STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE)

Civil Action Nos. 2012-CP-01-306
2012-CP-01-340
2012-CP-01-341
2012-CP-01-342
2012-CP-01-343
2013-CP-01-044
2013-CP-01-045
2013-CP-01-066
2013-CP-01-073
2013-CP-01-094
2013-CP-01-123
2013-CP-01-124
2013-CP-01-220
2013-CP-01-221

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STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
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EMILY Y MCMAHAN
CLERK OF COURT

ORDER

This matter comes before the Court on Motion of Defendants Peerless Insurance Company, Montgomery Insurance Company and Safeco Insurance Company ("Insurer Defendants") to Compel Arbitration and Dismiss Claims in each of the above-listed cases. The Insurer Defendants seek to apply an arbitration provision in a contract between them and co-defendant Southern Risk Insurance Company to the Plaintiffs in the instant litigation as alleged third party beneficiaries of the contract. This Court heard oral arguments on the motions on January 21, 2014. After careful consideration and for the reasons more fully stated below, this Court hereby denies Defendants' Motions to Compel Arbitration and Dismiss Claims.

Facts

Plaintiffs Lewis Williams, Johnny and Sally Calhoun, Robert Spires, Crystal Spires Wiley, Prescott Darren Bosler, Benjamin and Rebecca Wofford, Robert and Cynthia Gary, Janie Wiltshire, Marsha and Michael Antoniak, Eugene Lawton, Anita Belton and Jeanette Norman ("Insured Plaintiffs") filed suit in Abbeville County against two local insurance

EXHIBIT
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agents, Defendants Laura Willis and Jesse Dantice, and their agency, Southern Risk Insurance Company, as well as various insurance companies including the Insurer Defendants, alleging, among other causes of action, violations of the S.C. Unfair Trade Practices Act, common law unfair trade practices, fraud and conversion. Plaintiffs seek to recover against the Insurer Defendants under a *respondeat superior* theory, alleging these Defendants failed to supervise or audit Willis or the Southern Risk agency, resulting in Plaintiffs' harm.

Plaintiffs Richard Wilson and Robert Shirley ("Agent Plaintiffs") are two local insurance agents who worked in direct competition with Defendants Willis and the Southern Risk agency. The Agent Plaintiffs allege Willis, Southern Risk and the Insurer Defendants engaged in illegal underwriting practices, effectively prohibiting the Agent Plaintiffs from competing in the local insurance market and resulting in a substantial loss of clients and revenue.

The Insurer Defendants rely upon a 2010 Agency Agreement ("the Agreement") presented to Southern Risk Agency in support of their motion. These Defendants allege the Agreement contains a clear arbitration provision, requiring the parties to arbitrate any claims arising "in connection with the interpretation of this Agreement, its performance or nonperformance." (Exhibit B to Defendants' Motion to Compel, *Wilson v. Willis, et. al,* ¶ 12.A.) The Insurer Defendants allege that each of the Plaintiff's claims is premised on duties that would not exist but for the Agreement, and therefore, the Plaintiffs are bound by the arbitration clause contained within the Agreement.

The Insured Plaintiffs and the Agent Plaintiffs dispute their reliance on any provisions of the Agreement, noting they were unaware this Agreement even existed until the filing of the Insurer Defendants' motion. The Plaintiffs further argue Southern Risk never

FCA 2/10

signed the 2010 Agency Agreement that the Defendants are asking the Court to enforce. For these reasons, Plaintiffs allege no basis exists under the law to apply the doctrine of equitable estoppel in this case and force them, who are third parties to the contract at issue, to submit to arbitration.

STANDARD OF REVIEW

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Associates,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

Law and Analysis

I. No Evidence Exists to Support a Valid Contract Requiring Arbitration

"Generally, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 416 (4th Cir. 2000) (internal citations omitted). In the instant case, the Insurer Defendants primarily rely on a 2010 Agency Agreement that contains an arbitration provision in support of their motion. The Agreement, however, is not signed by Southern Risk Insurance Agency. Therefore, this Court holds Defendants have failed to meet their burden of proof in establishing a valid, binding contract by which the Plaintiffs should be forced to arbitrate their claims.

During oral argument, Defendants' counsel argued if the 2010 Agency Agreement is not valid, then the 2007 Agency Agreement, also attached as an exhibit to Defendants' Motions, should apply. In their own motions, however, the Insurer Defendants assert the "2010 Agency Agreement ... replaced and superseded any prior agreement between [the parties] and thus the relevant arbitration provision is the one found in this Agreement."

(Defendants' Motion to Compel, *Wilson v. Willis, et. al*, p. 4). Therefore, this court finds the 2007 Agreement inapplicable to the facts at hand, and the 2010 Agreement cannot be enforced due to Defendants' failure to prove it is a valid, binding contract.

In addition to the fact the Insurer Defendants have failed to meet their burden of proof, the Court alternatively finds the unsigned agreement invalid because it violates the Statute of Frauds. South Carolina law requires certain agreements be in writing and signed to be enforceable. *See* S.C. Ann. § 32-3-10. If such agreements are not signed or in writing, "no action shall be brought" under the agreement. *Id.* As is well-established by our courts, "[t]o satisfy the Statute of Frauds, every essential element of the contract must be expressed in a writing signed by the party to be compelled." *Fici v. Koon*, 372 S.C. 341, 346, 642 S.E.2d 602, 604 (2007) (citations omitted). Further, "the burden of proof is on the party seeking to enforce the contract." *Id.* Upon review of the Agreement at issue, and its provisions regarding arbitration, this Court finds it is unenforceable because it cannot be performed within one year's time and was not signed by Southern Risk. *See* § 32-3-10(d). For this reason, as well as those stated above, the Insurer Defendants have failed to meet their burden, and this Court denies the Motion to Compel Arbitration.

II. The Arbitration Clause is Too Narrowly Worded to be Enforced

As an alternative ground for denial of Defendants' Motions, this Court finds even if the Agency Agreement is a valid and binding contract, the arbitration clause contained therein is too narrowly worded for the Court to enforce in the instant litigation. South Carolina state and federal courts closely scrutinize the wording in arbitration provisions before ruling on their enforceability. For instance, a clause which provides for arbitration of all disputes "arising out of or relating to" the contract is construed broadly. *See, e.g. Prima Paint Corp. v.*

SCA 4/10

Flood & Conklin Mfg. Co., 388 U.S. 395, 398 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"). The Fourth Circuit has held that such broad clauses are "capable of an expansive reach." *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996). "Narrowly worded" arbitration clauses, on the other hand, are subject to strict scrutiny. As the Fourth Circuit explains, when it "may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," arbitration should not be ordered. *Am. Recovery*, 96 F.3d at 92 (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)); *see also Zabinski,* 346 S.C. at 597, 553 S.E.2d at 119 and *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013).

The arbitration clause contained within the Agency Agreement upon which Defendants rely is very narrow in scope: "If any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance or nonperformance, its termination, the figures and calculations used or any nonpayment of accounts, the parties will make efforts to meet and settle their dispute in good faith informally." Exhibit B to Defendants' Motion, *Wilson v. Willis, et. al,* ¶ 12(A). The Court finds the arbitration provision is not only too narrowly worded, but is also inapplicable on its face to the Plaintiffs' claims because these claims have no relation to and are not "in connection with the performance of the Agency Agreement." *Id.* The Agency Agreement appears to control only the business relationship between the agency and the insurance company, not the relationship between the insurers and its insureds. Further, there are no allegations in the Plaintiffs' tort complaints which allege or relate to any dispute or disagreement in connection with the interpretation of the

agreement, its performance or nonperformance, or its termination. The Agency Agreement, therefore, and the arbitration clause contained therein 'is not susceptible of an interpretation that covers the dispute," *Am. Recovery,* 96 F.3d at 92 (citations omitted), and is inapplicable to the instant claims. For this reason, the Court denies Defendants' Motions to Compel Arbitration.

III. The Court Finds the Doctrine of Equitable Estoppel Inapplicable to the Instant Claims

South Carolina courts have enforced arbitration clauses upon non-signatories under the doctrine of equitable estoppel. In *Pearson v. Hilton Head Hospital,* 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), the Court of Appeals recently addressed the limited instances when a non-signatory to an arbitration agreement could be compelled to arbitrate. The *Pearson* court held that the doctrine of equitable estoppel in the arbitration context "recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (*citing Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 418 (4th Cir. 2000)). This Court finds the *Pearson* case is inapplicable to the claims at issue and cannot support compelling the Plaintiffs to arbitrate under the instant circumstances.

In these cases, unlike the factual pattern in *Pearson,* there is absolutely no evidence whatsoever that the Plaintiffs have consistently maintained the provisions of the Agency Agreement between Defendants and Southern Risk should be enforced to benefit them. In fact, as mentioned above, Plaintiffs assert they had never even seen the instant contract prior to the filing of Defendants' motions. Further, a close reading of the contract evidences that

the allegations for which Plaintiffs seek to recover – stealing, misappropriation of funds, artificial premium calculations, fraud, and forgery – are not contemplated by the Agency Agreement at hand.

The Fourth Circuit Court of Appeals has applied a "direct benefits test" in determining whether the doctrine of equitable estoppel applies in enforcing arbitration clauses. *See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411 (4th Cir. 2000). Under the direct benefits analysis, the Fourth Circuit has held "a nonsignatory is estopped from refusing to comply with an arbitration clause when it [is seeking or] received a direct benefit from a contract containing an arbitration clause." *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, Inc.,* 384 F.3d 157, 161 (4th Cir. 2001) (citations and quotations omitted). In this case, the Agency Agreement controls the business relationship between the Defendants and Southern Risk, to include payment of commissions, limits on advertising, and use of the company's name by the agency. The agreement does not control acts of negligence by agents, which is an issue of South Carolina law. In their Complaints, Plaintiffs do not seek to receive any benefits from the Agency Agreement and do not utilize its terms to support the allegations in the Complaints. Plaintiffs' claims do not hinge on any alleged rights found in the Agency Agreement but instead are grounded in South Carolina law. Since Plaintiffs seek *no direct benefit* from the Agency Agreement, equitable estoppel should not apply to enforce the agreement's arbitration provision.

IV. South Carolina Courts Decline to Enforce Arbitration Provisions in the Case of Outrageous Acts Unforeseeable to Reasonable Consumers

The Plaintiffs assert, as the plaintiff did in *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 493-95, 689 S.E.2d 602, 604-05 (2010), that even if the Court held that their claims are encompassed by language of the arbitration clause, the clause does not apply because the

alleged actions of Defendants constitute "illegal and outrageous acts" unforeseeable to a reasonable consumer in the context of normal business dealings. The Court in *Partain*, *supra*, followed this reasoning in refusing to uphold an arbitration clause.

In the instant cases, Plaintiffs ground their Complaints on allegations of fraudulent conduct and misrepresentations of the Defendants. Like in *Partain*, this Court finds the Agency Plaintiffs and Insured Plaintiffs could not have foreseen the actions of Defendants and therefore cannot be bound to arbitration under the Agency Agreement between the Insurer Defendants and Defendant Southern Risk. For this reason as well as each of the other grounds stated above, the Court denies Defendants' motions.

V. Defendants' Waived Their Right to Compel Arbitration Under the Agency Agreement

As a sixth and final alternative ground for denying the Defendants' Motions, this Court finds by delaying to seek relief under the arbitration provision in the Agency Agreement, the Defendants have waived their right to now enforce the provision against the non-signatory Plaintiffs. "It is generally held that the right to enforce an arbitration clause may be waived." *General Equipment & Supply, Co., Inc. v. Keller Rigging & Const., SC, Inc.,* 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001) (citing *Hyload, Inc. v. Pre–Engineered Prods., Inc.,* 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct.App.1992)). "Waiver is the voluntary and intentional relinquishment of a known right." *Provident Life & Accident Ins. Co. v. Driver,* 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct.App.1994). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *General Equipment & Supply,* 344 S.C. at 556, 544 S.E.2d at 645 (citing *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.,* 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985)). "There is no set rule as to what constitutes a waiver of the right to

SCQ 8/10

arbitrate; the question depends on the facts of each case." *Hyload, Inc. v. Pre–Engineered Prods., Inc.,* 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct.App.1992).

Our courts have looked to the following factors to determine whether a party waived its right to compel arbitration: "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration." *Rhodes v. Benson Chrysler-Plymouth, Inc.,* 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). In the case of Plaintiffs: Wilson, Williams, Calhouns, Spires, Wiley, Bosler, Woffords, Garys, Wiltshire, Antoniaks and Lawton, the Court finds all three relevant factors are met and denies Defendants' Motions to Compel Arbitration on this basis.

The first factor to consider in analyzing waiver is the length of time between the filing of the action and the filing of the motion to compel arbitration. Many of these cases have been pending since December 2012, approximately eleven months prior to the filing of Defendants' Motions to Compel Arbitration. The *Rhodes* court held "[w]hat is a 'substantial length of time' varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration." *Rhodes,* 374 S.C. at 127, 647 S.E.2d at 251. In these cases, the parties have spent a substantial amount of time litigating. Plaintiffs have served Complaints and Amended Complaints, and Defendants have answered and filed Motions to Dismiss. This Court held oral arguments on the Motions to Dismiss in November 2013, only a few weeks after Defendants filed the instant motions. Additionally, the parties submit they have commenced

discovery in all cases and have spent a substantial amount of time preparing discovery responses and requests. This Court finds, given the complexity of these cases and the nature of the claims, an order compelling arbitration at this stage would substantially prejudice Plaintiffs, meeting the second and third factors set forth above in *Rhodes*. For these reasons, Defendants' Motions to Compel Arbitration as to Plaintiffs Wilson, Williams, Calhouns, Spires, Wiley, Bosler, Woffords, Garys, Wiltshire, Antoniaks and Lawton are denied on the basis of waiver.

CONCLUSION

For each of the reasons stated above, this Court hereby denies Defendants' Motions to Compel Arbitration and Dismiss Claims.

AND IT IS SO ORDERED.

Eugene C. Griffith, Jr.
Eighth Judicial Circuit

Newberry, South Carolina
March 21st, 2014

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	)	
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of a copy of Order of Judge Eugene C. Griffith, Jr., concerning Motions to Compel Arbitration/Dismiss Claims in the above-referenced cases, was made upon the following counsel of record by placing same in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this 25th day of March, 2014:

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