

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA**

BROOKDALE SENIOR LIVING INC.,

Plaintiff,

v.

Case No.

GARY WEIR, as Administrator  
of the Estate of Jean Howard

Defendant.

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff, Brookdale Senior Living Inc. (“Brookdale”), by and through its attorneys, brings this Complaint for Declaratory and Injunctive Relief and alleges as follows:

**NATURE OF THE ACTION**

1. This is an action for declaratory judgment and injunctive relief against Defendant Gary Weir (as Administrator of the Estate of Jean Howard) (“Defendant”). Defendant served Brookdale with an arbitration demand on or about May 15, 2020 (the “Arbitration Demand”), seeking a class arbitration on behalf of himself and a putative class of “similarly situated” residents of assisted living facilities owned and/or operated by Brookdale within the State of North Carolina.

2. Brookdale is seeking a declaration under 28 U.S.C. § 2201 that Defendant is precluded by law from pursuing any claims in arbitration on behalf of any purported class. The arbitration agreement upon which Defendant bases his arbitration demand, by its plain terms, does not authorize arbitration on a class basis. Accordingly, as confirmed by the Supreme Court, the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the “FAA”) bars Defendant from seeking to compel class arbitration against Brookdale.

3. Brookdale is also seeking further necessary and proper relief pursuant to 28 U.S.C.

§ 2202 in the form of a preliminary and permanent injunction enjoining Defendant from pursuing class claims in arbitration.

### **PARTIES**

4. Brookdale affiliates own and operate assisted living facilities, including the Brookdale Cotswold assisted living facility located in Charlotte, North Carolina (the “Community”). Brookdale Senior Living Inc. is a corporation formed under the laws of the state of Delaware with a principal place of business in Tennessee.

5. Defendant is the Administrator of the Estate of Jean Howard, who was at all material times a resident at the Community and was a citizen and resident of the state of North Carolina.

### **JURISDICTION AND VENUE**

6. The Court has jurisdiction over this matter pursuant to 28 USC § 1332(a), based on diversity of citizenship of the parties. The amount in controversy, exclusive of costs and interest, exceeds \$75,000.

7. Venue is proper in this District pursuant to 28 U.S.C. §1391(b)(2) because a substantial part of the events and/or omissions giving rise to this claim occurred in this District. Moreover, Ms. Howard’s arbitration agreement, *see infra* ¶¶ 10-12, specifies that the arbitration proceedings at issue in this action “shall take place in the county in which the Community is located, unless agreed to otherwise by mutual consent of the parties.” Ex. A, Residency Agreement at 9, § 4. The parties have not agreed to arbitrate in another location.

### **FACTS**

#### **The Agreement to Arbitrate**

8. On July 31, 2017, upon entry to the Brookdale Cotswold facility, Ms. Howard

executed a Residency Agreement that included (as section V) an agreement to arbitrate (the “Arbitration Agreement”). The Arbitration Agreement provides:

Any and all claims or controversies arising out of, or in any way relating to, this Agreement or any of your stays at the Community, excluding any action for involuntary transfer or discharge or eviction, and including disputes regarding interpretation, scope, enforceability, unconscionability, waiver, preemption and/or violability of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. The parties to this Agreement further understand that a judge and/or jury will not decide their case.

Ex. A, Residency Agreement at 8, § 1 (emphases in original).

9. On May 3, 2019, Ms. Howard filed a putative class action Complaint against Brookdale in federal court (the “Federal Action”), alleging that Brookdale made purportedly false promises regarding the staffing provided at the Community. *See generally* Ex. B, Class Action Complaint. Upon Ms. Howard’s passing, Mr. Weir was substituted as the party in interest as administrator of the Ms. Howard’s estate. *See* Ex. C, Case Management Order #2, Granting Motion to Substitute.

10. Subsequently, on April 6, 2020, the court presiding over the Federal Action granted Brookdale’s Motion to Compel Arbitration and ruled that Defendant was required to arbitrate his claims against Brookdale pursuant to the Arbitration Agreement. *See* Ex. D, Order and Memorandum Granting Motion to Compel Arbitration.

11. While the Residency Agreement was executed between Ms. Howard and Emeritus Corporation d/b/a Brookdale Cotswold, the parties stipulated in the Arbitration Agreement that any and all claims relating to Ms. Howard’s residency at the Community—specifically including the claims asserted against Brookdale in the Federal Action—would be submitted to arbitration

for resolution:

This Arbitration Provision binds third parties not signatories to this Arbitration Provision, including any spouses, children, heir, representatives, agents, executors, administrators, successors, family members or other persons claiming through the Resident, or persons claiming through the Resident's estate, whether such third parties make a claim in a representative capacity or in a personal capacity. Any claims or grievances against the Community or the Community's corporate parent, subsidiaries, affiliates, employees, officers or directors shall also be subject to and resolved in accordance with this Arbitration Provision.

12. The Arbitration Agreement contains no language expressly authorizing class arbitration and Brookdale has not otherwise consented to class arbitration. Accordingly, pursuant to *Stolt-Nielsen v. Animal Feeds International Group*, 559 U.S. 662 (2010), and *Lamps Plus, Inc. v. Varela*, 139 S. Cr. 1407 (2019), Defendant may not pursue class arbitration against Brookdale.

13. Furthermore, the Arbitration Agreement does not contain any clear and unmistakable provision that the arbitrator will decide whether the Arbitration Agreement authorizes class arbitration. In fact, the Arbitration Agreement says nothing at all about the subject. Accordingly, the question as to whether the Arbitration Agreement authorizes class arbitration is a gateway issue for this Court to decide. *See Del Webb. Cmtys., Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016).

### **The Demand for Arbitration**

14. Following the court's ruling in the Federal Action, Defendant served Brookdale with a Demand for Arbitration, in which he demanded that Brookdale arbitrate his claims on a class basis and attached a formal Class Arbitration Demand. A true and correct copy of the Demand for Arbitration and Class Arbitration Demand is attached hereto as Exhibit E.

15. In his Class Arbitration Demand, Defendant seeks damages on a class-wide basis for unfair and deceptive trade practices, breach of contract, unjust enrichment, and intentional

interference with a contractual relationship. *See generally* Exhibit E.

**Count I – Declaratory Relief (28 U.S.C. § 2201)**

16. Brookdale realleges each and every allegation in Paragraphs 1 through 15 above as if fully set forth herein.

17. An actual and justiciable controversy exists between Brookdale and Defendant concerning the arbitrability of the putative class claims that Defendant has demanded in his Class Arbitration Demand.

18. Brookdale is entitled to a declaration that, as a matter of law under the FAA and the governing United States Supreme Court decisions, *Stolt-Nielsen v. Animal Feed International Group*, 559 U.S. 662 (2010) and *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), Defendant is precluded from pursuing any claims in arbitration on behalf of any purported class because Brookdale did not agree to, and the Arbitration Agreement does not authorize, the arbitration of disputes on a class basis.

WHEREFORE, Brookdale respectfully requests that this Court:

(a) Declare that the Arbitration Agreement does not permit arbitration of class, collective or group claims and that Brookdale therefore did not agree to arbitration of disputes on a class, collective or group basis, and that Brookdale is not required to participate in class, collective or group arbitration as to the claims Defendant has raised in his Demand for Arbitration; and

(b) Grant any other relief that this Court deems just and equitable under the circumstances, including the award of costs and attorneys' fees.

**Count II – Injunctive Relief (28 U.S.C. § 2202)**

19. Brookdale realleges each and every allegation in Paragraphs 1 through 18 above as

if fully set forth herein.

20. Brookdale has been injured by Defendant's failure to arbitrate his claims against Brookdale on an individual, rather than class-wide, basis. Brookdale will be irreparably harmed if an injunction is not entered enjoining Defendant from arbitrating his claims on a class-wide basis.

21. Brookdale has no plain, speedy, or adequate remedy at law.

22. Brookdale's claims for relief are ripe for adjudication.

23. If not enjoined by this Court, Brookdale alleges on information and belief that Defendant will continue to violate the contractual agreement that requires him to arbitrate his claims against Brookdale on an individual basis.

24. Accordingly, injunctive relief is appropriate.

WHEREFORE, Brookdale respectfully requests that this Court:

(a) Issue an injunction enjoining Defendant from initiating or proceeding with any arbitration of claims against Brookdale on a class, collective or group basis; and

(b) Grant any other relief that this Court deems just and equitable under the circumstances, including the award of costs and attorneys' fees.

Dated: May 26, 2020

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I, John T. Holden, hereby certify that on this date a, a copy of the foregoing was served upon all counsel of record via ECF

This the 26<sup>th</sup> day of May 2020.

By: /s/ John Holden  
John T. Holden, Esq.