). The "Dispute Resolution Provision/Agreement" is a form agreement that has the same verbiage for all residents seeking to be admitted. *Id.* (p. 100, lines 18-25; 101, p. 1-11).

15. Josh Wood is the Administrator of GLC - Norman, and has been for four and a half years. *Id.* (p. 7, lines 10-14; p. 30, lines 24-25; p. 31, 1-3).

16. Mr. Wood does not specifically recall Cleo Boler and knows nothing about her physical condition or state of mental competence at the time of admission. *Id.* (p. 8, lines 12-17; p. 13, lines 8-12; p. 14, lines 21-24; p. 21, lines 11-15). Mr. Wood did not hear the GLC-Norman admissions coordinator, Debbie Coleman Jones, explaining the "Dispute Resolution Provision/ Agreement" to Judy Little. *Id.* (p. 91, lines 4-15). He was not there when Ms. Boler was admitted. *Id.* (p. 92, 92, lines 14-22).

17. Debbie Coleman Jones, an admissions coordinator that signed the Dispute Resolution Provision/Agreement involving Ms. Boler, does not recall anything specific about the circumstances surrounding Ms. Boler's admission into GLC-Norman, including her physical or mental condition at admission, and whether at that time she was capable of making her own medical decisions. **Plaintiffs Exh. "9",** (D. Coleman Jones Depo. Excerpts, p. 19, lines 17-20; p. 20, lines 20-25; p. 21, lines 1-8; p. 24, lines 20-24). She does not recall whether Judy Little had any questions about the Dispute Resolution Provision/Agreement. *Id.* (p. 46, line 25; p. 47, lines 1-4). It is infrequent that a resident or representative will take the time to read through the Dispute Resolution Provision/Agreement. *Id.* (p. 52, lines 1-6)

18. Ms. Boler s private insurance company was Health Choice. **Plaintiffs Exh. "8"** (J. Wood Depo. Excerpts, p. 15, lines 3-8; p. 20, lines 18-21). Health Choice is an Oklahoma insurance company. **Plaintiff's Exh. "9",** (D. Coleman Jones Depo. Excerpts, p. 15, lines 11-23).

19. CareSource is an Oklahoma durable medical equipment ("DME") company which shares the same office address in Oklahoma City as Amity Care, LLC, the management company for GLC-Norman. **Plaintiffs Exh. "8"** (J. Wood Depo. Excerpts, p. 36, lines 8-12, 15-20, p. 37, lines 13-16; p. 40, lines 1-8; p. 41, lines 1-6) CareSource sells and rents medical equipment to

GLC Norman and to residents. *Id.* (p. 38, lines 6-25; p. 39, lines 1-13). It mostly rents equipment to residents. **Plaintiff's Exh. "9",** (D. Coleman Jones Depo. Excerpts, p. 30, 17-25; p. 31, 1-13).

20. Amity Care, LLC, another Oklahoma entity, receives a monthly management fee from GLC-Norman, and has during the entirety of Mr. Wood's four and a half years at GLC-Norman. **Plaintiffs Exh. "8"** (J. Wood Depo. Excerpts, p. 42, lines 21-25; p. 43, lines 1-6.

21. Amity Care, LLC, at its corporate office in Oklahoma City (Will Rogers Parkway), sends out Medicare billing in electronic form. **Plaintiffs Exh. "9",** (D. Coleman Jones Depo. Excerpts, p. 10, lines 23-25: p. 11, line 1 to p. 12, line 13). Amity Care, LLC also sends out Medicaid bills. *Id.* (p. 33, lines 7-16). Medicaid bills are sent to the State of Oklahoma, to the Oklahoma Health Care Authority ("OHCA") in particular. *Id.* (p. 33. lines 23-25; p. 34, lines 1-8).

22. Michael Dimond is the Chief Financial Officer for Amity Care, LLC, the management company for GLC-Norman; Amity Care, LLC periodically receives all Medicare and Medicaid funds for GLC-Norman in a master account at Bank of Oklahoma - what Mr. Dimond calls "the Amity Care account" -- that also has Medicare and Medicaid funds from many other Grace nursing homes. **Plaintiffs Exh. "10",** M. Dimond Depo. Excerpts, p. 7, lines 17-19; p. 82, lines 7-25; p. 83, lines 1-21. Most Medicaid payments come to Amity Care, LLC from within Oklahoma. **Plaintiff's Exh. "8",** J. Wood Depo. Excerpts, at p. 49, 15-25, p. 50. lines 7-16, p. 51, lines 1-24; **Plaintiffs Exh. "10",** M. Dimond Depo. Excerpts, p. 21, lines 3-5. It is also possible that some Medicare payments Amity Care, LLC receives for GLC-Norman come from within Oklahoma. **Plaintiff's Exh. "8",** J. Wood Depo. Excerpts, p. 53, lines 6-18.

23. Further, Amity Care, LLC, as the management company, writes all checks to pay expenses for GLC-Norman's food and medical supplies. **Plaintiff's Exh. "8",** J. Wood Depo. Excerpts, p. 48, lines 7-16. Many invoices from supposed out-of-state food and medical supply vendors are actually issued either to Amity Care, LLC or CareSource, rather than to GLC-Norman. *Id.* (p. 54, lines 17-25; p. 56, line 1 to p. 61. line 13)(referring to attached Wood depo. Exh. "7") With regard to the invoices in depo. Exhibit 7, Mr. Wood cannot say that any of the food or medical supplies reflected therein were specifically provided to Ms. Boler. *Id.* (p. 82, lines 5-25; p. 83, lines 1-25; p. 84, line 1).

24. Mr. Wood, in his affidavit, says "[GLC-Norman] purchases approximately 50 to 85 percent of [GLC-Norman's] medical supplies, materials, equipment and food products from outside the State of Oklahoma." **Defendants' Motion, Exh. "5"** (J. Wood aff.) By Mr. Wood's own admission, however, this statement was based on a review of vendor information that, in some cases, did not include vendor addresses or locations. **Plaintiffs Exh. "8",** J. Wood Depo. Excerpts, p. 69, 12-21. Further, the statement is with reference to dollars spent in 2011, and not to the actual quantity of medical supplies, materials, equipment and food products obtained by GLC-Norman in 2011. *Id.* (p. 70, lines 8-22).

25. Mr. Wood has a local representative for U.S. Foods -- the main supplier of food for GLC-Norman -- with an area code "405" telephone number, and he is unsure as to whether the food is distributed from a local warehouse, or whether it comes from somewhere out of state. *Id.* (p. 71, lines 10-25; p. 72, lines 1-25; p. 73, lines 1-3). But U.S. Foods does have a warehouse distribution center within Oklahoma City. **Plaintiffs Exh. "10",** (M. Dimond Depo. Excerpts, p. 14, lines 7-21).

26. In terms of persons that periodically inspect GLC-Norman, Mr. Wood cannot make the determination of where they are from, but he would assume they are employed by the State of Oklahoma. **Plaintiffs Exh. "8",** J. Wood Depo. Excerpts, p. 75, lines 23-25; 76, lines 1-13; p. 78. lines 4-6. Debbie Coleman Jones, GLC- Norman's Admissions Coordinator, says inspection personnel have been out of Oklahoma. **Plaintiffs Exh. "9",** D. Coleman Jones Depo. Excerpts, p. 26, lines 3-6.

27. Mr. Wood does not know whether GLC-Norman or Amity Care, LLC advertises for out of state residents to reside at GLC-Norman. **Plaintiffs Exh. "8",** J. Wood Depo. Excerpts, p. 78, lines 18-25; p. 79, lines 1-2. Mr. Dimond does not know of Amity Care, LLC advertising to attract residents from outside Oklahoma. **Plaintiffs Exh. "10",** (M. Dimond Depo. Excerpts, p. 60, lines 1-5).

28. The information Mr. Wood reviewed regarding paragraph 11 of his affidavit only concerns out-of-state billings in July 2012, and does not concern any billings for Cleo Boler, nor does it concern any alleged out-of-state billings during the time Cleo Boler resided at GLC-Norman. **Plaintiffs Exh. "8",** J. Wood Depo. Excerpts, p. 80, lines 3-25; p. 81, lines 1-25. p. 82, lines 1-4.

## ARGUMENT

### A. Wrongful Death Claim Cannot Be Arbitrated

Defendants' motion is mostly premised on the applicability of the Federal Arbitration Act ("FAA") and the United States Supreme Court's February 2012 opinion in *Marmet. Marmet Health Care Ctr. v. Brown. Nos.* 11-391, 11-394, 2012 U.S. LEXIS 1076, 2012 WL 538286 (Feb. 21, 2012)(per curiam). Defendants not only want to bind Ms. Boler and, now, her estate to arbitration under the FAA and *Marmet,* they also presumably seek to bind Ms. Boler's wrongful death beneficiaries to arbitration. But Ms. Boler'ss two living children, Johnnie Boler and Judy Little - the only wrongful death beneficiaries - did not sign the Dispute Resolution Provision/Agreement in a personal capacity. Johnnie Boler's the Plaintiff here, did not sign it at all. Judy Little did sign it, but only as the attorney-in-fact for Cleo Boler. If, under ordinary principles of Oklahoma contract law, non-signatories in these circumstances cannot be bound to arbitrate, then neither the FAA nor *Marmet* is of any consequence. *Carter v. SSC Odin Operating Co.*, LLC, No. 113204, 2012 III. LEXIS 1004, **35-37 (III. S. Ct. September 20, 2012)(" *Marmet* recognized the significance of common law contract defenses when it returned that case to the West Virginia court to consider the validity of the arbitration clauses under that state's common law.").

Oklahoma common law does not require either Mr. Boler or Ms. Little, both non-signatories, to arbitrate any wrongful death claim against Defendants. To allege a contract is binding upon another, and actionable, privity of contract must exist. *E.g. Lutz v. Talequah Water Co.*, 1911 OK 236, 29 Okla. 171, 179, 118 P. 128, 131-132 ("The overwhelming weight of authority is against the right of the plaintiff to maintain this action. The reason why he may not do so is that there is a want of privity between him and the defendant which disables him either from suing for a breach of the contract or for the breach of duty growing out of the contract."); *Morgan, Baldwin & Co. v. Kanola Oil & Refining Co.*, 1924 OK 523, 102 Okla. 26, 29, 226 P. 335, 338 ("There being no privity of contract between plaintiff and defendant, plaintiff cannot prevail here.") In this vein, arbitration is a product of contract and will not be forced on a party who has not agreed to it. *Oklahoma Oncology & Hematology P.C. v. U.S. Oncology, Inc.*, 2007 OK 12. 160 P.3d. 936, 944-45.

The only aspects of the Dispute Resolution Provision/Agreement that could arguably bind the wrongful death beneficiaries are the following:
Resident, for purposes of this Agreement, is the person who this Admission Agreement permits to reside at the Facility. It is understood and agreed, however, that this Dispute Resolution Provision applies to and binds all persons or entities including those identified in paragraph (2) and (6) of this Provision to the extent any claim(s) whatsoever are asserted by them for or on behalf of the Resident, or for or on behalf of the Resident's estate, survivors, heirs, etc., including without limitation any claim(s) derived from or arising from Resident's claim(s).

**Plaintiffs Exh. "3",** p. 18 of 28, footnote 1.

The Dispute Resolution Provision applies to and binds the Resident and GLC. In addition, it applies to and binds any and all persons and/or entities who and/or which may assert a claim on behalf of, or derived through, the Resident and/or GLC, including, without limitation their legal representatives, guardians, heirs, executors, administrators, estate(s), successors and assigns; further, it applies to and binds any and all persons and/or entities who and/or which are or may be legally responsible for them, or for whom and/or which may be legally responsible, including without limitation their agents, principals, employees, managers, management companies, consultants, owners, members, operators, partners, officers, directors, shareholders, insurer(s), legal representatives, guardians, heirs, executors, administrators, estate(s), successors and assigns. As such, it is

recognized and agreed that this Dispute Resolution Provision survives the death, as well as the incompetency, of the Resident and cannot be revoked by said death or incompetency.

**Plaintiffs Exh. "3",** p. 19 of 28, paragraph 6.

Under Oklahoma law, a wrongful death claim is a new and independent claim which does not arise until after death. *See e.g. Ouellette v. State Farm Mut. Auto. Ins. Co.*, 1994 OK 79, 918 P.2d 1363, 1366 ("A cause of action for an injury to the person is *now survivable* (§§ 1051 and 1052), and a *new and independent* wrongful-death claim has been created (§§ 1053 et seq.). Both the death and the survivor actions *lie only if at the time of his/her death the decedent had a right of recovery for the injury in suit* (§ 1053).")(emphasis in original): Haws v. Luethje, 1972 OK 146, 503 P.2d 871, 874 ("This court recognized the right of action which is given to a personal representative by the wrongful death statute as a new cause of action which does not arise until after death. This right, however, is predicated upon the right of action which was personal to decedent had he lived.").

Courts in other jurisdictions have recognized that based on the separate and independent nature of wrongful death claims, it is inappropriate to require non-signatory personal representatives or wrongful death beneficiaries to arbitrate wrongful death claims, even if the decedent's survivor claims must be arbitrated. *Carter*, 2012 III. LEXIS 1004 at **15-35; *see generally Bybee v. Abdulla*, 2008 UT 35, 189 P.3d 40, 43-49 (in holding wrongful-death arbitration inappropriate, noted, "Unlike Michigan, Utah has uniformly held that a wrongful death cause of action, while derivative in the sense that it will not lie without a viable underlying personal injury claim, is a separate claim that comes into existence upon the death ofthe injured person. The independent nature of the wrongful death action in Utah means that in our state the heirs in a wrongful death action stand in, at most, one shoe of the decedent."); *Donna Ping v. Beverly Enters.*, No. 2010-SC-000558, 2012 Ky. LEXIS 108, **40-41 (Ky. Aug. 23, 2012)("Because under our law the wrongful death claim is not derived through or on behalf of the resident, but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss, we agree with the Courts cited above which have held that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim. This then is another reason, at least with respect to the wrongful death portion of the complaint, to uphold the trial court's denial of Beverly's motion to compel arbitration.") Based on this authority, and given the circumstances of this case and Oklahoma law, it would likewise be improper to require Ms. Boler's non-signatory wrongful death beneficiaries to arbitrate the wrongful death action brought by Johnnie Boler. Defendants' motion, at least to the extent it seeks arbitration of independent wrongful death claims, must be denied.

**B. Based on Factual Record and Bruner, FAA Inapplicable**

In *Bruner* the central issue was whether the Federal Arbitration Act ("FAA") operated to nullify [4] the Oklahoma Nursing Home Care Act ("ONHCA") anti-arbitration provision found at 63 O.S. §1-1939 (D, E). *See generally Bruner v. Timberlane Manor L.P.*, 2006 OK 90, 155 P.3d 16. A nursing home affiliated with Defendants in this case -- Timberlane Manor, LLC d/b/a Grace Living Center ("Grace Timberlane") - was the defendant/appellant in *Bruner*. Grace Timberlane appealed to the Oklahoma Supreme Court a district court ruling that the FAA did not apply to nullify or preempt the anti-arbitration mandate in 63 O.S. §1-1939 (D, E).

"The FAA reaches arbitration agreements in contracts evidencing a transaction that is; 1) economic activity; 2) which in aggregate is a general practice subject to control under the Commerce Clause; and 3) which in aggregate has a substantial impact on interstate commerce." *Bruner*, 2006 OK, P43, 155 P.3d at 31 (*citing Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57, 123 S. Ct. 2037, 2040, 156 L. Ed. 2d 46 (2003)).

In *Bruner*. the Oklahoma Supreme Court held that a Grace admission agreement virtually identical in wording to the one allegedly binding Cleo Boler [5] did not sufficiently involve interstate commerce to warrant application of the FAA and its

preemptive effect. *Bruner,* 2006 OK, P1, 155 P.3d at 19 ("We conclude that the Federal Arbitration Act does not apply to the nursing home admission contract at issue. We affirm the district court's order refusing to compel arbitration.").

The Oklahoma Supreme Court in *Bruner* held the FAA was not applicable, even despite allegations from the defendant that the Grace Timberlane admission agreement represented a transaction involving interstate commerce because: a) Grace Timberlane received federal Medicare and Medicaid Funds originating from a source outside Oklahoma; b) Grace Timberlane was required to comply with all federal Medicare and Medicaid licensing rules and regulations; c) numerous medical and non-medical supplies originate from other states outside Oklahoma; d) Grace Timberlane received inspections from out-of-state inspectors; and e) Grace Timberlane receives private-pay funds from out-of-state family representatives.

The Oklahoma Supreme Court in *Bruner* concluded the Grace admission agreement involved a "profoundly local transaction" since its subject matter was "in-state nursing home care provided to an Oklahoma individual by an Oklahoma entity licensed under Oklahoma law." *Bruner,* 2006 OK, P43, 155 P.3d at 31. As to the three *Citizens Bank* FAA-application factors, the Court in *Bruner* held that while "nursing home care for a fee" is economic activity, thus satisfying the first *Citizens Bank* factor, the final two *Citizens Bank* factors related to interstate commerce are not satisfied. *Id.*

With regard to the second *Citizens* Bank factor - that the admission agreement "in aggregate is a general practice subject to control under the Commerce Clause" - the Court in Bruner held it was not satisfied because Congress regulates nursing homes not through the Commerce Clause, but instead through Medicare and Medicaid statutes enacted pursuant to Congress's Spending Clause power. *Bruner,* 2006 OK, P44, 155 P.3d at 31. The Court wrote, "Nothing in the Medicare/Medicaid statutes indicates Congress found some overriding national concern and some substantial interstate commerce connection and therefore intended to take nursing home care out of the health and safety local concern category and place nursing home care in the interstate commerce category." *Id.*

Regarding the third *Citizens Bank* factor - whether the admission agreement "in aggregate has a substantial impact on interstate commerce" -- the Court in *Bruner* determined none of the evidence submitted by Grace Timberlane revealed a substantial impact on interstate commerce. In particular, neither distribution of Medicare nor Medicaid funds to Grace Timberlane, nor its purchase of supplies from out-of-state vendors, had the requisite substantial effect on interstate commerce. *Bruner,* 2006 OK, P45, 155 P.3d at 31. At most, the Court held, these activities demonstrate only a *de minimus* impact on interstate commerce. *Id.*

Alternatively, the *Bruner* court held that even if the FAA otherwise applied to the *Bruner* admission agreement, "...the FAA's mandate has been overridden by a contrary Congressional command" in the field of **elder** nursing care. *Bruner,* 2006 OK 90, P42-47, 155 P.3d 16, 31-32. The Court held that certain federal statutes and regulations giving nursing facility residents the right to agency hearings and the right to judicial review as allowed by state law, coupled with Oklahoma prohibiting arbitrations in nursing home cases, "imply[] that arbitration proceedings are antithetical to the federal goal of protecting dependent nursing home patients from **abuse** and neglect." *Id.* at 2006 OK 90 at P46; 155 P.3d 16, 31-32.

To prove the three *Citizens Bank* factors, Defendants here rely primarily upon the affidavit of Josh Wood, Administrator of GLC-Norman. Importantly, this affidavit is virtually *identical* to the affidavit of Susan Evers, N.H.A., the Administrator of Grace Timberlane, which was submitted as evidence by the Grace defendants in *Bruner. Plaintiff's Exh. "2"* The only slight difference between Ms. Evers's affidavit and Mr. Wood's affidavit here is that the latter contains a statement by Mr. Wood that "[t]he Facility has at all times complied with the provisions of the Fair Labor Standards Act based upon their understanding that their operations were subject to the provisions of the Act." *Defendants' Exh. "5",* Wood Aff., ¶12, p. 4.

In *Bruner* -- where the FAA was determined not to apply -- the plaintiff did *not* challenge the statements in Ms. Evers's affidavit. Here, however, Plaintiff has mounted such a challenge. He has deposed Mr. Wood, Debbie Coleman Jones (GLC-Norman's Admissions Coordinator), and Michael Dimond, the CFO for GLC-Norman's management company, Amity Care, LLC.[6] As noted above in the Statement of Facts In Support of Response, the following facts were gathered during these depositions:

• Cleo Boler's health insurer was HealthChoice, an Oklahoma insurance company.
• CareSource is an Oklahoma durable medical equipment company located in the same Oklahoma City building as Amity Care, LLC, the

management company for GLC-Norman. CareSource sells and rents medical equipment to GLC-Norman and its residents.

• Amity Care, LLC has received a monthly management fee from GLC-Norman.

• Acting in its role as management company for GLC-Norman, Amity Care, LLC sends out Medicare and Medicaid billing.

• Amity Care receives Medicare and Medicaid funds and deposits them into “the Amity Care account” at Bank of Oklahoma, along with Medicare and Medicaid funds from many other Oklahoma nursing homes managed by Amity Care.

• Medicaid payments largely come from within Oklahoma, from the Oklahoma Health Care Authority.

• As management company for GLC-Norman, Amity Care writes all checks to pay expenses for GLC-Norman's food and medical supplies. Many invoices issued by food and medical supply vendors are actually issued to either Amity Care or CareSource, rather than to GLC-Norman.

• Mr. Wood's affidavit statement that 50 to 85% of food and medical supplies are obtained from out of state is refuted by the fact he had no addresses for many of GLC-Norman's vendors. He is also unable to say whether any out-of-state food or medical supplies were given to Cleo Boler.

• U.S. Foods is the main supplier of food to GLC-Norman. It has a local, Oklahoma City warehouse distribution center. Mr. Wood is unsure of where food deliveries from U.S. Foods originate and can't say that any originate from out of state.

• Mr. Wood does not know by whom any of the GLC-Norman inspectors are employed, but he would assume by Oklahoma. Debbie Coleman Jones says inspection personnel “have been out of Oklahoma.”

•No witness had any knowledge about either GLC-Norman or Amity Care, LLC advertising to obtain out-of-state residents.

• While evidence may be available that billings regarding residents were occasionally sent out of state, there is no evidence that any out of state billings occurred during the time Ms. Boler resided at GLC-Norman.

These facts, among other things, reveal that in an effort to protect various wrongdoers from liability, Defendants have created a management-company structure whereby Amity Care, as compared to GLC-Norman, is the only firm transacting more than a modicum of business across state lines. Much the same can be said for CareSource, Defendants' Oklahoma company that purchases certain items from out of state, then either leases or rents them to either GLC-Norman or to its individual residents.

These activities by Amity Care and CareSource eliminate Defendants' argument that the admissions agreement between Ms. Boler and GLC-Norman satisfies the second and third *Citizens Bank* factors. The roles assumed by Amity Care and CareSource insulate GLC-Norman from any substantial involvement with interstate commerce, and support the point made in Bruner that the admissions agreement in issue - including the Dispute Resolution Provision/Agreement - involves a “profoundly local transaction.” *Bruner*, 2006 OK, P43, 155 P.3d at 31. The Court should follow *Bruner*, find the FAA does not apply to Ms. Boler, rule the ONHCA prevents arbitration in this case, and deny Defendants' motion in its entirety. [7]

**C. Marmet Should Not Influence Court's Ruling**

Realizing *Bruner* presents an insurmountable obstacle, and especially so with the factual record in this case, Defendants resort to a fictional argument premised on a new decision from the United States Supreme Court, *Marmet Health Care Ctr. v. Brown*, Nos. 11-391, 11-394, 2012 U.S. LEXIS 1076, 2012 WL 538286 (Feb. 21, 2012)(per curiam). Defendants claim the *Marmet* decision somehow means that all nursing home admission agreements, no matter their character or circumstances of execution, are sufficiently tied to interstate commerce to bring them within the FAA's ambit. Accordingly, Defendants argue, *Marmet* overrules *Bruner*.

But Defendants cannot point to a single sentence in the *Marmet* opinion or in any of the parties' *Marmet* petition for writ of *certiorari* briefing supporting such an argument. **Plaintiff's Exh. "5"** This is because in *Marmet* the FAA's application was not an issue on appeal. Rather, that the FAA applied was simply assumed by both the *Marmet* parties and by the United States Supreme Court. That the FAA's application was simply assumed in *Marmet* is supported by the following excerpt from the Supreme Court of West Virginia's opinion from which *Marmet* came:

> First, the admission agreements are in writing, as required by Section 2 of the FAA. Second, there is substantial evidence that the nursing home admission agreements in question are contracts evidencing a transaction affecting interstate commerce under Section 2 of the FAA. ***The plaintiffs do not seriously contend that the transactions at issue do not have a significant impact upon interstate commerce.*** In the aggregate, the economic activities of these nursing home facilities have a significant impact on general practices subject to federal control, such as interstate commerce and transportation. Hence, the FAA applies to our examination of this case.

*Brown v. Genesis Healthcare Corp.*, Nos. 35494, 35546, 35635, 2011 W. Va. LEXIS 61 at **74-75 (W. Va. June 29, 2011) (emphasis added); **Plaintiff's Exh. "6."**

Defendants, of course, know the issue of whether the FAA applied was never before the United States Supreme Court. Their knowledge of this is revealed on pp.3-4 of their Motion to Stay Proceedings, Compel Arbitration, and Request for Evidentiary Hearing:

> What's significant, for present purposes, is that the United States Supreme Court has now interpreted the FAA's application in the context of an arbitration agreement contained in the nursing home admission agreement - between persons and entities of the same state - and found it to be enforceable under the FAA. ***The Supreme Court simply could not have reached that conclusion without finding that these types of contacts involve interstate commerce and, thus, preempt state laws to the contrary.*** *Marmet* is binding on this Court and must be followed rather than *Bruner*.

Defendants' Motion, pp. 3-4. Thus, rather than cite for the Court specific language in Marmet addressing the FAA-application issue, Defendants gloss over the matter and simply tell the Court that the United States Supreme Court *must have* made some sort of implicit finding or ruling in *Marmet* about the FAA's application.

But the United States Supreme Court does not consider issues not specifically presented to it, or make implied findings. "This Court's Rule 14.1(a) provides, in relevant part: 'The statement of any question presented [in a petition for certiorari] will be deemed to comprise every subsidiary question fairly included therein. ***Only the questions set forth in the petition, or fairly included therein, will be considered by the Court."*** *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-31, 114 S. Ct. 425, 426-27,126 L. Ed. 2d 396 (1993)(emphasis added). "A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included' therein." *Id.* (citing *Yee v. Escondido*, 503 U.S. 519, 537, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992)).

In *Marmet,* the only two questions presented for review in the nursing home appellants' Petition for Writ of Certiorari were the following:
1. Whether Section 2 of the FAA preempts a state-law rule that prohibits the enforcement of a pre-dispute arbitration agreement when a plaintiff asserts a personal injury or wrongful death claim.

2. Whether the West Virginia court applied its state-law unconscionability doctrine in a manner that subjected Petitioner's arbitration provisions to special scrutiny, thereby contravening the FAA.

**Plaintiff's Exh. "5"** The wording of these two questions removes any doubt whatsoever the FAA's application was simply assumed in *Marmet,* never had to be addressed, and was never considered to be complementary or related to either.

Further, determining FAA applicability requires, in part, a factual inquiry by a trial courts as to the FAA Section 2 issue of whether a contract evidencing a transaction involving commerce is in play. 9 U.S.C. §3. With that in mind, Supreme Court Rule 10 states "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." United States Supreme Court Rule 10. Hypothetically, then, even had the Supreme Court of West Virginia made an erroneous factual determination that the FAA did not apply due to a lack of "involving commerce," the United States Supreme Court likely would not have addressed that determination on appeal. *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 179, 58 S. Ct. 849, 851, 82 L. Ed. 1273 (1938)("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.")

Finally, considerations of *stare decisis* would have prevented the United States Supreme Court from impliedly interpreting the FAA in a manner for it to globally apply to all nursing home admission agreements, without any meaningful discussion and analysis. *See e.g. Hilton v. South Carolina Pub. Rys. Comm'n,* 502 U.S. 197, 202, 112 S. Ct. 560, 564, 116 L. Ed. 2d 560 (1991)( "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." ) (*citing Patterson v. McLean Credit Union,* 491 U.S. 164, 172-73, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)). In sum, *Marmet* should not influence the Court at all in resolving the arbitration issue here.

**D. Defendants' Criticisms of Bruner Unfounded**

That *Bruner* is controlling really does not need to be belabored. Still, it is worth briefly discussing how Defendants misrepresent certain issues related to whether the FAA should apply. Plaintiff has already discussed Defendants misrepresent *Marmet* means the FAA applies to all nursing home admission agreements, when, in fact, *Marmet* does not say that at all. In *Marmet,* the FAA was simply assumed to apply; applicability of the FAA, global as to nursing home admission agreements or otherwise, was never a question considered by the United States Supreme Court. The second misrepresentation is less obvious, but equally troubling. It involves Defendants utilizing the wrong interstate-commerce analysis, likely intentionally, to persuade this Court that *Bruner* was wrongly decided.

The second misrepresentation has its roots in Defendants' reliance on the so-called "three alternative legs" which, they claim, emanate from the United States Supreme Court's *Lopez* decision. *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L. Ed. 2d 626 (1995); see Defendants' Brief, pp. 14-15. Importantly, *Lopez* was not a case addressing the meaning of Section 2 of the FAA, which, in part, provides the FAA applies to "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce..."9 U.S.C. §2. All United States Supreme Court decisions addressing the scope of the FAA's application invariably contain an examination of the types of "contract[s] evidencing a transaction involving commerce" under FAA Section 2. *See e.g. Bruner,* 2006 OK 90, P11-22, 155 P.3d at 21-25 (summarizing the holdings in, among other cases, *Moses H. Cone Mem'l Hosp., Keating, Perry, Citizens Bank, Bernhardt, and Allied-Bruce Terminex Cos.).*

*Lopez*, rather, was a case addressing the issue of whether Congress, under the Commerce Clause, had the authority to enact the then-current version of the Gun-Free School Zones Act of 1990 (GFSZA). In the course of ultimately concluding the GFZA was unconstitutional because carrying an unloaded gun in a school does not substantially affect interstate commerce, the Court remarked as follows regarding the three categories of activities Congress may regulate under the Commerce Clause:
Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. *Perez, supra*, at 150; *see also Hodel, supra*, at 276-277. First. Congress may regulate the use of the channels of interstate commerce. *See, e. g., Darby*, 312 U.S. at 114; *Heart of Atlanta Motel, supra*, at 256 ("'The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question"' (quoting *Caminetti v. United States*, 242 U.S. 470, 491, 61 L. Ed. 442, 37 S. Ct. 192 (1917))). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. *See, e. g., Shreveport Rate Cases*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914); *Southern R. Co. v. United States*, 222 U.S. 20, 56 L. Ed. 72, 32 S. Ct. 2 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez, supra*, at 150 ("For example, the destruction of an aircraft (18 U.S.C. § 32), or... thefts from interstate shipments (18 U.S.C. § 659)"). **Finally.** Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U.S. at 37, i. e., those activities that substantially affect interstate commerce, *Wirtz, supra*, at 196, n. 27.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. *Compare Preseault v. ICC*, 494 U.S. 1, 17, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990), with Wirtz, supra, at 196, n. 27 (the Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"). We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

*Lopez*, 514 U.S. 549, 558-559. 115 S.Ct. 1624, 1629-1630 (1995)(emphasis added)(footnotes omitted). Throughout their brief Defendants assert the second *Lopez* category - what they deem to be Congress's "in commerce" authority to regulate - clearly required application of the FAA to the admission agreement in *Bruner*, and requires it to the alleged agreement here involving Cleo Boler. Defendants claim this is so because "activities carrying out its contractual obligations to Ms. Boler involved an array of contacts that are, in fact, 'in commerce."'

Defendants' Brief, p. 17. Such activities include, so Defendants say, purchasing medical and non-medical supplies from outside Oklahoma and the receipt of federal Medicaid and Medicare funds from out-of-state sources.[8] Defendants' Brief, pp. 17-18. Defendants posit *Bruner* was improperly decided because in it, the Oklahoma Supreme Court did not utilize any *Lopez* "in commerce" category 2 analysis.

Herein is the misrepresentation to this Court. The *Lopez* "in commerce" category 2 has no application whatsoever to this arbitration case. That particular category merely relates Congress's ability to regulate things or persons that are physically moving, or facilitating physical movement in interstate commerce, such as trucks, airlines, railroads, and the persons involved in that movement, such as truck drivers, airline pilots, and railroad personnel. The category has no application at all to an alleged private contract between two citizens of the same state whose subject matter is **elderly** nursing care performed entirely within the state. A private, intrastate contract like this does not, itself, actually move in interstate commerce. Neither does it facilitate the physical movement of anything in interstate commerce. The law on this could not be any clearer.[9] *E.g. United States v. Ochoa*, No. 8-CR-1980 WJ, 2009 U.S. Dist. LEXIS

107881 at *6 (D.N.M. Nov. 12, 2009)("The instrumentalities of interstate commerce are the means of interstate commerce, such as ships, railroads and telegraphs, as well as the persons or things transported by those instrumentalities.")(*citing United States v. Patton*, 451 F.3d 615, 621-22 (10th Cir. 2006), *cert. denied*, 549 U.S. 1213, 127 S. Ct. 1247, 167 L. Ed. 2d 87. (2007))[10];

The cases cited by Defendants to support its "in commerce" theory are entirely inapposite and their citation is designed to mislead. Defendants' Brief, p. 16. The *Gulf Oil* case, an anti-trust case, merely addresses the meaning and scope of certain "in commerce" language utilized in both the Robinson-Patman Act and the Clayton Act. *See generally Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974). The *American Building* case similarly addresses the "in commerce" language in the Clayton Act. *See generally United States v. American Bldg. Maintenance Industries*, 422 U.S. 271, 95 S. Ct. 2150, 45 L. Ed. 2d 177 (1975). Neither of these cases relate in any way to FAA Section 2 and the meaning of its "contract[s] evidencing a transaction involving commerce" language.

The United States Supreme Court cases that do directly interpret the FAA, Section 2 language, again, are described and discussed extensively by the Oklahoma Supreme Court in *Bruner*. *Bruner*, 2006 OK 90, P11-22, 155 P.3d at 21-25. [11] In *Bruner*, the Oklahoma Supreme Court correctly identified the Citizen's Bank decision as providing the proper three-part analytical framework for determining whether the FAA applies to a given contract. [12] *Id.* at P.43, 155 P.3d at 31; *see Citizens Bank*, 539 U.S. 52, 56-57, 123 S. Ct. 2037, 2040, 156 L. Ed. 2d 46. The United States Supreme Court in Citizens Bank held the standard for FAA application is whether,....in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control"' subject to the requirement that the "general practice need bear on interstate commerce in a substantial way." *Id.* As noted above, the Oklahoma Supreme Court in Bruner, considering a record with more evidence of interstate commerce, held the Grace admission agreement in *Bruner* was neither a general practice subject to control under the Commerce Clause, nor something that bore on interstate commerce in a substantial way. *Bruner*, 2006 OK, P44, 155 P.3d at 31. The identical result must occur here.

Because Defendants appear to emphasize them, Plaintiff, albeit briefly, will address two additional arguments made by Defendants to defeat *Bruner*. First, Defendants argue the Tenth Circuit's Turley decision represents application of "a purely 'in commerce" analysis ([*Lopez*] Category 2 [].)"' Defendants' Brief, pp. 18-20: *see Foster v. Turley*, 808 F.2d 38 (10th Cir. 1986). But as discussed, the *Lopez* category 2 analysis is not at all relevant or proper here. And, in any event, the transaction in Turley has characteristics nearly identical to those *Allied-Bruce* discussed in footnote 6, *supra*, as evidenced by the following *Turley* exerpt:

> At the time the parties entered into the agreement, Foster was a resident of Oregon and Turley was a resident of New Mexico. The agreement required Foster to make a substantial down payment to Turley, and required Turley to remit proceeds from the mining operation to Foster. Some ore from the mines was milled at facilities outside the state of New Mexico and the parties attempted to market their product all over the country. At one point Foster sent truck transportation from Oregon to haul the ore from the mines. In view of the interstate payments between the parties and the interstate nature of the production and marketing involved, we conclude that the agreement here is clearly within the ambit of the Arbitration Act.

*Turley*, 808 F.2d at 40. *Turley*, like *Allied-Bruce*, thus involved contracting parties from different states, and further involved contractual performance in the form of payments and shipments of materials on an interstate basis. These cases have no bearing at all on the set of circumstances involving the intrastate Grace admission agreement (made all the more intrastate by GLC-Norman's dealings with Amity Care and CareSource) concerning nursing care alleged to have bound Cleo Boler. [13]

The second argument Plaintiff will briefly address concerns what Defendants assert to be a misapplication of the "general practice test" in *Bruner*. *See* Defendants' Brief, pp. 21-23. To support this argument, Defendants cite *National Labor Relations Board v. Reliance Fuel Corp.*, 371 U.S. 224. 83 S.Ct. 312 (1963)(per curiam). But, like *Lopez*, *American Paving*, and *Gulf Oil*, *Reliance Fuel* is not an arbitration case. It is instead a case merely discussing the contours of the National Labor Relations Board's jurisdiction under the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, whose Section 10 empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." *Reliance Fuel Corp.*, 371 U.S. at 226, 83 S. Ct. at 313. The then-existing version of the NLRA contained its own,

unique definition of "affecting commerce." *Id.* The Court in *Reliance Fuel* cited the following facts as supportive of the NLRB's jurisdiction under the "affecting commerce" language:

> Jurisdiction before the Board was predicated upon the fact that Reliance, a New York distributor of fuel oil whose operations were local, purchased within the State a "substantial amount" of fuel oil and related products from the Gulf Oil Corporation, a supplier concededly engaged in interstate commerce. Most of the products sold to Reliance by Gulf were delivered to Gulf from without the State of New York and prior to sale and delivery to Reliance were stored, without segregation as to customer, in Gulfs tanks located within the State. During the fiscal year ending June 30, 1959, Reliance had gross sales in excess of $ 500,000 and, during the calendar year 1959, it purchased in excess of $ 650,000 worth of fuel oil and related products from Gulf.

*Id.* So, apart from the fact *Reliance Fuel* is not an arbitration case, it can be distinguished on the basis that *Reliance Fuel's* core business - the provision of heating oil to New York homes - centers on purchases of oil from Gulf Oil, a firm beyond doubt engaged in interstate commerce. This is in contrast to *Bruner*, where the Oklahoma Supreme Court explicitly recognized that inasmuch as Defendants rely upon the receipt of Medicare and Medicaid funds to show the nursing home is subject to regulation under the Commerce Clause, receipt of those funds is made possible not by the Commerce Clause, but instead by Congress's Spending Clause authority. *Bruner*, 2006 OK, P44, 155 P.3d at 31. For this reason, the home's general practice as it relates to these funds is not necessarily subject to regulation under the Commerce Clause. *Id.* Further, the Court in Bruner held, "[t]he nursing home admission contract in this case involves a profoundly local transaction - in-state nursing home care provided to an Oklahoma individual by an Oklahoma entity licensed under Oklahoma law," *Bruner*, 2006 OK, P43, 155 P.3d at 31, and held the nursing home's dealings with out-of-state vendors and Medicare/Medicaid "demonstrates a de minimus impact on interstate commerce." *Id.* at P45, 155 P.3d at 31. Accordingly, *Reliance Fuel* is of no significance. *Bruner* controls and warrants denial of Defendants' motion to compel arbitration.

**E. Adhesion Contract/Unconscionability**

As noted by the Oklahoma Supreme Court in *Bilbrey:*

> In an adhesion contract, there is no adjustment of rights of the parties; the contract is on a take-it-or-leave-it basis. *Max True Plastering Co. v. U.S. Fidelity and Guaranty Co.*, 1996 OK 28, P 7, 912 P.2d 861, 864. A contract of adhesion is not the result of bargaining between the parties. The services that are the subject of the contract cannot be obtained except by acquiescing to the form agreement. *Max True Plastering Co.*, 1996 OK 28, P 7, 912 P.2d at 864.

*Bilbrey v. Cingular Wireless, L.L.C.*, 2007 OK 54. P11, 164 P.3d 131.134. The standard of unconscionability is also set forth in *Bibrey:*

> 'The basic test of unconscionability of a contract is whether under the circumstances existing at the time of making of the contract, and in light of the general commercial background and commercial need of a particular case, clauses are so one-sided as to oppress or unfairly surprise one of the parties. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contractual terms which are unreasonably favorable to the other party.'

*Id* at P20, 164 P.2d at 136 (quoting *Barnes v. Helfenbein*, 1976 OK 33, P23, 548 P.2d 1014, 1020): see 12 O.S. §880 (requiring close review for unconscionability in alleged arbitration agreements). With these principles in mind, even if the Court finds there to be a binding arbitration contract involving Cleo Boler, it should be revoked or rescinded. The evidence reveals the admission documents (especially the Dispute Resolution Agreement) amounted to form agreements, with extensive legalese

and confusing terminology, were to be executed on a "take it or leave it" basis, and that no bargaining between Ms. Little and the nursing home was possible. In addition, the Dispute Resolution Agreement provides for the potential that the Resident is to incur all costs and fees related to the arbitration. **Plaintiffs Exh. "3",** p. 19 of 28. This is improper. *See e.g. Graham Oil Co. v. Arco Prod. Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1995); *Cole v. Burns Int'd Security Svcs.*, 105 F.3d 1465, 1483-1484 (D.C. Cir. 1997); *Shankle v. B-G Maintenance Mgmt. of Colorado. Inc.*, 163 F.3d 1230 (10th Cir. 1999). Further, given Oklahoma prohibiting arbitration clauses in nursing home contracts [14], and the cost and fee shifting provision, there can be no question that the alleged agreements upon which Defendants rely are unreasonably favorable to Defendants. Once rescission occurs, there is no binding arbitration contract such that Defendants motion to compel arbitration should be denied.

**F. Waiver/Estoppel Based on OHCA Licensure**

Under the ONHCA, a clear condition of licensure is that the license applicant comply with all ONHCA provisions and regulations. See e.g. 63 O.S. §1-903(A)("No person shall establish, operate, or maintain in this state any nursing facility without first obtaining a license as required by the Nursing Home Care Act."); 63 O.S. §1-906(E)(1)("The Commissioner may suspend or revoke a license on any of the following grounds: 1. Violation of any of the provisions of this act or the rules, regulations and standards issued pursuant thereto"); 63 O.S. §1-906(F)(1)("The Department, after notice to the applicant or licensee, may suspend, revoke, refuse to renew a license or assess administrative penalties in any case in which the Department finds that there has been a substantial failure to comply with this act or the rules promulgated by the Board under this act"); 63 O.S. §§ 1-1914.1 ("For violations of the Nursing Home Care Act, the rules promulgated thereto, or Medicare/Medicaid certification regulations: 3. The Department may deny, refuse to renew, suspend or revoke a license, ban future admissions to a facility, assess administrative penalties, or issue a conditional license"); 63 O.S. §1-1916.2 ("The State Department of Health may deny, refuse to renew, suspend or revoke a license or assess administrative penalties to an applicant, licensee, or facility which has a history of noncompliance or incomplete or partial compliance with or repeated violations of the provisions of the Nursing Home Care Act or the standards, rules or regulations of the Board issued pursuant to the provisions of the Nursing Home Care Act...")

Here, Defendants take the position GLC-Norman "is a fully licensed nursing home...." **Defendants' Motion, Exh. "5."** By obtaining its license, GLC-Norman has represented to the State of Oklahoma, and has agreed, to be bound by and carry out *all* provisions of the ONHCA. Such a representation and agreement is tantamount to a waiver of its right to include illegal arbitration provisions in its admission documents, and to enforce such provisions against residents like Cleo Boler. *Barringer v. Baptist Healthcare of Oklahoma d/b/a Blackwell Regional Hosp.*, 2001 OK 29; 22 P.3d 695, 700-701 (discussing waiver concepts). Similarly, Defendants, based on these representations and agreements, are estopped from attempting to enforce the arbitration provisions against Cleo Boler. *Black's Law Dictionary.* 551 (Sixth Ed. 1990)(defining estoppel to be a person being "prevented by his own acts from claiming a right to the detriment of the other party who was entitled to rely upon such conduct and acted accordingly.") Based on principles of waiver and estoppel arising from licensure, Defendants' motion to compel arbitration should be denied.

**WHEREFORE, PREMISES CONSIDERED,** Defendants' use of *Marmet* is a thinly veiled, improper attempt to bog the Court down in matters of arbitration. Defendants realize this matter is not arbitrable under *Bruner*, especially given the fact Amity Care and CareSource, and not GLC-Norman, are the only arguable links with interstate commerce. Plaintiff thus respectfully asks the Court to deny in all things Defendants' Motion to Stay Proceedings, Compel Arbitration, and Request for Evidentiary Hearing. Plaintiff also respectfully asks for such other and further relief to which she is justly entitled.

Respectfully submitted,

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Footnotes

1 On October 23, 2012 Plaintiffs Judy Little and Johnnie Boler filed a Motion for Substitution of Party and for Leave to Amend First Amended Petition. This motion is based upon the death of Cleo Boler on June 17, 2012. These plaintiffs assume this motion will be granted and that Johnnie Boler, as Personal Representative, will be the only plaintiff prosecuting this action. If that is not the case, then any reference herein to "Plaintiff" is made with reference not only to Johnnie Boler, but also to Judy Little.

2 While a hearing is unnecessary in light of *Bruner*, Plaintiff also requests that an evidentiary hearing occur, especially to the extent the Court determines it needs to hear evidence regarding any contract-formation or rescission defenses to arbitration Plaintiff asserts.

3 Due Judy Little having treatment for a serious illness, she was unable to provide her signed affidavit (Exh. "4") in time for the filing of this response. Ms. Little's affidavit will be supplemented sufficiently in advance of the hearing on this matter, which is set for November 14, 2012. It is believed Ms. Little, in her affidavit, will say what is in the cites to it in the "Statement of Facts In Support of Response." For now, counsel for Plaintiff, Jackie Piland, submits a verification pursuant to Okla. RDC 4. essentially verifying that she believes Ms. Little will say, in an affidavit or at a hearing, what is in the "Statement of Facts In Support of Response" cites to the affidavit.

4 FAA nullification or preemption would occur, as noted in *Bruner*, if the state law in issue - here, O.S. §1-1939 (D, E)--"'...arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with the text of 9 U.S.C. §2." *Bruner*, 2006 OK, P13, 155 P.3d at 22 (citing *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 2527, 96 L.Ed.2d 426 (1987)).

5 In *Bruner*, the Oklahoma Supreme Court also held one reason the FAA did not apply is because the Grace Timberlane admission agreement contained explicit provisions requiring application of Oklahoma law. These Oklahoma law provisions, the Court in *Bruner* reasoned, meant the parties had agreed Oklahoma arbitration law and jurisprudence would prevail over the FAA, and any preemptive effect it might otherwise have on Oklahoma's anti-arbitration rules. *Bruner*, 2006 OK 90 at P40-41; 155 P.3d at 30-31. Predictably, after *Bruner* Defendants changed the form of the Grace admission agreements in an effort to eliminate the Oklahoma choice of law provision. The Admission Agreement and Dispute Resolution Agreement allegedly binding Cleo Boler is the revised form, now not containing the particular Oklahoma choice of law language identified in *Bruner*.

6 Because the factual record here is also different from the *Moses* case previously ruled upon by this Court against the backdrop of *Bruner* and *Marmet*, Plaintiff respectfully asks the Court to give *Moses* only limited consideration in resolving the arbitration issue in this case.

7 Despite Defendants' arguments to the contrary, *Bruner* is neither novel nor an outlier. Courts in other states have rejected application of the FAA in similar contexts involving healthcare and other types of businesses. *See e.g. Flexon v. PHC-Jasper, Inc.*, 731 S.E.2d 1 (S.C. Ct. App. 2012); *Ark. Diagnostic Ctr. P.A. v. Tahiri*, 370 Ark. 157, 257 S.W.3d 884, 891 (Ark. 2007) ("Nothing presented by ADC demonstrated that it considered itself, or operated as, an interstate business. Instead, the evidence ADC did present failed to demonstrate anything other than that it was a local clinic, with local physicians who had privileges at local hospitals, and treated local patients.").

8 Of course, based upon the previously discussed depositions Plaintiff has taken, it is now clear that there was very little to no interstate commerce transacted by GLC-Norman. The few transactions with out-of-state concerns were actually done by either Amity Care or CareSource, neither of which are parties to the any of the Cleo Boler admission papers, including the Dispute Resolution Agreement/ Provision at issue here.

9 The reason Defendants create the *Lopez* category 2 "in commerce" fiction is to facilitate their position -- which, tellingly, is unsupported by case authority -- that "Category 2 does *not* engage in any type of *quantitative* analysis as to the *amount* of things and/ or persons within the flow of commerce (i.e., it matters not how much or how many goods or services are in interstate commerce)." Defendants' Brief, p. 16 (emphasis in original). Defendants need such a position to counter what the Oklahoma Supreme Court did in *Bruner* (quite properly) in terms of evaluating whether, in view of the evidence in *Bruner*, the admission agreement there had a substantial affect on interstate commerce. *See generally Bruner*, 2006 OK 90, P41-45, 155 P.3d at 30-31. But, as demonstrated throughout this briefing, the *Lopez* category 2 analysis is fundamentally flawed, if not intentionally misleading, and the Oklahoma Supreme Court in *Bruner* conducted a proper FAA-application analysis.

10 In *Patton*, the Tenth Circuit, quite appropriately, wrote as to *Lopez* category 2, "The illustrative cases for this category involve things actually being moved in interstate commerce, not all people and things that have ever moved across state lines." *Patton*, 451 F.3d at 622.

11 Among these cases is *Allied-Bruce*. *See generally Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995). Defendants argue the United States Supreme Court in *Allied-Bruce* applied the *Lopez* category 2 analysis to conclude a termite-prevention agreement executed between Allied-Bruce Terminex (a multi-state firm) and a homeowner in Alabama sufficiently involved interstate commerce for purposes of FAA Section 2. Defendants' Brief, p. 16. But this is just not so. The following language from *Allied-Bruce* is telling: "The parties do not contest that the transaction in this case, in fact, involved interstate commerce. In addition to the multistate nature of Terminix and Allied-Bruce, the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama." *Allied-Bruce*, 513 U.S. at 282, 115 S. Ct. at 843. Thus, in *Allied-Bruce*, it was possible to determine the agreement in issue had a substantial affect on interstate commerce (which, per *Citizens 'Bank*, is the proper inquiry in an arbitration-dispute context) because: 1) the parties agreed interstate commerce was involved; 2) the termite agreement was between parties residing in different states; and 3) Allied-Bruce obtained the termite-treatment supplies at the heart of the contract from out-of-state sources. Like the *Bruner* admission agreement, the alleged Cleo Boler admission agreement exists in the context of far different facts and, in any event, the Supreme Court in *Allied-Bruce* did not employ (and could not have employed) any sort of *Lopez* category 2 analysis at all.

12 *Citizens'* Bank was decided after *Allied-Bruce*, and the *Citizens'* Bank opinion extensively cites to *Allied-Bruce*. Even Defendants ultimately acknowledge *Allied-Bruce* to provide a proper analytical framework in determining whether a given contract falls within the FAA's ambit. Defendants' Brief, p. 15 ("Accordingly, when interpreting whether a contract falls within the purview of Section 2 of the FAA, the Allied-Bruce decision dictates the analytical framework to be employed.") This further illustrates the speciousness of Defendants' arguments based on *Lopez, Gulf Oil*, and *American Bldg. Maintenance* and the category 2 "in commerce" theory.

13 Adherence to *Bruner* is required and would not fun afoul of any comity principles Defendants cite to, as expressed in *Akin*. Defendants' Brief, p. 18, *see Akin v. Missouri Pac. R.R.*, 1998 OK 102, P30, 977 P.2d 1040, 1052. Even if Turley is somehow at odds with *Bruner* (it is not), the Oklahoma Supreme Court in *Akin* acknowledged that a compelling reason to depart from comity principles "exists where the Tenth Circuit interprets a Supreme Court decision in a way which we are convinced is erroneous and where to follow it would be to perpetuate error. Our independent obligation correctly to interpret Supreme Court decisions is of greater importance than the object, desirable as it is, of achieving harmony between state and federal courts within our state." *Id.* Similarly, to the extent Defendants ask this Court to recognize the validity of recent federal court decisions by Judges Payne and Miles-LaGrange, *see* Defendant's Brief, pp. 25-27, such a recognition should be rejected because the Oklahoma Supreme Court's holding in *Bruner* represents a compelling reason not to. A district court in Oklahoma is obviously bound to follow the established precedent of the Oklahoma Supreme Court.

14 The Dispute Resolution Provision also violates federal law. *See* 42 U.S.C. §1396r(c)(5)(A)(iii)(stating nursing facilities may not solicit "other consideration" as a precondition to admission); 42 C.F.R. §483.12(d)(3). Thus, even were the FAA to apply, the Court could not enforce its preemptive effect based on these more specific federal provisions. See e.g. Shearson/Am. Exp., Inc. v. McMahon,

482 U.S. 220, 226-227 (1987)(FAA will be superseded where there is an inherent conflict between compelling arbitration and another federal statute).

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