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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-01-00306
Appellate Case No. 2014-00946

Richard Wilson, Michael J. Antoniak, Jr., Marsha L.
Antoniak, Anita L. Belton, Prescott Darren Bosler,
Johnny Calhoun, Sallie Calhoun, Cynthia Gary, Robert
Wayne Gary, Eugene P. Lawton, Jr., Jeanette Norman,
James Robert Shirley, Robert W. Spires, Crystal Spires
Wiley, Lewis S. Williams, Janie Wiltshire, Benjamin
Franklin Wofford, Jr., and Rebecca Hammond Wofford .. Respondents,

v.

LAURA B. WILLIS and JESSE A. DANTICE,
individually, and as agents and/or brokers for Southern
Risk Insurance Services LLC, Travelers Casualty
Insurance Company of America, Allied Property and
Casualty Insurance Company, Peerless Insurance
Company, Montgomery Mutual Insurance Company,
Safeco Insurance Company of America, and Foremost
Insurance Company, SOUTHERN RISK
INSURANCE SERVICES, LLC, TRAVELERS
CASUALTY INSURANCE COMPANY OF
AMERICA, ALLIED PROPERTY AND CASUALTY
INSURANCE COMPANY, PEERLESS INSURANCE
COMPANY, MONTGOMERY MUTUAL
INSURANCE COMPANY, SAFECO INSURANCE
COMPANY OF AMERICA, AND FOREMOST
INSURANCE COMPANY, and Laurie Williams Defendants,

Of Whom Peerless Insurance Company, Montgomery
Mutual Insurance Company, and Safeco Insurance
Company of America are, ... Appellants,

Of Whom Laurie Williams is, ... Respondent.

RECORD ON APPEAL – VOLUME II

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SAFECO PROPERTY & CASUALTY INSURANCE AGENCY AGREEMENT

This Agreement governs your agency relationship with Safeco Insurance Companies. It replaces all previous agency contracts and agreements, whether oral or written, between you and Safeco.

For purposes of this Agreement, "Agency" refers to your agency, including the sub-producers and employees of Agency that may be contracted under this Agreement. "Safeco" refers to the Safeco Insurance Companies with which Agency will be appointed and authorized to represent Safeco in accordance with this Agreement.

I. AGENCY OBLIGATIONS

- A. **Authority.** Subject to any requirements imposed by applicable state law, Safeco grants Agency the authority to:
1. Solicit, quote, receive, accept, and bind proposals for contracts of insurance in any jurisdiction where Agency is properly licensed and appointed for the lines of business authorized by Safeco, and where Safeco has notified the state and Agency that Agency is appointed with Safeco.
 2. Collect, receive, and transmit to Safeco premiums, or applicant and payment information related to premiums, for insurance placed with Safeco by Agency.
- B. **Responsibilities.** In exchange for such authority, Agency must:
1. Have authority to solicit and submit all applications forwarded to Safeco for binding without legal or contractual restriction.
 2. Countersign insurance contracts as required by law. Where countersignature of a new or renewal policy written by Agency is required by law, Safeco will effect countersignature on Agency's behalf by any method authorized by applicable state statutes.
 3. Service all business for which Agency is designated as a "producer of record," subject to the customary business standards of the insurance industry, except as otherwise agreed upon in writing by Agency and Safeco.
 4. Maintain complete and accurate records and accounts relating to all of Agency's business with Safeco. This responsibility shall include collecting, or assisting Safeco's collection of, all policy related forms, waivers and endorsements requiring signature by insureds.
 5. Pay all expenses that are incidental to responsibilities under this Agreement, including but not limited to: business expenses, taxes, license fees, and sub-producer and employee compensation.
 6. Maintain at all times during the term of this Agreement a policy of public liability insurance covering Agency's errors and omissions with policy limits of at least one million dollars (\$1,000,000.00) per occurrence from an insurance company that is rated at least a "B+" by A.M. Best. Agency shall notify Safeco of any lapse in coverage under the insurance policy required by this Paragraph.
 7. Promptly notify Safeco of all written complaints received relating to insurance transactions contemplated under this Agreement, and provide appropriate information and material to Safeco necessary to assist it, if it needs to respond to such inquiries, in a timely manner.
- C. **Limitations.** Agency shall be subject to the following limitations:
1. Agency shall bind Safeco only in such classes of risks and under such limits as Safeco may from time to time establish in product underwriting and binding guides published on www.safecow.com or in other written instructions ("Product Guidelines"). After receiving written, electronic notice from Safeco, Agency shall not bind or write policies of insurance when the object of the insurance is subject to unusually increased risk as defined in such notice.
 2. Agency shall not authorize any other person or entity not covered by this Agreement to exercise any of Agency's authority, as provided in Section I., A., without prior written consent from Safeco.
 3. Agency shall not be deemed the producer of record on any business previously owned by another agent or agency appointed with Safeco unless the business is accompanied by a producer of record letter signed either by both producers involved in the transaction, or by the insured requesting a change in the insured's agency relationship.

4. Agency shall not charge policyholders any fees or charges for the sale, solicitation or servicing of insurance placed with Safeco, services for which Safeco pays Agency to perform, without Safeco's prior written approval, and then only as permitted by law.
5. Agency shall not use Safeco trademarks or service marks in advertising or promotional materials without Safeco's prior written consent. Notwithstanding the above, if permission to use Safeco's name or logo is granted, Agency shall comply with all Safeco's marketing guidelines as provided electronically to Agency.

II. SAFECO OBLIGATIONS

- A. **Authority.** Safeco shall have the following authority:
 1. Safeco shall have the authority to: (a) issue policies, renewals, endorsements and cancellation notices; (b) bill for, and collect premiums; (c) adjust claims; (d) communicate to policyholders regarding (1) administrative and billing issues and services; and (2) the marketing of Safeco products and services, with Agency's consent, provided such marketing does not conflict with Agency's ownership of expirations; and (e) provide other policyholder services consented to by Agency.
 2. Safeco shall have the right to reject, modify, cancel or refuse to renew any policy in accordance with applicable law and the Product Guidelines. Safeco will send direct notice of cancellation or non-renewal to the policyholder or binder holder in accordance with applicable state law, with a copy of such notice to Agency.
 3. Safeco may suspend the writing of new business in any jurisdiction with written notice to Agency.
 4. Safeco shall have the right to audit, during normal business hours, Agency's books and records related to Agency's business and performance under this Agreement upon reasonable advance notice.
- B. **Responsibilities.** Safeco shall have the following responsibilities:
 1. Safeco shall, upon receipt of Agency's written request, appoint any sub-producers acceptable to Safeco.
 2. To the extent reasonably practicable, Safeco shall provide Agency written, electronic notices regarding Safeco products and services, and access to automated reports related to Agency's commissions and business with Safeco on www.safecow.com, in a format developed by Safeco and in a format which may change from time to time.

III. COMMISSIONS

- A. Safeco will pay Agency commissions at the rates specified in commission schedules distributed via written documentation or through www.safecow.com. Safeco agrees to compute and remit to Agency promptly following the close of each month the commission Safeco owes Agency, less unearned commissions Agency owes Safeco, in accordance with the applicable commission schedules.
- B. The commission schedule may be changed by Safeco with 30 days notice to Agency, or as required by state law, whichever is greater, or by mutual written agreement by Agency and Safeco.
- C. Any undistributed commission or other funds of Agency that Safeco holds may be applied at any time to, and as an offset on, any due and unpaid obligation of Agency owed to Safeco under this Agreement.
- D. Agency will not receive changes to paid commissions as a result of adjustments to retrospectively rated commercial policies.
- E. If Safeco's Electronic Commission Direct Deposit Program is available to Agency, commissions will be transmitted to Agency under the terms of the program then in effect, unless otherwise agreed to by Agency and Safeco.

IV. OWNERSHIP OF EXPIRATIONS

- A. Agency is the exclusive owner of expirations in policies Agency produces under this Agreement or acquires from previous owners and for which Agency is designated the "producer of record." For purpose of this Agreement, "expirations" means business records and information originating with Agency regarding any insured under a policy or renewal, including the name and address of the insured, and the date of the expiration and policy limits of any policy or renewal. Agency shall remain the undisputed owner of such expirations, and shall control such expirations, subject to this Section IV, and Section XII.
- B. If a conflict exists as to whether Agency or another producer of Safeco is authorized to represent an existing or prospective policyholder, then the policyholder's latest written instructions designating the authorized producer shall control.

- C. Notwithstanding the terms set forth in Section IV., A., Agency's ownership of affected expirations will transfer to Safeco under the following circumstances: (a) failure by Agency to satisfy a debt owed to Safeco within 60 days of termination of this Agreement; (b) failure by Agency to properly account for and pay all premiums for which Agency is liable upon 60 days notice of a demand to provide such payment; or (c) "Abandonment" of Agency's business. For purposes of this Agreement, "Abandonment" shall mean documented evidence of the consistent disregard of the affected business or premises of Agency.

V. REGULATORY COMPLIANCE

- A. Agency will maintain a valid license, as required by law, with any state in which Agency represents Safeco, and comply with all applicable laws in the states in which Agency is appointed by Safeco. Agency will not quote, service or solicit insurance in any state or jurisdiction in which Agency is not properly licensed and appointed and immediately will terminate such activity in any state or jurisdiction if Agency's license or appointment is suspended, terminated or has lapsed.
- B. Agency will ensure that only persons who are licensed and properly appointed by Safeco act as sub-producers for business produced by Agency for Safeco. Agency hereby certifies that it has completed any background investigations of sub-producers required by applicable federal or state law and warrants, based on actual knowledge, their fitness to be a licensed sub-producer for Safeco. Agency will notify Safeco in writing within five business days of the employment or termination of any person appointed as a sub-producer to represent Company.
- C. If permitted by state or federal law, Safeco will provide Agency with notice of a governmental inquiry of Agency. If, as a result of Agency's failure to comply with any federal or state producer requirements, Safeco is required to pay administrative penalties, Safeco shall advise Agency of the amount of the fine, and Agency will reimburse Safeco promptly.

VI. PREMIUM COLLECTION & TRANSMITTAL

- A. Premiums collected on Safeco's behalf shall be held by Agency in a fiduciary capacity. Agency shall have no interest in the premiums, except for the amount of commissions authorized by Safeco to be deducted by Agency. Agency will make no deductions from nor make personal use of such premiums, nor retain any such premiums as an offset against any disputed claim Agency may have against Safeco.
- B. If state law permits, Agency may retain any interest earned on premiums in Agency's control. Such interest retention creates no ownership interest in the premiums.
- C. Personal lines policies are issued on a direct bill basis only, as described in this Section. Agency may use either direct bill or agency bill procedures for commercial policies, subject to certain conditions.
- D. If Safeco's Electronic Agency Sweep Program is available to Agency, premiums will be collected from Agency under the terms of the program then in effect.
- E. **Direct Bill Procedures.**
1. Valid payments include: cash; credit card; checks or electronic funds transfer honored by the appropriate financial institution; money orders; or other negotiable instruments, whether electronic or otherwise, approved in advance by Safeco.
 2. If Safeco does not receive the required initial payment from Agency or the insured within 10 days after binding the policy, Safeco will send direct notice of cancellation to the insured, with a copy to Agency, unless Agency otherwise furnishes to Safeco evidence of policy cancellation.
 3. If Safeco must send a notice of cancellation for non-payment of the initial payment of premium, Safeco will attempt to flat cancel the policy or provide the number of days of coverage required by law prior to the effective date of cancellation. If earned premium is due, Safeco will bill Agency for the earned premium for this coverage.
 4. If Agency's direct bill commission statement indicates that Agency owes Safeco money, and Agency has not generated enough commission to cover the debt, Agency agrees to pay Safeco the full amount owed within 30 days of Agency's receipt of Agency's commission statement.
- F. **Agency Bill Procedures.**
1. If Agency elects to submit an application for a policy to be billed on an Agency bill basis, Agency agrees to pay Safeco net premiums due on all insurance policies placed by or through Agency with Safeco. Agency agrees to either provide the premium or collect it promptly.
 2. Agency agrees to refund proportionately to Safeco unearned commissions, which may be based on premiums returned by Safeco to policyholders or uncollected installment premiums from policyholders.

3. If Agency is delinquent in its accounting or submission of payments due to Safeco, Safeco may, by notice to Agency, suspend Agency's authority to write any new business with written notice of the suspension. Payment of overdue amounts shall not automatically end the suspension, nor shall such suspension prevent termination of the Agreement.
4. If any premium cannot be collected by Agency within 30 days of notice to Agency, Safeco shall undertake direct collection and Agency shall not be responsible for collection of premium, provided:
 - a. Agency notifies Safeco of delinquency as soon as Agency perceives the premiums are uncollectible, but no later than 45 days after the issue date of the policy; and
 - b. Safeco shall not pay commission to Agency on premiums which Safeco receives through direct collection.

VII. LICENSES

- A. Safeco grants Agency a personal, nontransferable and nonexclusive license to access and use Safeco's agency tools and underwriting and rating systems through one or more of Safeco's agency interfaces, including, but not limited to, the Quote and Issue browser, and Safeco's Intranet connection, www.safeconow.com (collectively, "the Licensed Program"). Agency's sole use of the Licensed Program shall be in connection with this Agreement. Agency further agrees to use the Licensed Program according to the terms Safeco may provide to Agency from time to time.
- B. Ownership of the Licensed Program, including all rights to copyrights and trade secrets, shall remain vested in Safeco. Agency agrees not to remove or reproduce any copyright notice(s) or other proprietary legends appearing on the Licensed Program. In addition, Agency shall not, nor shall Agency authorize any third party to, reverse engineer, disassemble or create derivative works and/or modify the Licensed Program in any way.
- C. Agency agrees that the Licensed Program contains confidential and proprietary information, know-how and inventions ("Confidential Information") and agrees not to disclose, transfer, provide or otherwise make available in any form such Confidential Information to any person other than to Agency's employees or sub-producers.
- D. With regard to the electronic transfer of any policy, billing, claim or other business information from Safeco to Agency and Agency to Safeco using any software, Safeco and Agency understand that such information and services are provided "as is" with all faults and without any representations or warranties. The entire risk as to satisfactory quality, performance, accuracy and effort is with Agency and any users of the information and services.
- E. Agency and Safeco agree that neither will knowingly deliver any systems connectivity that contains any devices (e.g., viruses, external key locks, back doors, trap doors, etc.) that would: (a) destroy or damage data or computer systems or make data inaccessible or delayed; or (b) permit their respective personnel or other individuals to access the other's data or computer systems after having their usual access privileges revoked or suspended.
- F. Nothing in this Section shall prevent Agent from disclosing to a prospect or customer a quote from Safeco's Quote and Issue browser.
- G. This Section shall survive the termination of this Agreement.

VIII. PRIVACY, CONFIDENTIALITY & SECURITY OF RECORDS

- A. As used in this Agreement, "Confidential Information" means all of either party's confidential, proprietary, or trade secret information, including, but not limited to, for Safeco, underwriting criteria and guidelines, procedures and processes; reserves, studies, reports, compensation arrangements, and any other data or information developed by Safeco and provided to Agency, or which is subject to protection under any applicable federal or state law, and for the Agency, its expirations information, procedures and processes, business plans and strategies, and any other data or information developed by Agency which, by its nature, would ordinarily be considered confidential or proprietary or which is subject to protection under any applicable federal or state law.
- B. The following shall not constitute "Confidential Information" for purposes of this Agreement: Information that is obtained or was previously obtained by the receiving party from a third party who was not prohibited from transmitting the information by a contractual, legal or fiduciary obligation to the disclosing party, or information which is or becomes generally available to the public other than as a result of a breach of this Agreement by the disclosing party or a disclosure by disclosing party to another person.
- C. Safeco and Agency both agree that neither will disclose to third parties, without a customer's permission, any customer information, including but not limited to customer names, addresses, telephone numbers, property descriptions, policy limits and coverage types, billing and payment history, driving records and

other loss information, except to the extent that such disclosure is part of the business of insurance between Safeco and Agency or in connection with any governmental or bureau reporting either party is required to make.

- D. If either party becomes, or believes they may be, subject to a court order requiring the disclosure of any Confidential Information to a third party, the affected party agrees to provide the other party as much notice as possible so that they may intervene and seek appropriate relief from the court.
- E. Agency shall develop, implement, maintain and use appropriate administrative, technical and physical security measures to preserve the confidentiality, integrity and availability of all electronically maintained or transmitted Confidential Information received from, or on behalf of Safeco. If the Gramm-Leach-Bliley Act, including the regulations promulgated thereunder, or any other applicable law, now or hereafter in effect, imposes a different standard of compliance with respect to information security and integrity, such requirements shall prevail over the provisions of this Agreement.

IX. TERM

- A. This Agreement shall commence on the Effective Date and shall continue in effect until terminated as provided in this Agreement.

X. SUSPENSION

- A. Agency's binding authority shall be suspended:
 - 1. Automatically on the effective date of the sale or transfer of Agency's business to, or the consolidation of Agency's business with, an entity that is neither a subsidiary nor an affiliate of Agency, unless Safeco is notified of the transaction, and in writing, agrees to such sale, transfer or consolidation.
 - 2. Automatically if Agency's insurance license or certificate of authority has been placed on probation, suspended, revoked, terminated or will not be renewed by a public authority, or if Safeco finds documented evidence of any action in violation of Agency's license under applicable state law.
 - 3. Upon written notification by an authorized Safeco Sales Manager, which states the reason for the suspension.
- B. Once Agency's binding authority is suspended, Agency may not acquire any existing Safeco business through acquisition or change of "producer of record" requests by insureds, unless otherwise required by law.

XI. TERMINATION

- A. This Agreement may terminate, in accordance with the laws of Agency primary resident state license and applicable state consumer protection laws:
 - 1. At any time upon mutual written agreement of the parties;
 - 2. By either party unilaterally upon 90 days prior written notice (or longer if required by law);
 - 3. Automatically and with notice if Agency's insurance license or certificate of authority has been placed on probation, suspended, revoked, or terminated by a public authority;
 - 4. After written notice and a finding that no new business has been written with Safeco in a 24 month period;
 - 5. After written notice and a reasonable opportunity to cure any material breach of this Agreement. A reasonable opportunity to cure shall be no less than 30 days;
 - 6. After written notice and a finding of Abandonment, as defined in Section IV., C.; or
 - 7. Immediately upon written notice and credible evidence of fraud, forgery, misrepresentation, insolvency or gross and willful misconduct on the part of Agency.
- B. Subject to state law, effective upon receipt of any notice of termination, Agency's authority under Section I., A. of this Agreement shall immediately cease.

XII. OBLIGATIONS AFTER TERMINATION

- A. After termination of this Agreement, the following rights and duties shall apply:
 - 1. Agency shall have no authority to solicit, quote, receive, or accept insurance or bind coverage on new policies issued by Safeco. Notwithstanding the foregoing, unless otherwise notified by Safeco in writing, Agency will continue to have binding authority with respect to endorsements to policies and renewals outstanding after termination of this Agreement, and Agency may retain Safeco materials that are necessary to exercise this authority. Safeco may grant Agency limited access to

www.safecnow.com in order to process such requests, or provide Agency with access to call center services to process such transactions.

2. Agency will pay all premiums and other sums for which Agency is liable to Safeco and Safeco will pay Agency all compensation and other sums for which Safeco is liable to Agency.
3. Safeco may notify policyholders of the termination of this Agreement.
4. All in-force policies and renewals will continue to normal expiration, subject to their terms.
5. If mutually agreed upon by Agency and Safeco, subject to applicable underwriting standards, Safeco will offer to renew all in-force policies written prior to notice of termination and will pay Agency commission on each resulting renewal at rates published according to the commission schedule listed on www.safecnow.com.
6. If Safeco chooses to cease renewing Agency's book of business at any time after termination, Safeco will provide Agency with ninety (90) days notice of its decision and will work with Agency to non-renew Agency's book of business, according to applicable state law, under the following terms:
 - a. Agency will account for and pay over all premiums and other sums for which Agency is liable to Safeco and Safeco will pay to Agency all compensation and any other sums to which Safeco is liable to Agency;
 - b. Agency will use reasonable efforts to replace all of the policies with policies of other insurers; and
 - c. Safeco will advise Agency of the date, as permitted by law, when Safeco will begin non-renewing policies. Unless required by law, Safeco will not pay Agency commission on business written or renewed after the effective date of termination of this Agreement. If Safeco is required by law to allow Agency to continue to provide service to insureds after this Agreement is terminated, Safeco will pay Agency a service fee of 3% of premiums written (or such commission as required by law) after the date of termination of this Agreement as full compensation for such service.
- B. Upon Safeco's demand, Agency shall return to Safeco, or if return is not feasible, destroy all Safeco Confidential Information in whatever form or medium the Agency received such Safeco Confidential Information. Agency shall retain no copies of the Safeco Confidential Information, including any compilations derived from, or allowing identification of, the Safeco Confidential Information. Agency shall complete such return or destruction as promptly as possible after Safeco's demand, but no later than 30 days after the effective date of the termination of this Agreement if Safeco exercises its rights under Section XII, A., 6.

XIII. BUSINESS MODIFICATION, SALE OR TRANSFER

- A. Agency agrees to give written notice to Safeco of any change of affiliation, or any sale or transfer of Agency's business or book of business, or its consolidation with an entity that is neither a subsidiary nor an affiliate of Agency in order that Safeco may, at its election, determine whether to assign this Agreement to the successor organization or terminate this Agreement in accordance with its terms.

XIV. DISPUTE RESOLUTION & GOVERNING LAW

- A. Any and all claims, disputes or controversies arising out of or relating to this Agreement, including disputes relating to the interpretation of any provision of this Agreement or any party's performance hereunder, will be resolved as set forth below. All negotiations pursuant to this Section will be confidential and will be treated as compromise and settlement negotiations for purposes of the applicable rules of evidence.
- B. **Informal Dispute Resolution.** The parties will attempt to resolve any dispute informally, in accordance with the following:
 1. Either party may initiate the informal dispute resolution process set forth in this Section by giving written notice of a dispute that has not been resolved in the ordinary course ("Dispute Notice") to the other party, to which the other party will have five business days to respond. The Dispute Notice and the response will each include: (1) a statement of the party's position and a summary of arguments supporting that position, and (2) the name and title of the designated representative who will represent that party in attempting to resolve the dispute.
 2. Within 10 business days of delivery of the Dispute Notice, the parties' designated representatives will meet (and will continue to meet as often as the parties reasonably deem necessary) to gather and furnish to the other party all information with respect to the matter at issue that the parties believe to be appropriate and germane in connection with its resolution. The designated representatives will discuss the problem and attempt to resolve the dispute without the necessity of any formal proceeding.

3. If, within 20 business days of the delivery of the Dispute Notice, the designated representatives are unable to resolve the dispute, either party may escalate the dispute by escalating it to the appropriate senior manager(s) within their organization, which senior managers of each party will then meet (and continue to meet as often as the parties reasonably deem necessary) to attempt in good faith to resolve such dispute.

C. **Arbitration.** If the dispute has not been resolved within 45 days of the Dispute Notice, the dispute will be resolved by binding arbitration conducted in Seattle, Washington. Arbitration will be conducted by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules of the AAA ("AAA Rules"), provided that notwithstanding any contrary provision within the AAA Rules, the arbitrator must determine the rights and obligations of the parties according to the substantive laws of the state of Washington. The parties will select an arbitrator, who will be an attorney with at least 10 years experience in commercial and contract law, provided that if the amount in dispute is greater than \$1,000,000, the dispute will be heard by a panel of three arbitrators, with each party selecting one arbitrator and the AAA selecting the third arbitrator. If the parties are unable to agree on an arbitrator(s), the arbitrator(s) will be selected according to AAA Rules. Claims between Agency and Safeco and any subcontractor or agent of Agency will, upon demand by Safeco, be submitted in the same arbitration. Each party will bear its own expenses and will share equally the fees of the arbitrator(s), provided that the arbitrator(s) will have the discretion to award the prevailing party all or part of its attorneys' fees and costs, including the costs of the arbitrator(s), if the arbitrator(s) find that the position taken by the other party on material issues was without substantial foundation. The arbitrator(s) will not have the power to add to, subtract from or modify any of the terms or conditions of this Agreement. The arbitrator(s) rendering judgment upon disputes between the parties will deliver a written opinion within 15 business days following conclusion of the hearing, setting forth findings of fact, conclusions of law and the rationale for the decision. Any award, which may include legal and equitable relief, will be final and binding and judgment may be enforced by any court of competent jurisdiction.

XV. INDEMNIFICATION

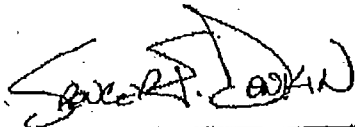
- A. Agency agrees to indemnify and hold harmless Safeco from any damage and against any liability for losses, costs, expenses, fines, penalties and all costs of defense caused by or resulting from (a) any misconduct, act, error or omission of Agency; (b) any breach of this Agreement by Agency; and (c) any obligation, act or transaction created or performed by Agency in violation of, in excess of, or in contravention of the rights and authority set forth in this Agreement.
- B. Safeco agrees to indemnify and hold harmless Agency from any damage and against any liability for losses, costs, expenses, fines, penalties and all costs of defense caused by or resulting from (a) any misconduct, act, error or omission of Safeco; (b) any breach of this Agreement by Safeco; and (c) any obligation, act or transaction created or performed by Safeco in violation of, in excess of, or in contravention of the rights and authority set forth in this Agreement.
- C. This Section shall survive the termination of this Agreement.

XVI. GENERAL PROVISIONS

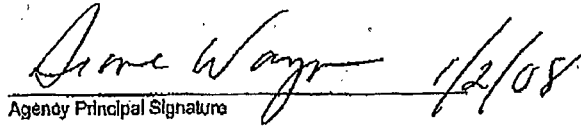
- A. This Agreement supersedes all prior similar agreements between Agency and Safeco. All prior or contemporaneous correspondence, proposals and offers concerning the subject matter hereof are without any force whatsoever upon the effective date of this Agreement.
- B. Except as otherwise provided, changes to this Agreement shall be by mutual written agreement of the parties and are only valid if approved by a Safeco Executive Vice President, Senior Vice President or Vice President.
- C. Agency is not an employee of Safeco, and nothing contained in this Agreement shall be construed to create an employee-employer relationship between Agency and Safeco.
- D. This Agreement shall be subject to and construed under the laws of the State of Washington. If any provision of this Agreement is found to violate the laws of the United States or the state in which enforcement is sought, it is agreed that such provision shall not invalidate the entire Agreement, and the Agreement shall be construed as if without the invalid provision.
- E. Sections IV., V., VI., VII., VIII., and XV. shall continue to be effective after the termination of this Agreement and after termination of the last renewal.

Effective the 19th day of SEPTEMBER, 2007
 Executed the _____ day of _____

Safeco Insurance Company of America
 General Insurance Company of America
 First National Insurance Company of America
 Safeco National Insurance Company
 Safeco Insurance Company of Illinois
 Safeco Lloyds Insurance Company
 Safeco Insurance Company of Oregon
 Safeco Insurance Company of Indiana
 American States Insurance Company
 American Economy Insurance Company
 American States Insurance Company of Texas
 American States Lloyds Insurance Company
 American States Preferred Insurance Company
 Insurance Company of Illinois

ASSUREALLIANCE INCAgency Name100 HENRY PLStreet AddressSPARTANBURGSC29508-3230CityStateZip03-42-074439-36716SPI Stat #SBI Stat #


Spencer J. Donkin, Sr. Vice President
 Sales & Distribution



Agency Principal Signature



SAFECO LIMITED AGENCY APPOINTMENT AND AGREEMENT

("You" and "Your" refers to the individual or entity named on this contract. "We," "Us" and "Our" refers to the Company or Companies with which You may have a limited appointment, as listed below.)

The Company or Companies indicated below hereby appoint the undersigned Agent for the limited purpose of placing Safeco insurance products in the name of **SOUTH CAROLINA AGENT NETWORK INC.** a contracted and appointed agency authorized to act as a program manager for Safeco ("Program Managers").

All Safeco payments of commissions and bonuses related to this limited appointment shall be made to the Program Manager. This appointment shall grant no greater rights to You than are provided in any agreement between You and the Program Manager. This limited appointment, and all rights contained herein, is cancellable by Us at any time.

As a part of this limited appointment, We grant You a personal, nontransferable and nonexclusive license to access and use Our agency tools and underwriting and rating systems through one or more of Our agency interfaces, including, but not limited to, the *Personal Lines Rating System ("PLRS")* and the *Efficient Service & Pricing Interface ("E-S-P™")*, and Intranet connection, www.SafecoPlaza.com (collectively, "the Licensed Program"). Your sole use of the Licensed Program shall be in connection with this limited appointment with Us. You agree to use the Licensed Program according to the terms We may provide to You from time to time.

Ownership of the Licensed Program, including all rights to copyrights and trade secrets, shall remain vested in Us. You agree not to remove or reproduce any copyright notice(s) or other proprietary legends appearing on the Licensed Program. In addition, You shall not, nor shall You authorize any third party to, reverse engineer, disassemble or create derivative works and/or modify the Licensed Program in any way.

You agree that the Licensed Program contains confidential and proprietary information, know-how and inventions ("Confidential Information") and agree not to disclose, transfer, provide or otherwise make available in any form such Confidential Information to any person other than to those of Your employees who have signed this or similar confidentiality agreements obligating them to at least the same extent as You are obligated under this Safeco Agency Limited Appointment and Agreement.

With regards to the electronic transfer of any policy, billing, claims or other business information from Us to You using any software, We agree that such information and services are provided "as is" with all faults and without any representations or warranties. The entire risk as to satisfactory quality, performance, accuracy and effort is with You and any users of the information and services. You agree to waive any claim You may have against Us arising out of the failure of any part of the Licensed Program.

- ☒ Safeco Insurance Company of America
- ☒ General Insurance Company of America
- ☒ First National Insurance Company of America
- ☐ Safeco National Insurance Company
- ☐ Safeco Insurance Company of Illinois
- ☐ Safeco Lloyds Insurance Company
- ☐ Safeco Insurance Company of Oregon
- ☐ Safeco Insurance Company of Indiana
- ☒ American States Insurance Company
- ☒ American Economy Insurance Company
- ☐ American States Insurance Company of Texas
- ☐ American States Lloyds Insurance Company
- ☐ American States Preferred Insurance Company
- ☐ Insurance Company of Illinois

SOUTHERN RISK INS SERVICES LLC

Agency Name

1924 MCCONNELL SPRINGS RD

Street Address

ANDERSON

SC

29621-2642

City

State

Zip

03-42-0758

39-38061

Safeco Stat No.

American States Stat No.

Executed this _____ day of _____, 20____

By:

Paula Rosput Reynolds
PAULA ROSPUT REYNOLDS
PRESIDENT AND CHIEF EXECUTIVE OFFICER

By:

James M. Smith
Title: PRESIDENT

A copy of this signed appointment sent via fax machine is valid and enforceable, and is equivalent to the original.

Safeco and the Safeco logo are registered trademarks of Safeco Corporation.
E-S-P™ is a trademark of Safeco Insurance Company of America.
D00

AM-1035 7/00

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

Affidavit of James E. Berry

James E. Berry, being duly sworn, states the following:

1. I am over eighteen years of age and of sound mind and body. The statements made in this affidavit are based upon my personal knowledge unless it is stated that they are made upon information and belief, and then I believe them to be true.
2. I am a Territory Manager for the Safeco Insurance companies and Montgomery Insurance companies that are part of the Liberty Mutual Insurance family of companies. I have been a Territory Manager since 2008. I manage personal-lines insurance business within my territory for Liberty Mutual Insurance.
3. Southern Risk Insurance Services, LLC ("Southern Risk") was an agency, and Jesse A. Dantice an agent, who operate within the territory for which I am responsible and I regularly interacted with Dantice and Southern Risk and am familiar with their relationship with the Liberty Mutual Insurance family of companies.
4. Montgomery Mutual Insurance Company, Peerless Insurance Company, and The Netherlands Insurance Company (hereafter "Montgomery Companies"), defendants in several matters pending in Abbeville and Anderson Counties, South Carolina, are part of the Montgomery Insurance companies which are now owned by members of and are part of the Liberty Mutual Insurance family of companies.

5. Similarly, Safeco Insurance Company of America and First National Insurance Company of America (hereafter "Safeco Companies"), defendants in several matters pending in Abbeville and Anderson Counties, South Carolina, are part of the Safeco Insurance companies which are now owned by members of and are part of the Liberty Mutual Insurance family of companies.

6. South Carolina Agents Network, Inc. ("SCAN"), which later changed its name to AssureAlliance, Inc., is a master agency operating within my territory that has, at all times while I have been a Territory Manager for Liberty Mutual Insurance, had in place master agency agreements with the Safeco Companies and Montgomery Companies.

7. The mater agent agreements between SCAN and the Safeco Companies and Montgomery Companies, specifically allow sub-agencies, sub-agents, or producers employed by or affiliated with SCAN/AssureAlliance to place business for the Safeco Companies and Montgomery Companies subject to the terms of the master agency agreements.

8. At the time I became a territory manager for Liberty Mutual in 2008, Southern Risk was a sub-agency and Dantice was a sub-agent/producer under SCAN/AssureAlliance.

9. As required by the Safeco Companies at the time, Dantice, on behalf of Southern Risk, was required to sign a Safeco Limited Agency Appointment and Agreement in order to place insurance with the Safeco Companies as a subagent/producer under SCAN/AssureAlliance. A copy of such signed agreement is attached as Exhibit 1.

10. To the best of my personal recollection, the Montgomery Companies did not require a similar, separate written agreement to operate as a subagency or subagent/producer placing policies for the Montgomery Companies under SCAN/AssureAlliance.

11. In early 2010, Liberty Mutual decided to appoint Southern Risk directly as an agency.

12. Exhibit 2, attached, is a copy of the agency agreement effective April 1, 2010, between Liberty Mutual Insurance and its affiliated Montgomery and Safeco Companies, and Southern Risk. The Companies have been unable as of the date of this affidavit to locate a copy of this agreement signed by Dantice on behalf of Southern Risk

Upon information & belief
13. While I have been Territory Manager and until terminated as stated in the letter dated November 1, 2012, attached as Exhibit 3, Southern Risk as an agency, the agents/producers such as Dantice who work for it, and the Safeco and Montgomery Companies governed their relationship pursuant to the agreement effective April 1, 2010, and preceding agreements.

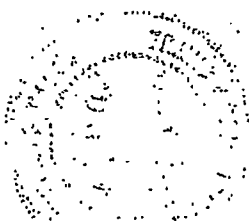
James E. Berry
James E. Berry

SWORN to and subscribed before me

this 7 day of FEBRUARY, 2014

W. Jawn (L.S.)
Notary Public for South Carolina

My Commission Expires: 8/12/2021



FILED
STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

2014 FEB 11 AM 9:05

EMILY Y. MACMAHAN
CLERK OF COURT

Exhibit 1



SAFECO LIMITED AGENCY APPOINTMENT AND AGREEMENT

("You" and "Your" refers to the individual or entity named on this contract. "We," "Us" and "Our" refers to the Company or Companies with which You may have a limited appointment, as listed below.)

The Company or Companies indicated below hereby appoint the undersigned Agent for the limited purpose of placing Safeco insurance products in the name of SOUTH CAROLINA AGENT NETWORK, a contracted and appointed agency authorized to act as a program manager for Safeco ("Program Managers").

All Safeco payments of commissions and bonuses related to this limited appointment shall be made to the Program Manager. This appointment shall grant no greater rights to You than are provided in any agreement between You and the Program Manager. This limited appointment, and all rights contained herein, is cancellable by Us at any time.

As a part of this limited appointment, We grant You a personal, nontransferable and nonexclusive license to access and use Our agency tools and underwriting and rating systems through one or more of Our agency interfaces, including, but not limited to, the *Personal Lines Rating System ("PLRS")* and the *Efficient Service & Pricing Interface ("ESP")*, and Intranet connection, www.SafecoPlaza.com (collectively, "the Licensed Program"). Your sole use of the Licensed Program shall be in connection with this limited appointment with Us. You agree to use the Licensed Program according to the terms We may provide to You from time to time.

Ownership of the Licensed Program, including all rights to copyrights and trade secrets, shall remain vested in Us. You agree not to remove or reproduce any copyright notice(s) or other proprietary legends appearing on the Licensed Program. In addition, You shall not, nor shall You authorize any third party to, reverse engineer, disassemble or create derivative works and/or modify the Licensed Program in any way.

You agree that the Licensed Program contains confidential and proprietary information, know-how and inventions ("Confidential Information") and agree not to disclose, transfer, provide or otherwise make available in any form such Confidential Information to any person other than to those of Your employees who have signed this or similar confidentiality agreements obligating them to at least the same extent as You are obligated under this Safeco Agency Limited Appointment and Agreement.

With regards to the electronic transfer of any policy, billing, claims or other business information from Us to You using any software, We agree that such information and services are provided "as is" with all faults and without any representations or warranties. The entire risk as to satisfactory quality, performance, accuracy and effort is with You and any users of the information and services. You agree to waive any claim You may have against Us arising out of the failure of any part of the Licensed Program.

- ☒ Safeco Insurance Company of America
- ☒ General Insurance Company of America
- ☒ First National Insurance Company of America
- ☐ Safeco National Insurance Company
- ☐ Safeco Insurance Company of Illinois
- ☐ Safeco Lloyd's Insurance Company
- ☐ Safeco Insurance Company of Oregon
- ☐ Safeco Insurance Company of Indiana
- ☒ American States Insurance Company
- ☒ American Economy Insurance Company
- ☐ American States Insurance Company of Texas
- ☐ American States Lloyd's Insurance Company
- ☐ American States Preferred Insurance Company
- ☐ Insurance Company of Illinois

SOUTHERN RISK INS SERVICES LLC

Agency Name

1924 MCCONNELL SPRINGS RD

Street Address

ANDERSON

SC

29621-2642

City

State

Zip

03-42-0758

39-38061

Safeco Stat No.

American States Stat No.

Executed this _____ day of _____, 20____

By:

Paula Rosput Reynolds
PAULA ROSPUT REYNOLDS
PRESIDENT AND CHIEF EXECUTIVE OFFICER

By:

James M. Smith
Title: PRESIDENT

A copy of this signed appointment sent via fax machine is valid and enforceable, and is equivalent to the original.

Safeco and the Safeco logo are registered trademarks of Safeco Corporation.
ESP™ is a trademark of Safeco Insurance Company of America.
DOC

AM-1035 7/00

FILED
STATE OF SOUTH CAROLINA
COUNTY OF Horry
2011 FEB 11 11:05
EMILY J. KORMAN
CLERK OF COURT

Exhibit 2



LIBERTY MUTUAL AGENCY CORPORATION AGENCY AGREEMENT

The undersigned Agency and Liberty Mutual Agency Corporation on behalf of its insurer affiliates marketing under the Liberty Mutual Agency Corporation divisions identified in separate addenda attached hereto (each referred to herein as a "Company"), agree as follows:

1. Authority of Agency

- A. Agency is an independent contractor without exclusive territorial rights and has exclusive control of its time, the conduct of its agency, employees, sub producers, and the selection of companies it will represent.
- B. Agency is authorized to solicit and submit applications for the lines of business agreed to between Company and Agency, subject to the terms of this Agreement.
- C. Agency is only authorized to act as agent for Company and bind Company pursuant to written authority and guidelines furnished to Agency by Company.
- D. Agency will not publish or distribute any Company advertisements, circulars, domain names, icons, logos, passwords, service marks, trademarks, trade names, trade secrets, or other materials referring to Company or containing Company's name without first securing advance written approval from an officer of Company.
- E. Agency is not authorized to use a subproducer to produce business unless written authorization is obtained from Company. "Subproducer" means a person or entity that submits business through Agency to Company.
- F. Agency has no authority to adjust or settle claims unless such authority is provided by Company in writing.

2. Responsibilities of Agency

- A. Agency will transact all business for Company in accordance with all applicable legal and/or regulatory requirements, including, without limitation, those requiring disclosure of the existence or terms of this Agreement or any form of compensation paid or payable hereunder, and in accordance with all Company underwriting rules and instructions now in force or hereafter issued by the Company from time to time.
- B. Agency represents that if any affiliates of Agency are intended to be bound by this Agreement, Agency has all requisite authority to execute this Agreement for and on behalf of such affiliates, that such affiliates agree to be bound by the terms of this Agreement, and that Agency accepts responsibility for the acts, errors and omissions of such affiliates in their performance of their obligations pursuant to this Agreement.
- C. Agency represents that it, its employees, subproducers, and others acting on Agency's behalf have all necessary and requisite authority to perform the functions delegated pursuant to this Agreement. "Authority" means any requisite written consents, authorizations, licenses, certificates of authority and/or permits. Transactions specified by this Agreement must fall within the scope of activities permitted by the parties' licenses and authority.
- D. Agency will immediately notify Company of any suits, claims, or formal complaints received by Agency in which Company is named as a defendant or respondent.
- E. Agency will immediately notify Company in the event that any officer, employee, subproducer or representative of Agency has been convicted of any felony involving dishonesty or breach of trust or had their licenses or other requisite authority suspended or revoked.

- F. Agency will comply with any Company requests for assistance in completing background checks or investigations of Agency personnel, including obtaining necessary written authorizations if requested by Company.
- G. If using electronic commerce, Agency will read, accept and abide by the terms and conditions and privacy statement set forth in Company's websites and will execute any additional agreements or documents required by Company to facilitate electronic commerce.
- H. Agency is responsible for its own acts, errors and omissions and those of its directors, officers, employees, subcontractors, subproducers, and others acting on Agency's behalf.
- I. Agency will maintain, at all times during the term of this Agreement and during any applicable post-termination period, errors and omissions insurance with reasonable policy limits, but in no event shall such limits be less than \$1,000,000 (both per occurrence and in the aggregate), for insurance agencies of the size and type of Agency, with an insurer rated "A minus" or better by A.M. Best Company. Upon Company's request, Agency will provide a copy of the current certificate of insurance evidencing the maintenance of such errors and omissions coverage to Company.

3. Ownership of Expirations

- A. Except as provided in Section 3.B below, the use and control of expirations, the records thereof, and Agency's work product, will remain in the undisputed possession and exclusive ownership, use and control of Agency. Company will not use its records of those expirations or Agency's work product in any marketing method for the sale, service or renewal of any form of insurance coverage or other product or service which abridges Agency's rights of ownership, use and control, nor will Company refer or communicate this expiration information or work product to any other agency or producer.
- B. Other than as provided herein, in the event of termination of this Agreement, the records of Agency and the use and control of all renewals and/or expirations of all policies remain the exclusive property of Agency. For the purposes of this Agreement, "policies" shall mean any insurance policy, as well as any surety bond, guarantee, undertaking, recognizance, or other surety obligation that Agency may arrange for Company to issue or procure. However, if (1) Agency has not paid all money due Company; or (2) Agency has not paid all money due to any policyholder or premium finance company to whom Company may be liable as the result of such nonpayment; or (3) if Company terminates this Agreement pursuant to Section 10.A.4 hereof; or (4) if Agency has not moved an account after expiration of any mandatory renewal cycle, all of Agency's rights with respect to that account with Company, including policy expirations and renewals, terminate immediately, at the option of Company. Notwithstanding that renewal of some of said policies may be legally mandated, in the event of termination of Agency's rights to the expirations under (1), (2), (3), or (4), above, Agency's records with respect to all policies written and the use and control of all renewals and/or expirations of such policies and all electronically stored data with respect to same, become the undisputed property of Company and Agency will, immediately upon receipt of written request therefore, deliver all such records, renewals and/or expirations and data to Company and will not in any way interfere with, compete with or otherwise hinder Company in the exercise of any of its rights in the use and control of such records, renewals and/or expirations and data.
- C. In the exercise of its right to collect any indebtedness due from Agency through use and control of such expirations, Company will use reasonable business judgment in selling such expirations and is accountable to Agency for any sums received which, net of expenses, exceed the amount of indebtedness. Agency remains liable for the excess of the indebtedness over the sums received by Company from any such sale. Any indebtedness due from Agency does not prevent application of the ownership of expirations clause in favor of Agency if Agency furnishes collateral security acceptable to Company in the amount of such indebtedness to be held by Company until the indebtedness is satisfied.
- D. Nothing in this Agreement interferes with Company's obligation to renew policies containing contractual renewal guarantees or which must be renewed pursuant to law, regulation or by order of government authority.

4. Commissions

- A. Company will pay commissions to Agency in accordance with the rates and conditions set forth in Company's then-applicable Commission Schedule(s) when Agency is agent-of-record in accordance with the Company's guidelines.
- B. Commission rates may be revised by Company at any time upon 90 days advance written notice to Agency.
- C. Uncollectible premiums and any premiums paid as a result of collection efforts instituted by the Company are not subject to commission.
- D. Agency will refund the unearned commission on canceled insurance and on reductions in premiums, including audit premiums, at the same rate at which commissions were originally allowed to Agency.
- E. Company may at any time apply any compensation it may owe Agency as an offset against any amounts due and owing to Company from Agency.
- F. Assignment of commission is not binding upon Company without its prior written consent.
- G. For business placed by Agency under this Agreement, commissions are Agency's sole and full compensation and Agency will not charge insureds any additional amounts for Company's policies or coverages. Agency may charge insureds fees otherwise permitted by law for additional services requested by insureds, provided these fees and services are disclosed as required by applicable law.

5. Direct-Billed Business

On business placed by Agency with Company as direct-billed, the following provisions apply:

- A. Except where otherwise agreed by Company, if Agency collects initial premium, Agency will remit such premium, without reduction for commissions, within the time period set forth in the established Company procedure furnished to Agency by Company. All funds collected by Agency on behalf of Company will be held by Agency in a fiduciary capacity until remitted to Company.
- B. Agency is not responsible to Company for bad checks written by insureds for the initial premium obligation when accepted in good faith by Agency.
- C. Company may, at its sole discretion, assume responsibility for billing and collecting the initial premium when existing business of Agency is transferred to a direct-bill program of Company.
- D. Company will bill all renewal or adjustment premiums direct to the insured, or to a designated lending institution or service agency holding premiums in escrow or reserve. These premiums are payable to Company in gross.
- E. Commissions on direct-billed premiums will be paid to Agency within 15 days after the end of the month in which the premiums are booked and recorded by Company, provided that any required deposit premium on new and renewal business has been actually received by Company, with the exception of audit premiums. Commissions on audit premiums will be paid upon Company's collection of the audit premium. No commissions will be paid on direct-billed premiums which remain unpaid 45 days after due date. Any business billed direct to the insured by Company and for which Agency, its directors, officers, employees, subcontractors, subproducers, or others acting on Agency's behalf receive the premium payment will be promptly paid in gross to Company and properly identified as to policy without deduction for commissions.
- F. Company will identify Agency by name when transmitting policies, endorsements, premium notices and other communications to policyholders. Where practical, Company will promptly provide Agency with advance or

contemporaneous notification of all communications with a policyholder, except where Company has exercised its rights under Section 3.B. of this Agreement.

6. Agency-Billed Business

- A. Agency will promptly collect premium on all business not billed to insureds directly by Company and will remit balances net of commission to Company in accordance with the applicable Commission Schedule(s). It is expressly understood that all premiums received by Agency will be held in trust by Agency as fiduciary for the benefit of Company, that these premiums are the property of Company, that Agency has no interest in premiums received, and that Agency will make no deductions or expenditures from these monies before paying Company (except for agreed upon commissions, which may be deducted and retained by Agency). Such funds will be maintained in a specially segregated premium account, which shall be designated a "trust fund" account where required by applicable law. Upon request of Company, Agency will promptly furnish to Company the account number and the name of the financial institution where such funds are held.
- B. Agency assumes full responsibility for payment to Company of all earned premiums, less agreed upon commissions, on all business placed with Company through Agency, whether or not such premiums are collected from the policyholder. Failure of Company to bill Agency for any item will not relieve Agency of responsibility to pay the amount due.
- C. Agency will exercise due diligence to collect earned premiums that have been determined by audits, adjustments for retrospectively rated policies, and interim audit reports. Agency will be relieved of responsibility for these premiums provided Agency has exercised due diligence and has notified Company in writing within 45 days from audit declaration or date of billing, whichever is later, that the premiums could not be collected. Such written notification shall set forth the efforts Agency has taken to collect the subject premium. "Due diligence" may be demonstrated by Agency's communicating in writing at least twice to the policyholder demanding payment. Agency must provide copies of such correspondence together with the written notification. If Agency fails to notify Company, Agency will be responsible to pay the premium. No commissions will be allowed on premiums collected directly by Company under this provision.
- D. Agency and Company will comply with the following accounting procedures on business, other than direct-billed business, placed by Agency with Company:
 - 1. Itemized statements of money due will be prepared monthly by Company.
 - 2. The balance shown on the statement due Company will be payable no later than 45 days after the end of the account month for which the statement was prepared.
- E. In addition to any other action permitted under this Agreement or by applicable law, Company reserves the right, at its option, to direct-bill all unpaid policies and renewals if Agency fails to pay Company as required herein.

7. Indemnification

- A. Company shall indemnify, protect, and hold Agency harmless from and against any and all civil, administrative and all other non-criminal liability, claims, losses, damages, costs, and expenses, including court costs and reasonable attorneys' fees, arising out of or incurred by reason of any error or omission on the part of Company, its directors, officers, agents (other than Agency), or employees in placing business pursuant to or carrying out the terms and conditions of this Agreement, except to the extent such error or omission was caused or contributed to by Agency.
- B. Agency shall indemnify, protect, and hold Company harmless from and against any and all civil, administrative and all other non-criminal liability, claims, losses, damages, costs, and expenses, including court costs and reasonable attorneys' fees, arising out of or incurred by reason of any error or omission on the part of Agency, its directors,

officers, agents, employees, affiliates or subproducers in placing business pursuant to or carrying out the terms and conditions of this Agreement, except to the extent such error or omission was caused or contributed to by Company.

8. Suspension of Authority

In the event of premium or accounting delinquency, or any other material violation by Agency of the provisions of this Agreement, or for Company-determined underwriting reasons, Company may notify Agency that, effective immediately, all authority of Agency to bind or write any new business is suspended. Notice will be in writing if at all practicable and will state the reasons. However, in all other respects, Agency's and Company's rights and obligations under this Agreement will remain in full force and effect.

9. Agency Change of Ownership

Agency will give notice to Company of any sale, transfer, merger, consolidation or change of control or majority ownership of Agency's business, stock or assets as soon as practicable in advance of the effective date of the transaction.

10. Termination of Agreement

A. Except as may otherwise be required by law or regulation, this Agreement will terminate:

1. Automatically if any public authority suspends, cancels or declines to renew Agency's license or certificate of authority.
2. Automatically as of the effective date of the sale, transfer, merger, consolidation or change of control or majority ownership of Agency's business, stock or assets, unless Agency and Company execute a Change of Ownership Amendment or enter into a new Agency Agreement.
3. Upon either party giving at least 90 days advance written notice to the other; provided, however, that such termination, at Company's option, may be limited to one or more underwriting companies or lines of business.
4. Immediately upon either party giving written notice to the other in the event of material breach of this Agreement, abandonment, fraud, insolvency, nonpayment of accounts, or gross and willful misconduct on the part of such other party.
5. At Company's option, immediately upon written notice in the event of three late payments of account in any consecutive six-month period.

B. Company may, in its sole discretion, rehabilitate Agency in an effort to assist Agency in avoiding termination.

C. Upon notice of termination, Agency will not, without the prior written approval of Company, bind any new risk or increase or extend Company's liability, or alter the terms of any such policy.

D. Upon notice of termination, Company reserves the right to direct-bill all accounts.

11. After Termination

Except as may otherwise be required by law or regulation, after termination:

- A. Agency will continue to be the duly authorized representative of Company with respect only to the limited purpose of servicing policies continued in force or renewed after the termination of this Agreement, subject to all of the applicable provisions of this Agreement.

- B. Company will continue unexpired policies in force until expiration, subject to earlier termination in accordance with the policies' terms and conditions.
- C. Agency will not be entitled to commissions on policies that must be renewed after termination, except as may be required by law and then only for as long as required by law.
- D. Paragraphs 1.D., 1.F., 2.B-2.D., 2.H., 2.I., 3, 7, 10.C., 10.D., 11-15, and 16.A.-16.F shall survive termination of this Agreement.

12. Arbitration

- A. 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. If the parties cannot agree on a written settlement to the dispute within 30 days after it arises, or within a longer period agreed upon by the parties in writing, then the matter in controversy, upon request of either party, will be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA) and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction; provided, however, that this provision will not apply to claims for equitable relief or, at Company's election, Company claims for unpaid premiums. The body of law that AAA employs will include insurance law and arbitrators will have particular knowledge and experience with independent insurance agency/company issues. Depositions can be taken at the request of either party prior to the arbitration hearing.
- B. The parties will agree to submit the dispute to one arbitrator chosen impartially by the AAA. If the amount in controversy exceeds \$50,000.00, then either party has the right to have the matter decided by a panel of three arbitrators. One arbitrator shall be named in writing by each party within twenty (20) days after a demand for arbitration is made by one of the parties. The parties' chosen arbitrators will then choose a third arbitrator within forty-five (45) days after the date the last arbitrator is named. If the arbitrators are unable to agree upon a third arbitrator, then the third arbitrator will be chosen impartially by the AAA.
- C. The determination of the arbitrator(s) is final and binding on all parties, provided such determination is made in writing and signed by the arbitrator(s). Where arbitration results in an award, such award will include interest in the amount of 10% per annum running from the date when the amount that is the subject of the award first became due.
- D. The costs of the arbitration will be borne equally by the parties. Each party is responsible for its own attorney's fees and all other of its costs of arbitration.

13. Amendments

- A. This Agreement may be amended in writing:
 - 1. Any time upon mutual written agreement of Agency and Company; or
 - 2. By Company providing Agency 90 days written notice; or
 - 3. As required by law.

Any modifications or interlineations to the form of this Agreement by Agency will be void and of no effect, regardless of when Company executes this Agreement.

- B. Notwithstanding the above, Company retains the right, upon written notice to Agency, to modify unilaterally in any manner any of Company's underwriting rules, rates or guidelines, to change Agency's binding authority, to change

Company's billing manual, to change Company's Websites' terms and conditions, to change privacy policies, or to revise any of its administrative procedures governing Company's business relationship with Agency.

14. Confidentiality & Privacy

- A. Each party is providing to the other, in furtherance of this Agreement, information that is confidential and proprietary to the disclosing party. "Confidential and Proprietary Information" as used herein shall include, but not be limited to, description of services, methods and procedures, rates, forms and fees, information relating to productivity and performance quality, financial information, and other information designated as "Confidential and Proprietary Information" by the disclosing party, provided that Confidential and Proprietary Information shall not include information that: (a) is already in the possession of the receiving party, (b) becomes generally available to the public other than as a result of any disclosure by the receiving party, (c) becomes available to the receiving party on a non-confidential basis from a source not known to the receiving party to be bound by a confidentiality agreement or other obligation of secrecy, or (d) developed by the receiving party independently and without benefit of information disclosed hereunder by the disclosing party.
- B. Each party will use such Confidential and Proprietary Information of the other which it comes to possess only for purposes in furtherance of the Agreement, and neither party will disclose such Confidential or Proprietary Information of the other to any party for any other purpose, whether during the term of this Agreement or after its expiration or termination.
- C. After expiration or termination of this Agreement, each party shall return to the other or destroy, at the other party's written request, all Confidential and Proprietary Information of the other.
- D. Except for the purposes of carrying out this Agreement, Agency shall not disclose or use any non-public personally identifiable customer or claimant information provided by Company to Agency ("Customer/Claimant Information"). "Non-public personally identifiable information" is personal financial or medical information of or concerning a private person which either has been obtained from sources that are not available to the general public or that is obtained from the person who is the subject of the information and whose information is included in data files exchanged by the parties hereto. Agency shall promptly adopt and implement necessary security procedures to protect from improper disclosure or use of Customer/Claimant Information, such procedures to be in compliance with all applicable federal and state regulatory requirements.
- E. If Agency discloses any Customer/Claimant Information to Company, (i) Company shall not redisclose such Customer/Claimant Information except as authorized, required, or permitted by law, and (ii) Company shall use the Customer/Claimant Information only for the purpose of this Agreement and to determine eligibility for insurance, administer or service policies, and/or evaluating and processing claims related to the Customer/Claimant's case.
- F. Agency and Company will promptly adopt and implement security procedures to protect from improper disclosure or use all Customer/Claimant Information and each other's Confidential and Proprietary Information and these procedures will also be in accordance with applicable law. Agency shall notify Company without unreasonable delay, unless an applicable law enforcement agency has directed Agency to delay notification as provided by applicable law, of any breach of security, intrusion, or any unauthorized access, acquisition, disclosure, or use of Customer/Claimant Information (collectively "Breach"). Agency shall take prompt corrective action to cure or mitigate any such Breach and shall take all actions pertaining to any such Breach required by applicable federal and state laws and regulations.

15. Records

- A. Agency agrees to maintain in a safe and secure manner a complete and accurate record of all transactions pertaining to each policy processed pursuant to this Agreement, through electronic commerce or otherwise, for a minimum of 5 years, or as may be otherwise required by law, from the date of expiration or other effective termination date of any individual policy. Such records will include all relevant applicant information as specified by the applicable Company underwriting guidelines, manuals, or state regulatory requirements, including but not limited to those forms or

documents requiring the policyholder's signature. Such records, including originals, will be forwarded to Company upon its request. During the term of this Agreement and for two years thereafter, any authorized representative of Company may, upon reasonable advance notice to Agency, during normal business hours, examine the facilities, equipment, data, books, accounts, records (including computerized records), or any other memoranda or data in Agency's possession which pertain to this Agreement.

- B. In lieu of retaining and transmitting hard copies of Agency's records, Agency may retain computerized records of all such information as set forth in Company's manuals. If Agency chooses to retain such information electronically rather than in hard copies, Agency will ensure that it backs up all such electronic files on a regular basis, or as may be otherwise required by state law or by Company. In addition, Agency will ensure that it designates an individual within its office(s) to be the custodian of all such electronically retained records and will further ensure that such custodian is in a position to verify the chain of custody with respect to all such records.
- C. Notwithstanding the above and where required by state law or regulation, Agency will retain or forward, as Company directs, the original of any application or required coverage selection forms, including, but not limited to, uninsured coverage and driver exclusion forms.
- D. Agency agrees to provide to Company, upon Company's request, copies of any records in Agency's possession pertaining to business related to Company. Additionally, in order to comply with various statutory and regulatory obligations, as well as its own audit purposes, Company will have access to all Agency's retained computerized records pertaining to Company's book of business during Agency's regular business hours or at such other reasonable times as may be determined between the parties.
- E. Agency will provide to Company information necessary to process any transaction binding upon Company within 10 working days after the transaction occurs, including mail time, as well as such other information at such times as may be required by Company in its written guidelines. For purposes of this Agreement, the transaction occurs on the date Agency acted or should have acted on behalf of Company.
- F. Records or property belonging to Company (including, but not limited to, marketing materials, product brochures, powers of attorney and corporate seals), including reproductions, will be returned to Company by Agency upon request.
- G. Upon request, Company agrees to furnish Agency a list of existing policies placed by Agency with Company.

16. Miscellaneous Provisions

- A. This Agreement and any addenda hereto constitute the entire agreement between Company and Agency relating to the subject matter hereof and replaces, from and after the effective date, all previous agreements, including any amendments thereto, whether written or oral, and will remain in force and effect until suspended or terminated as provided herein.
- B. Company's obligations under this Agreement extend only to the Agency named in this Agreement and not to its employees, sub producers, or anyone else. Agency may not incur any debt or liability, bind or execute contracts, except policies in accordance with the terms of this Agreement, waive defaults of policyholders, extend the time or method of payment of premium or service fees by policyholders, alter, modify, waive, or change any of the provisions or conditions of our policies, rates, rating rules or rating plan, withhold money or property of our (other than in accordance with the terms of this Agreement), or assign this Agreement or its rights and obligations herein without prior written approval from a duly authorized representative of Company.
- C. No past practice, custom or usage, or failure of Agency or Company to declare promptly a default for breach of any of the terms and conditions of this Agreement will constitute or be construed as a waiver of said terms and conditions or estop Agency or Company from thereafter demanding full and complete compliance with the Agreement.

- D. If any provision of this Agreement is held to be invalid or unenforceable under the laws or regulations of any jurisdiction that may govern this Agreement, such provision shall be deemed amended to the minimum extent necessary to effect compliance with such law or regulation and to reflect the intent of the parties.
- E. Section headings are for reference only and will not be used to construe the terms of this Agreement.
- F. Any commercially reasonable means of transmission to Agency to an address below will be sufficient proof of service of a notice required under this Agreement. Agency consents to communication via the media referenced below. Notice to Company may be provided in accordance with the provisions of the Company-specific addendum attached hereto.

The persons signing below warrant that they are authorized to execute this Agreement.

This Agreement is effective: April 01, 2010

LIBERTY MUTUAL AGENCY CORPORATION on
behalf of its insurer affiliates marketing under the Liberty
Mutual Agency Corporation divisions identified in separate
addenda attached hereto

Deborah McGonigle

By: Deborah McGonigle
Its: Senior Vice President
Dated:

4910094

Southern Risk Insurance Services LLC
Agency Name

By: _____

Its: _____
Title:

Dated: 05/31/2012
Address: 1007 Crestview Rd. ANDERSON, SC 296213705
Telephone: (864) 231-0793
Fax: (864) 231-0797
E-mail:
Agency Code: 4910094



**Montgomery
Insurance.**

Member of Liberty Mutual Group

**MONTGOMERY INSURANCE™
ADDENDUM
TO
AGENCY AGREEMENT**

WHEREAS, Agency has entered into a Liberty Mutual Agency Corporation Agency Agreement effective as of April 01, 2010 ("Agreement"); and

WHEREAS, as of the effective date of this Addendum, Montgomery Insurance is a "Company" covered by the Agreement and Agency and Montgomery Insurance are entering into this Addendum to the Agreement to supplement the terms of the Agreement and further define the scope of Agency's authority and responsibilities with respect to Montgomery Insurance business.

NOW, THEREFORE, in furtherance of the Agreement, and in consideration of the mutual covenants herein contained and other good and valuable consideration, and intending to be legally bound hereby, the parties hereto agree as follows:

1. Notice to Montgomery Insurance may be sent by mail, fax or electronic mail to the following address:

Montgomery Insurance
Montgomery Insurance
c/o Marketing Department
13830 Ballantyne Corporate Place
Suite 300
Charlotte, NC 28277

Phone: 704-759-7661
Fax: 704-544-2851

With a copy by first class mail to:

Liberty Mutual Agency Corporation
Agency Administration
9450 Seward Road
Fairfield, OH 45014

2. This Addendum applies only to Agency's relationship and transactions with Montgomery Insurance, and not to Agency's relationship or transactions with any other Company that is party to the Agreement. Termination of Agency's authority with respect to Montgomery Insurance shall not impair Agency's authority for any other line of business for which it may have continuing authority from a Company, as defined in the Agreement. This Addendum forms a part of the Agreement and together they constitute the entire Agreement between

Montgomery Insurance and Agency relating to the subject matter hereof and replace, from and after the effective date, all previous agreements, whether written or oral, between Montgomery Insurance and Agency as they relate to Montgomery Insurance business.

3. "Subproducers" also include any person or entity that is given a subcode linked to Agency's mastercode. The issuance of a subcode by Montgomery Insurance is deemed to be Montgomery Insurance's written permission for Agency to use that subproducer.
4. In the event of any conflict between this Addendum and the Agreement, with respect to Montgomery Insurance business only this Addendum shall control.
5. Each signatory hereto hereby represents that he or she has full legal authority to execute this Addendum.

Southern Risk Insurance Services LLC

Montgomery Insurance



By: Authorized Representative

By: Michael J. Plavnicky

Authorized Representative

Title

Title

May 31, 2012

Date

Date



Member of Liberty Mutual Group

**SAFECO INSURANCE™ ADDENDUM
TO THE
LIBERTY MUTUAL AGENCY CORPORATION
AGENCY AGREEMENT**

WHEREAS, Agency has entered into the Liberty Mutual Agency Corporation Agency Agreement effective as of April 01, 2010 ("Agreement");

WHEREAS, Safeco is a "Company" covered by the Agreement and Agency and Safeco are entering into this Addendum to the Agreement ("Addendum") to supplement the terms of the Agreement and to further define the scope of Agency's authority and responsibilities with respect to Safeco business;

WHEREAS, this Addendum replaces any previous version of the Safeco Addendum ("Original Safeco Addendum") to the Liberty Mutual Agency Corporation Agency Agreement that Agency may have entered into; and

WHEREAS, the effective date of this Addendum is the date of Agency's signature as reflected on the signature page of this Addendum ("Effective Date").

NOW, THEREFORE, in furtherance of the agreement, and in consideration of the mutual covenants herein contained and other good and valuable consideration, and intending to be legally bound hereby, the parties hereto agree to the as follows:

1. Section 1(A) of the Agreement: The following sentence is added to the end of this section:

"For purposes of this Agreement, "Agency" includes the employees and sub-producers of the Agency."

2. Section 1(B) of the Agreement: This section is replaced in its entirety with the following:

"Agency, including its employees and subproducers, is authorized to solicit and submit business for all personal lines of business except to the extent of any limitation set forth in an Amendment. Safeco shall have the right to reject, modify, cancel or refuse to renew any policy in accordance with applicable law and the Product Guidelines (defined in Section 1(C) below). Safeco will send direct notice of cancellation or non-renewal to the policyholder or binder holder in accordance with applicable state law, with a copy of such notice to Agency."

3. Section 1(C) of the Agreement: This section is replaced in its entirety with the following:

"Agency is only authorized to act as agent for Safeco and bind Safeco in such classes of risks and under such limits as Safeco may from time to time establish in product underwriting and binding authority guides published on www.safecow.com or in other written instructions ("Product Guidelines"). After receiving written, electronic notice from Safeco, Agency shall

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not bind or write policies of insurance when the object of the insurance is subject to unusually increased risk as defined in such notice."

4. Section 1(E) of the Agreement: The last sentence of this section is deleted and new language is added. Therefore, this section now reads:

"Agency is not authorized to use a subproducer to produce business unless written authorization is obtained from Safeco. Safeco's assignment of a sub stat code for a sub-producer shall be deemed to be written authorization to Agency. If applicable, the management of sub-producers appointed pursuant to this Agreement shall be governed by the terms set forth in Exhibit A-1 of this Addendum."

5. A new Section 1(G) is added to the Agreement, as follows:

"Agency agrees to give written notice to Safeco of its plan to acquire new Safeco business from another agency in order that Safeco may, at its election, determine whether to accept the new business. Safeco will provide written notice to Agency if Safeco chooses to not accept this new business."

6. Section 3(B) of the Agreement: This section is replaced in its entirety with the following:

"Agency is the exclusive owner of expirations in policies Agency produces under this Agreement or acquires from previous owners and for which Agency is designated the "producer of record." For purpose of this Agreement, "expirations" means business records and information originating with Agency regarding any insured under a policy or renewal, including the name and address of the insured, and the date of the expiration and policy limits of any policy or renewal. However, Agency's ownership of expirations will transfer to Safeco under the following circumstances: (a) failure of Agency to satisfy a debt owed to Safeco within 60 days of termination of this Agreement; or (b) failure by Agency to properly account for and pay all premiums for which Agency is liable upon 60 days notice of a demand to provide such payment; or (c) abandonment of Agency's business. For purposes of this Agreement, "abandonment" shall mean documented evidence of the consistent disregard of the affected business or premises of Agency."

7. Section 4(A) of the Agreement: This section is replaced in its entirety with the following:

"Safeco will pay Agency commissions at the rates specified in commission schedules distributed via written documentation or through www.safecow.com. Safeco agrees to compute and remit to Agency promptly following the close of each month the commission Safeco owes Agency, less unearned commissions Agency owes Safeco, in accordance with the applicable commission schedules. If Safeco's Electronic Commission Direct Deposit Program is available to Agency/sub-producer, commissions will be transmitted to Agency/sub-producer under the terms of the program then in effect, unless otherwise agreed to by Agency/sub-producer and Safeco."

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8. Section 4(G) of the Agreement: This section is replaced in its entirety, as follows:

"For business placed by Agency under this Agreement, commissions are Agency's sole and full compensation. Agency shall not charge policyholders any fees or charges for the sale, solicitation or servicing of insurance placed with Safeco, services for which Safeco pays Agency to perform, without Safeco's prior written approval, and then only as permitted by law."

9. Section 5(B) of the Agreement: The following language is added to the end of this section:

"Safeco reserves the right to bill Agency or to offset commissions owed to Agency for any earned premium due except to the extent caused by a bad check written by an insured."

10. Section 8 of the Agreement: This section is replaced in its entirety with the following:

"Agency's binding authority shall be suspended:

1. Automatically on the effective date of the sale or transfer of Agency's business to, or the consolidation of Agency's business with, an entity that is neither a subsidiary nor an affiliate of Agency, unless Safeco is notified of the transaction, and in writing, agrees to such sale, transfer or consolidation.
2. Automatically if Agency's insurance license or certificate of authority has been placed on probation, suspended, revoked, terminated or will not be renewed by a public authority, or if Safeco finds documented evidence of any action in violation of Agency's license under applicable state law.
3. Upon written notification (email is acceptable) by an authorized Safeco Sales Manager Underwriting Manager, which states the reason for the suspension."

11. Section 9 of the Agreement: This section is replaced in its entirety with the following:

"Agency agrees to give written notice to Safeco of any change in affiliation, or any sale or transfer of Agency's business or book of business, or its consolidation with an entity that is neither a subsidiary nor affiliate of Agency in order that Safeco may, at its election, determine whether to assign this Agreement to the successor organization or terminate this Agreement in accordance with its terms."

12. Section 10(A)(4) of the Agreement: This section is replaced in its entirety with the following:

"Immediately upon either party giving written notice to the other in the event of a material breach of this Agreement, abandonment, fraud, insolvency, nonpayment of accounts, or gross and willful misconduct on the part of such other party. In addition, Safeco will have the right to terminate this Agreement immediately with written notice in the event of Agency's failure to successfully execute any rehabilitation plan agreed to with Safeco's underwriting department."

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13. Section 11(C) of the Agreement: This section is replaced in its entirety with the following:

"Agency will not be entitled to commissions on policies that must be renewed after termination, except as may be required by law and then only for as long as required by law. If Safeco is required by law to allow Agency to continue to provide service to insureds after this Agreement is terminated, Safeco will pay Agency a service fee of 3% of premiums written (or such commission as required by law) after the date of termination of this Agreement as full compensation for such service."

14. Section 16(B) of the Agreement: The first sentence of this section is deleted. Therefore, this section now reads:

"Agency may not incur any debt or liability, bind or execute contracts, except policies in accordance with the terms of this Agreement, waive defaults of policyholders, extend the time or method of payment of premium or service fees by policyholders, alter, modify, waive, or change any of the provisions or conditions of our policies, rates, rating rules or rating plan, withhold money or property of our (other than in accordance with the terms of this Agreement), or assign this Agreement or its rights or obligations herein without prior written approval from a duly authorized representative of Safeco."

15. A new Section 16(G) is added to the Agreement, as follows:

Notice to Safeco may be sent by mail or fax to the following address:

Safeco Insurance
c/o Legal Department
1001 Fourth Avenue, Floor 2700
Seattle, WA 98154
Phone: (206) 473-6435
Fax: (206) 473-6722

With a copy by first class mail to:

Liberty Mutual Agency Corporation
Agency Administration
9450 Seward Road
Fairfield, OH 45014

16. A new Section 16(H) is added to the Agreement, as follows:

"If, as of the Effective Date of this Addendum, Agency has executed an Addendum to the Safeco Property and Casualty Agency Agreement for Gold Services, Gold Plus Services or for Gold Extended Hours ("Gold Service Addendum"), such Gold Service Addendum shall be governed by the Agreement as of the Effective Date of this Addendum."

17. A new Section 16(I) is added to the Agreement, as follows:

A1035702 (02-11)

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"Safeco shall have the authority to: (a) issue policies, renewals, endorsements and cancellation notices; (b) bill for, and collect premiums; (c) adjust claims; (d) communicate to policyholders regarding administrative and billing issues and services and, with Agency's consent; (e) communicate to policyholders regarding the marketing of Safeco products, provided such marketing does not conflict with Agency's ownership of expirations."

This Addendum applies only to Agency's relationship and transactions with Safeco, and not to Agency's relationship or transactions with any other Company that is party to the Agreement. In the event of any conflict between this Addendum and the Agreement, with respect to Safeco business, only this Addendum shall control. Termination of Agency's authority with respect to Safeco shall not impair Agency's authority for any other line of business for which it may have continuing authority from a Company, as defined in the Agreement. This Addendum forms a part of the Agreement and together, along with other Addenda or Letter Amendments that may be issued by Safeco from time to time, they constitute the entire Agreement between Safeco and Agency relating to the subject matter hereof and replace, from and after the Effective Date, all previous agreements, whether written or oral, between Safeco and Agency as they relate to Safeco business.

Each signatory hereto hereby represents that he or she has full legal authority to execute this Addendum.

Southern Risk Insurance Services LLC

Safeco Insurance

Cecil Booher

By: Authorized Representative

By: Cecil Booher

Title

Vice President, Region General Manager

Title

Date

May 31, 2012

Date

EXHIBIT A-1

SUBPRODUCER MANAGEMENT

1. Agency is responsible for identifying and updating promptly in writing all subproducers for which Agency requests Safeco to provide an appointment. Safeco is responsible for obtaining and maintaining appointments for all subproducers that will submit business to Safeco, as mutually agreed upon by Agency and Safeco. Agency will notify Safeco within five business days of the termination of any person appointed as a subproducer to represent Safeco.
2. Agency will ensure that only persons who are licensed and properly appointed by Safeco act as subproducers for business produced by Agency for Safeco.
3. If, as a result of Agency's failure to comply with any federal or state producer requirements, Safeco is required to pay administrative penalties, Safeco shall advise Agency of the amount of the fine, and Agency will reimburse Safeco promptly.
4. Agency warrants that the subproducers are licensed insurance agents authorized to produce business on Agency's behalf. Agency represents that it has entered into written agreements with all subproducers governed under this Agreement who write business directly with Safeco and/or who have direct access to Safeco's Quote and Issue system, and Agency is responsible for ensuring that such subproducers abide by the terms and conditions of this Agreement and Safeco's entire business relationship with Agency, despite the fact that the subproducers may be independent contractors, and not employees, of Agency.
5. Based on these representations, Safeco will communicate any issues involving a subproducer to Agency, and Agency will address such issues with the subproducer. Further, Safeco will rely on Agency to make all decisions related to commission payment levels so long as such subproducers are affiliated with Agency.
6. Safeco will terminate the appointment of any subproducer whose subproducer agreement with Agency has been terminated. Notwithstanding the above, Agency understands that Safeco may independently appoint any eligible subproducer after the termination of Agency's agreement with a subproducer, in accordance with Safeco's appointment criteria.

FILED
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

2014 FEB 11 AM 9:05

EMILY Y. BOGARD
CLERK OF COURT

Exhibit 3



A Liberty Mutual Company

CONFIDENTIAL – VIA CERTIFIED MAIL

November 1, 2012

4910094 / 03-42-0758
JESSE DANTICE
SOUTHERN RISK INSURANCE SERVICES LLC
1007 CRESTVIEW RD
ANDERSON, SC 29621

Subject: Liberty Mutual Agency Corporation Relationship
Personal Lines Authority Termination

Dear Jesse:

Accept this letter as formal notice of termination of the personal lines authority granted you, your agency and its producers, by Liberty Mutual Agency Corporation companies, including without limitation those companies listed on Attachment A (collectively, the "Companies"). Correspondingly, this letter also constitutes notice of termination of any agreements that you or your agency had with the Companies granting personal lines authority. Your appointment(s) as an agent to sell, solicit or negotiate personal lines insurance for the Companies will be terminated on February 4, 2013. Please note that, subject to prior suspension, new business cannot be written after the binding authority termination date of November 8, 2012. Upon termination, you and all producers in your agency are no longer authorized personal lines representatives and should not represent yourselves as such in relation to any of the Companies.

If you have any questions concerning this matter, please contact your Territory Manager.

We wish you the best of luck in your future endeavors.

Sincerely,

A handwritten signature in cursive script that reads "Cecil Booher".

Cecil Booher
Regional General Manager
Personal Lines Distribution

ROA_0528



A Liberty Mutual Company

Enclosures: Attachment A

Attachment A

Letter to

Dated 11/1/2012

JESSE DANTICE
SOUTHERN RISK INSURANCE SERVICES LLC
1007 CRESTVIEW RD
ANDERSON, SC 29621

Reason for Termination

Agency No Longer Represents Company

Effective Date of Termination

February 4, 2013

Effective Date of Binding Authority Suspension

November 8, 2012

Program Manager: NA

LMAC Regional Company /Safeco Agreement(s) Status Change: Termination

LMAC Regional Company /Safeco Line(s) of Business Affected by Change:

Personal Insurance - Terminated

Liberty Agency Underwriters Lines(s) of Business Affected by Change:

Not Applicable

Surety Line(s) of Business Affected by Change:

Surety - Terminated

Resident State: SC

Termination Applies to any and all Companies listed in which authority was granted for line(s) of business affected:

American Economy Insurance Company
America First Insurance Company
American States Insurance Company
American States Preferred Insurance Company
Colorado Casualty Insurance Company
Excelsior Insurance Company
Golden Eagle Insurance Company
Hawkeye Security Insurance Company
Insurance Company of Illinois
Liberty Northwest Insurance Corporation
Montgomery Mutual Insurance Company
Netherlands Insurance Company
Oregon Automobile Insurance Company
Ohio Security Insurance Company
Peerless Indemnity Insurance Company
Safeco Insurance Company of Illinois
Safeco Insurance Company of Oregon
Safeco National Insurance Company

American Fire and Casualty Insurance Company
America First Lloyds Insurance Company
American States Lloyds Insurance Company
American States Insurance Company of Texas
Consolidated Insurance Company
First National Insurance Company of America
General Insurance Company of America
Indiana Insurance Company
Liberty County Mutual
Mid-American Fire & Casualty Company
Midwestern Indemnity Insurance Company
North Pacific Insurance Company
Ohio Casualty Insurance Company
Peerless Insurance Company
Safeco Insurance Company of America
Safeco Insurance Company of Indiana
Safeco Lloyds Insurance Company
West American Insurance Company

Rights and Responsibilities

Subject to normal underwriting guidelines, policies with anniversary dates during the notice period will renew. After the notice period expires, policies will continue in force until their next renewal date and are subject to normal underwriting procedures. Company will follow all state requirements subject to our normal underwriting procedures.

STATE OF SOUTH CAROLINA)
COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Richard W. Wilson,

Plaintiff,

vs.

Laura B. Willis and Jesse A. Dantice,
individually and as agents and/or
brokers for Southern Risk Insurance
Company, Travelers Casualty Insurance
Company of America, Allied Property
& Casualty Insurance Company,
Peerless Insurance Company,
Montgomery Mutual Insurance
Company, Safeco Insurance Company
of America, and Foremost Insurance
Company; Southern Risk Insurance
Company, Travelers Casualty Insurance
Company of America, Allied Property
& Casualty Insurance Company,
Peerless Insurance Company,
Montgomery Mutual Insurance
Company, Safeco Insurance Company
of America, and Foremost Insurance
Company,

Defendants.

Civil Action No. 2012-CP-01-00306

TRUE COPY
[Signature]
ABBEVILLE COUNTY CLERK OF COURT

DEFENDANTS MONTGOMERY
MUTUAL INSURANCE
COMPANY'S, SAFECO
INSURANCE COMPANY OF
AMERICA'S AND PEERLESS
INSURANCE COMPANY'S
MOTION FOR JUDGMENT
REGARDING THE CLAIMS FOR
CIVIL CONSPIRACY AND UNFAIR
TRADE PRACTICES

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
JUL 11 2012
CLERK OF COURT

Pursuant to Rules 9(g) and 12(c) of the South Carolina Rules of Civil procedure, Defendants Montgomery Mutual Insurance Company ("Montgomery", Safeco Insurance Company of America ("Safeco"), and Peerless Insurance Company ("Peerless") (Montgomery, Safeco and Peerless are collectively referred to herein as "Defendants"), hereby move for an order entering judgment for the moving defendants regarding the claims for civil conspiracy and violation of the South Carolina Unfair Trade Practices Act

("SCUTPA") asserted against them in Plaintiff Richard W. Wilson's ("Plaintiff") Complaint.

This Motion is based on the following grounds:

1. Judgment should be entered for the moving Defendants with respect to Plaintiff's SCUTPA claim because matters involving the business of insurance are exempted from the application of SCUTPA. Subsection (c) of § 39-5-40 states, "[t]his article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, §§ 38-57-10 through 38-55-320." S.C. Code Ann. § 39-5-40(c). Chapter 57 of the insurance code defines and regulates all unfair trade practices in the business of insurance, and specifically provides that "[n]o person may make a false, misleading, fraudulent, or incomplete representation or comparison of insurance policies or insurers for the purposes of inducing or intending to induce any person to lapse, forfeit, surrender, terminate, retain, or convert an insurance policy or to take out a policy in another insurer." S.C. Code Ann. § 38-57-60.

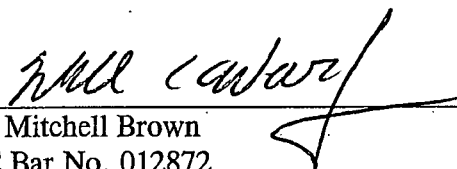
2. Judgment should be entered for the moving Defendants on Plaintiff's claim for civil conspiracy because: (a) the claim is based on the same allegations as the other claims; and (b) no special damages are alleged.

3. This Motion is further based on the pleadings filed in this case, the South Carolina Rules of Civil Procedure, the applicable statutory and case law of South Carolina and other jurisdictions, and any memorandum of law submitted prior to, at, or subsequent to a hearing on this Motion.

WHEREFORE, based on the foregoing, Defendants Montgomery Mutual Insurance Company, Safeco Insurance Company of America and Peerless Insurance Company respectfully request that this Court grant their Motion:

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:


C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
William C. Wood, Jr.
SC Bar No. 015111
E-Mail: bill.wood@nelsonmullins.com
Brian P. Crotty
SC Bar No. 16983
E-Mail: brian.crotty@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Montgomery Mutual Insurance
Company, Safeco Insurance Company of America and
Peerless Insurance Company

Columbia, South Carolina

1/16, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Richard W. Wilson,

Plaintiff,

vs.

Laura B. Willis and Jesse A. Dantice,
individually and as agents and/or brokers
for Southern Risk Insurance Company,
Travelers Casualty Insurance Company
of America, Allied Property & Casualty
Insurance Company, Peerless Insurance
Company, Montgomery Mutual
Insurance Company, Safeco Insurance
Company of America, and Foremost
Insurance Company; Southern Risk
Insurance Company, Travelers Casualty
Insurance Company of America, Allied
Property & Casualty Insurance
Company, Peerless Insurance Company,
Montgomery Mutual Insurance
Company, Safeco Insurance Company of
America, and Foremost Insurance
Company,

Defendants.

Civil Action No. 2012-CP-01-00306

TRUE COPY
[Signature]
ABBEVILLE COUNTY CLERK OF COURT

**MOTION FOR JUDGMENT ON
THE PLEADINGS ON CLAIM FOR
COMMON LAW UNFAIR TRADE
PRACTICES OF DEFENDANTS
MONTGOMERY MUTUAL
INSURANCE COMPANY, SAFECO
INSURANCE COMPANY OF
AMERICA, AND PEERLESS
INSURANCE COMPANY**

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2013 JUN 28 AM 11:35
EMILY Y MCMAHAN
CLERK OF COURT

Pursuant to 12(c) of the South Carolina Rules of Civil procedure, Defendants Montgomery Mutual Insurance Company ("Montgomery"), Safeco Insurance Company of America ("Safeco"), and Peerless Insurance Company ("Peerless"). (Montgomery, Safeco and Peerless are collectively referred to herein as "Defendants"), hereby move for an order entering judgment for the moving defendants regarding the claim for common law unfair trade practices asserted against them in the Second Amended Complaint.

This Motion is based on the following grounds:

1. The Second Amended Complaint asserts as its second cause of action a claim for “common law unfair trade practices.” The common law in South Carolina recognizes a claim for unfair trade practices, sometimes referred to as unfair competition, but does so only in very limited circumstances. The cases allowing this common law claim limit it to cases involving trademark or servicemark infringement or the misappropriation of other intellectual property rights. *See, e.g., Shakespeare Co. v. Silstar Corp. of Am., Inc.*, No. 3:90-1695-19, 802 F. Supp. 1386, 1399 (D.S.C. 1992) (citations omitted) (“The elements of trademark infringement and unfair competition under South Carolina common law are identical to the elements for those claims under the Lanham Act.”), *rev’d on other grounds* by 9 F.3d 1091 (4th Cir. 1992); *Taylor v. Hoppin’ Johns, Inc.*, 304 S.C. 471, 472, 474-75, 405 S.E.2d 410, 411-12 (Ct. App. 1991) (finding judgment on common law unfair trade practices to be double recovery since “[t]he single alleged wrong in this case was trademark infringement”); *Columbia Broadcasting Sys., Inc. v. Custom Recording Co.*, 258 S.C. 465, 468, 478, 189 S.E.2d 305, 306, 312 (1972) (discussing unfair competition in the context of plaintiff “who sought to enjoin defendants’ ‘pirating’ or appropriating performances embodied in phonograph recordings manufactured by its Columbia Records Division”).

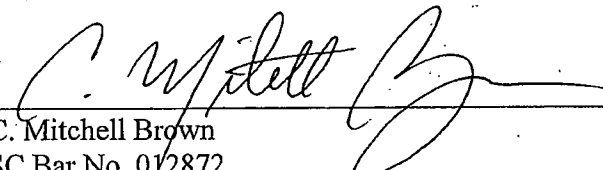
2. As explained by the South Carolina Supreme Court in *Super Duper Inc. v. Pennsylvania National Mutual Casualty Insurance Co.*, 385 S.C. 201, 209 n.7, 683 S.E.2d 792, 796 n.7 (2009): “The common law tort of misappropriation is defined as, ‘[a] judge-made common law form of unfair competition where the defendant has copied or appropriated some item or creation of the plaintiff which is not protected by either

patent law, copyright law, trademark law, or any other traditional theory of exclusive rights.”) (quoting J. Thomas McCarthy, *McCarthy's Desk Encyclopedia of Intellectual Property* 273 (2d ed. 1995)). There are no South Carolina appellate court cases finding common law unfair trade practices or unfair competition where it is merely alleged that one competitor made misrepresentations in an effort to lure customers from another competitor, as is the situation in the present case. Accordingly, the Defendants request that the Court grant judgment in their favor as to this cause of action.

This Motion is based on the pleadings filed, the South Carolina Rules of Civil Procedure, the applicable statutory and case law of South Carolina and other jurisdictions, and any memorandum of law which may be submitted.

WHEREFORE, based on the foregoing, Defendants respectfully request that this Court grant their Motion.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

C. Mitchell Brown
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William C. Wood, Jr.
SC Bar No. 015111
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(803) 799-2000

Attorneys for Montgomery Mutual Insurance Company,
Safeco Insurance Company of America and Peerless
Insurance Company

Columbia, South Carolina

6/27, 2013

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
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C. Mitchell Brown
Tel: 803.255.9595
Fax: 803.255.9025
mitch.brown@nelsonmullins.com

November 6, 2013

The Honorable Frank R. Addy, Jr.
Eighth Judicial Circuit
528 Monument St., Ste 210
Greenwood, SC 29646

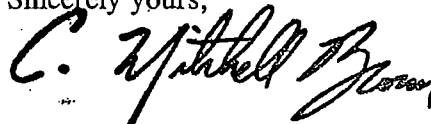
RE: Richard W. Wilson v. Laura B. Willis, and Jesse A. Dantice, et al.
Civil Action No. 2012-CP-01-306
Our File No. 00350/01679

Dear Judge Addy:

Please be advised that on behalf of our clients Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Peerless Insurance Company, we have moved to compel arbitration in this matter as to the allegations made against our clients. As such, we are withdrawing our motions for judgment on the pleadings on claims for common law unfair trade practices filed on June 28, 2013 and our motion for judgment regarding claims for civil conspiracy and unfair trade practices filed on January 22, 2013. These motions are attached for your convenience. This means such motions would not be heard on November 14, 2013. I am copying opposing counsel and the clerk of court on this correspondence. Thank you and please let me know if there are any questions.

With kind regards, I remain

Sincerely yours,



C. Mitchell Brown

CMB:mws

Enclosure

cc: (all w/o enclosures)

The Honorable Emily Yeargin McMahan, Clerk of Court
Thomas E. Hite, Jr., Esquire
William H. Nicholson III, Esquire

With offices in the District of Columbia, Florida, Georgia, Massachusetts, North Carolina, South Carolina, Tennessee and West Virginia

ROA_0537

November 6, 2013

Page 2

Mason A. Goldsmith, Esquire
Elizabeth M. McMillan, Esquire
Jeffrey C. Kull, Esquire
D. Larry Kristinik, Esquire

STATE OF SOUTH CAROLINA)

COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Richard W. Wilson,

Plaintiff,

vs.

Civil Action No. 2012-CP-01-00306

TRUE COPY
[Signature]
ABBEVILLE COUNTY CLERK OF COURT

Laura B. Willis and Jesse A. Dantice,
individually and as agents and/or
brokers for Southern Risk Insurance
Company, Travelers Casualty Insurance
Company of America, Allied Property
& Casualty Insurance Company,
Peerless Insurance Company,
Montgomery Mutual Insurance
Company, Safeco Insurance Company
of America, and Foremost Insurance
Company; Southern Risk Insurance
Company, Travelers Casualty Insurance
Company of America, Allied Property
& Casualty Insurance Company,
Peerless Insurance Company,
Montgomery Mutual Insurance
Company, Safeco Insurance Company
of America, and Foremost Insurance
Company,

Defendants.

**DEFENDANTS MONTGOMERY
MUTUAL INSURANCE
COMPANY'S, SAFECO
INSURANCE COMPANY OF
AMERICA'S AND PEERLESS
INSURANCE COMPANY'S
MOTION FOR JUDGMENT
REGARDING THE CLAIMS FOR
CIVIL CONSPIRACY AND UNFAIR
TRADE PRACTICES**

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2012 OCT 16 PM 3:13
EMILY JOHNSON
CLERK OF COURT

Pursuant to Rules 9(g) and 12(c) of the South Carolina Rules of Civil procedure,
Defendants Montgomery Mutual Insurance Company ("Montgomery", Safeco Insurance
Company of America ("Safeco"), and Peerless Insurance Company ("Peerless")
(Montgomery, Safeco and Peerless are collectively referred to herein as "Defendants"),
hereby move for an order entering judgment for the moving defendants regarding the
claims for civil conspiracy and violation of the South Carolina Unfair Trade Practices Act

("SCUTPA") asserted against them in Plaintiff Richard W. Wilson's ("Plaintiff") Complaint.

This Motion is based on the following grounds:

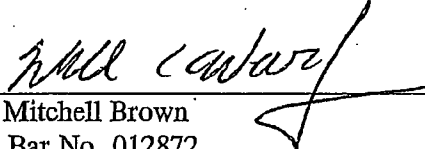
1. Judgment should be entered for the moving Defendants with respect to Plaintiff's SCUTPA claim because matters involving the business of insurance are exempted from the application of SCUTPA. Subsection (c) of § 39-5-40 states, "[t]his article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, §§ 38-57-10 through 38-55-320." S.C. Code Ann. § 39-5-40(c). Chapter 57 of the insurance code defines and regulates all unfair trade practices in the business of insurance, and specifically provides that "[n]o person may make a false, misleading, fraudulent, or incomplete representation or comparison of insurance policies or insurers for the purposes of inducing or intending to induce any person to lapse, forfeit, surrender, terminate, retain, or convert an insurance policy or to take out a policy in another insurer." S.C. Code Ann. § 38-57-60.

2. Judgment should be entered for the moving Defendants on Plaintiff's claim for civil conspiracy because: (a) the claim is based on the same allegations as the other claims; and (b) no special damages are alleged.

3. This Motion is further based on the pleadings filed in this case, the South Carolina Rules of Civil Procedure, the applicable statutory and case law of South Carolina and other jurisdictions, and any memorandum of law submitted prior to, at, or subsequent to a hearing on this Motion.

WHEREFORE, based on the foregoing, Defendants Montgomery Mutual Insurance Company, Safeco Insurance Company of America and Peerless Insurance Company respectfully request that this Court grant their Motion:

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

C. Mitchell Brown

SC Bar No. 012872

E-Mail: mitch.brown@nelsonmullins.com

William C. Wood, Jr.

SC Bar No. 015111

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Brian P. Crotty

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Columbia, SC 29201

(803) 799-2000

Attorneys for Montgomery Mutual Insurance
Company, Safeco Insurance Company of America and
Peerless Insurance Company

Columbia, South Carolina

1/16, 2013

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Richard W. Wilson,

Plaintiff,

vs.

Laura B. Willis and Jesse A. Dantice,
individually and as agents and/or brokers
for Southern Risk Insurance Company,
Travelers Casualty Insurance Company
of America, Allied Property & Casualty
Insurance Company, Peerless Insurance
Company, Montgomery Mutual
Insurance Company, Safeco Insurance
Company of America, and Foremost
Insurance Company; Southern Risk
Insurance Company, Travelers Casualty
Insurance Company of America, Allied
Property & Casualty Insurance
Company, Peerless Insurance Company,
Montgomery Mutual Insurance
Company, Safeco Insurance Company of
America, and Foremost Insurance
Company,

Defendants.

Civil Action No. 2012-CP-01-00306

TRUE COPY
[Signature]
ABBEVILLE COUNTY CLERK OF COURT

**MOTION FOR JUDGMENT ON
THE PLEADINGS ON CLAIM FOR
COMMON LAW UNFAIR TRADE
PRACTICES OF DEFENDANTS
MONTGOMERY MUTUAL
INSURANCE COMPANY, SAFECO
INSURANCE COMPANY OF
AMERICA, AND PEERLESS
INSURANCE COMPANY**

EMILY Y MCMAHAN
CLERK OF COURT

2013 JUN 28 AM 11:35

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

Pursuant to 12(c) of the South Carolina Rules of Civil procedure, Defendants Montgomery Mutual Insurance Company ("Montgomery"), Safeco Insurance Company of America ("Safeco"), and Peerless Insurance Company ("Peerless") (Montgomery, Safeco and Peerless are collectively referred to herein as "Defendants"), hereby move for an order entering judgment for the moving defendants regarding the claim for common law unfair trade practices asserted against them in the Second Amended Complaint.

This Motion is based on the following grounds:

1. The Second Amended Complaint asserts as its second cause of action a claim for “common law unfair trade practices.” The common law in South Carolina recognizes a claim for unfair trade practices, sometimes referred to as unfair competition, but does so only in very limited circumstances. The cases allowing this common law claim limit it to cases involving trademark or servicemark infringement or the misappropriation of other intellectual property rights. *See, e.g., Shakespeare Co. v. Silstar Corp. of Am., Inc.*, No. 3:90-1695-19, 802 F. Supp. 1386, 1399 (D.S.C. 1992) (citations omitted) (“The elements of trademark infringement and unfair competition under South Carolina common law are identical to the elements for those claims under the Lanham Act.”), *rev’d on other grounds* by 9 F.3d 1091 (4th Cir. 1992); *Taylor v. Hoppin’ Johns, Inc.*, 304 S.C. 471, 472, 474-75, 405 S.E.2d 410, 411-12 (Ct. App. 1991) (finding judgment on common law unfair trade practices to be double recovery since “[t]he single alleged wrong in this case was trademark infringement”); *Columbia Broadcasting Sys., Inc. v. Custom Recording Co.*, 258 S.C. 465, 468, 478, 189 S.E.2d 305, 306, 312 (1972) (discussing unfair competition in the context of plaintiff “who sought to enjoin defendants’ ‘pirating’ or appropriating performances embodied in phonograph recordings manufactured by its Columbia Records Division”).

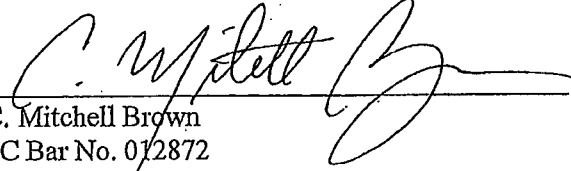
2. As explained by the South Carolina Supreme Court in *Super Duper Inc. v. Pennsylvania National Mutual Casualty Insurance Co.*, 385 S.C. 201, 209 n.7, 683 S.E.2d 792, 796 n.7 (2009): “The common law tort of misappropriation is defined as, ‘[a] judge-made common law form of unfair competition where the defendant has copied or appropriated some item or creation of the plaintiff which is not protected by either

patent law, copyright law, trademark law, or any other traditional theory of exclusive rights.”) (quoting J. Thomas McCarthy, *McCarthy's Desk Encyclopedia of Intellectual Property* 273 (2d ed. 1995)). There are no South Carolina appellate court cases finding common law unfair trade practices or unfair competition where it is merely alleged that one competitor made misrepresentations in an effort to lure customers from another competitor, as is the situation in the present case. Accordingly, the Defendants request that the Court grant judgment in their favor as to this cause of action.

This Motion is based on the pleadings filed, the South Carolina Rules of Civil Procedure, the applicable statutory and case law of South Carolina and other jurisdictions, and any memorandum of law which may be submitted.

WHEREFORE, based on the foregoing, Defendants respectfully request that this Court grant their Motion.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
William C. Wood, Jr.
SC Bar No. 015111
E-Mail: bill.wood@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Montgomery Mutual Insurance Company,
Safeco Insurance Company of America and Peerless
Insurance Company

Columbia, South Carolina

6/27, 2013

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

JEANETTE NORMAN,) Civil Action No. 2013-CP-01-221
)

Plaintiff,)

VS.)

LAURA B. WILLIS, individually, and)
as agent for Southern Risk Insurance)
Services, LLC, Montgomery Mutual)
Insurance Company, and Peerless)
Insurance Company; JESSE A.)
DANTICE, individually and as)
broker/agent for Southern Risk)
Insurance Services, LLC, Montgomery)
Mutual Insurance Company, and)
Peerless Insurance Company;)
SOUTHERN RISK INSURANCE)
SERVICES, LLC; PEERLESS)
INSURANCE COMPANY; and)
MONTGOMERY MUTUAL)
INSURANCE COMPANY,)

Defendants.)

TRUE COPY

BY *[Signature]*
ABBEVILLE COUNTY CLERK OF COURT

MOTION OF DEFENDANTS
MONTGOMERY INSURANCE
COMPANY AND PEERLESS
INSURANCE COMPANY TO
COMPEL ARBITRATION AND
TO DISMISS CLAIMS

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
OCT 31 11 10 51

Pursuant to the South Carolina Rules of Civil Procedure and the Federal Arbitration Act, and in response to Plaintiff's Complaint, Defendants Montgomery Insurance Company ("Montgomery") and Peerless Insurance Company ("Peerless") (collectively "the Insurers"), by and through their undersigned attorneys, hereby move the Court for an Order compelling arbitration and dismissing the claims against the Insurers. Failing the above, the Court should compel arbitration and stay this matter.

This motion is based on the ground that each of Plaintiff Jeanette Norman's claims against the Insurers in her Complaint is premised on the Insurers' alleged duties

that would not exist but for the Insurers' agency agreement with the agency, Southern Risk Insurance Services, LLC (the "Agency Agreement"). The Agency Agreement, however, contains a broad, binding arbitration provision. Norman cannot rely on and seek to recover monies based on some provisions of the Agency Agreement while ignoring others such as the arbitration clause. Accordingly, because the arbitration provisions encompass the dispute at issue, this Court should compel arbitration and dismiss the action.

BACKGROUND

Norman is a resident of Abbeville County, South Carolina. (Compl. at ¶ 1.) She alleges that defendant Laura B. Willis was a licensed insurance agent operating under the direct supervision of the Insurers, the Southern Risk Insurance Agency ("Southern Risk"), and Jesse Dantice. (*Id.* at ¶ 2.) Norman alleges that in September of 2010, she met with Willis to discuss insurance for her automobiles and for certain real property. (*Id.* at ¶¶ 10 and 13.) At that meeting, Norman alleges she filled out applications for insurance. (*Id.* at ¶¶ 11 and 14.) Norman alleges that, although she provided Willis with her Social Security number for use on the application, a different Social Security number was used, and Willis did not inquire of Norman's claim history or ask for her automobiles' Vehicle Identification Numbers. (*Id.* at ¶¶ 11 and 14.) At that meeting, Norman alleges she paid part of what she believed to be the premium for the real estate policy. (*Id.* at ¶ 12.) She alleges she subsequently received her automobile insurance identification cards, which contained incorrect information, and that she was later contacted by the company financing one of her vehicles to inform her the vehicle was not insured. (*Id.* at ¶ 15.) Norman alleges that Willis' various tortious acts have impaired her credit rating and caused her to pay a higher rate for

automobile insurance both now and in the future. (*Id.* at ¶ 16.) Norman alleges the Insurers had a duty to properly investigate, train, and supervise Willis (*id.* at ¶ 8), that they failed to detect and stop her wrongdoing (*id.* at ¶ 17), and that they engaged in statutory unfair trade practices (*id.* at ¶¶ 19-23), common law unfair trade practices (*id.* at ¶¶ 24-28), conversion (*id.* at ¶¶ 29-32), fraud (*id.* at ¶¶ 33-41), and negligent misrepresentation (*id.* at ¶¶ 42-48).

During the entire period of Willis' alleged wrongdoing, the Insurers' relationship with Willis and Southern Risk was established and governed solely by contract, namely a 2010 Agency Agreement between Montgomery and Southern Risk. (Ex. A.)¹ Specifically, on or around April 1, 2010, Montgomery, acting through Liberty Mutual, signed and sent an Agency Agreement to Southern Risk. (*See* Ex. B.) This Agreement contained an arbitration provision. (*Id.* at ¶ 12.) The addendum with the Agreement noted that it replaced all prior agreements between the Insurers and Southern Risk. (*See id.*, Montgomery Addendum at 1-2 (stating that the Addendum and Agreement constitute the entire Agreement between the insurer and Southern Risk and replace all previous agreements, whether written or oral, between the insurer and the agency).)

THE ARBITRATION AGREEMENT

As noted above, the 2010 Agency Agreement between Liberty Mutual, acting for Montgomery, and Southern Risk replaced and superseded any prior agreements between

¹ Because Peerless is a member of the Montgomery Insurance division of Liberty Mutual, any of Peerless' dealings with Southern Risk, Willis, or Assure Alliance would only be pursuant to and governed by the terms of Liberty Mutual/Montgomery's 2007 and 2010 Agency Agreements with Assure Alliance and Southern Risk. *See* www.montgomery-ins.com/omapps/ContentServer?pagename=MontgomeryInsurance/Views/MontgomeryInsurance&ft=1&fid=2237825802125 (identifying Peerless as one of Montgomery's underwriting companies) (last visited October 14, 2013).

them, and thus the relevant arbitration provision is the one found in this Agreement. The 2010 Agreement requires the parties to attempt informal resolution when “any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance or nonperformance.” (Ex. A at ¶ 12.A.)²

If the disputing parties cannot informally resolve the dispute, it will be resolved by arbitrators who “have particular knowledge and experience with independent insurance agency/company issues” and who apply the American Arbitration Association’s (“AAA”) Commercial Arbitration Rules. (*Id.*) The arbitration will be conducted by a single arbitrator chosen impartially by the AAA unless the amount in controversy exceeds \$50,000, in which case either party may demand a three-arbitrator panel and each party may select one of the arbitrators. (*Id.* at ¶ 12.B.) The costs of the arbitration are to be borne equally by the parties, and each party is responsible for its own attorneys’ fees. (*Id.* at ¶ 12.C.)

ARGUMENT

Norman’s claims against the Insurers should be compelled to arbitration despite the fact that she did not personally sign the contracts containing the arbitration agreement. South Carolina courts have recognized that one who has not signed an arbitration agreement may nevertheless be bound by the agreement. *See Pearson v. Hilton Head Hospital*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). In such instances, the non-signatory may be bound on the basis of common law principles of contract and agency law such as estoppel. *Id.* at 289, 733 S.E.2d at 601 (quoting *Int’l Paper Co. v. Schwabedissen*

² The Insurers have been sued by Plaintiff Norman. Separately, the Insurers have been sued by Southern Risk. No effort was made by Norman or Southern Risk to informally resolve anything with The Insurers prior to taking formal actions and filing lawsuits. Hence, it is not possible to “informally” resolve anything *prior* to formal action, since formal action has already been taken against The Insurers.

Maschinen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000)). Here, just like in *Pearson*, the doctrine of equitable estoppel permits the Insurers to compel arbitration of Norman's claims because her claims against the Insurers are premised on the contract(s) containing the arbitration provision:

In the arbitration context, the doctrine 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 (quoting *Int'l Paper*, 206 F.3d at 418).

As explained below, the allegations of Norman's Complaint against the Insurers depend on the terms, authority, and obligations created and imposed by the Agency Agreement.

I. Norman's Complaint is premised on the Agency Agreement.

Each of Norman's allegations against the Insurers is premised on the Insurers' alleged rights or duties that would not exist but for the Agency Agreement. First, Norman alleges in the Complaint that the alleged wrongdoer, Willis, operated "under the direct supervision of" the Insurers. (Compl. at ¶ 2.) The supervisory authority, if any, belonging to the Insurers is grounded solely in the relevant Agency Agreement. Further, it is only pursuant to the Agency Agreement that Willis "is authorized to solicit and submit applications" for insurance from the Insurers. (See Ex. A at ¶ 1.B.)

Second, Norman alleges in the Complaint that the corporate defendants had "a legal duty to fully investigate and do full background research on" Willis. (Compl. at ¶ 8.) The Insurers' alleged ability to perform or have the agency perform a background check on Willis is also derived from the Agency Agreement. Specifically, the Agreement contemplates background checks and investigations of Southern Risk's

personnel, such as Willis. (See Ex. A at ¶ 2.F (requiring agency to assist insurer in completing background checks on agency personnel).) Similarly, it is the Agency Agreement that requires the agents and their employees to be properly licensed and credentialed. (See *id.* at ¶ 2.C (representing that all agency employees and subproducers have the requisite consents, authorizations licenses, certificates, and permits).) Thus, again, Norman's claims here are dependent upon the existence of the Agency Agreement.

Third, Norman alleges in the Complaint that the Insurers had "a legal duty to properly train and supervise" Willis. (Compl. at ¶ 8.) Yet again, this alleged duty, as far as it goes, is grounded in the Agency Agreement. (See Ex. A at ¶ 1.C ("Agency is only authorized to act as agent for Company and bind Company pursuant to written authority and guidelines furnished to Agency by Company.").)

Fourth, Norman alleges in the Complaint that all of Willis' wrongful acts were performed "with the express or implied permission of the other Defendants." (Compl. at ¶ 17.) As noted above, the only source of Willis' authority or permission to act in relation to the Insurers is derived from the Agency Agreement. In addition, the Agency Agreement expressly limits the permission given to Willis to the acts expressly permitted by the Agreements. (See Ex. A at at ¶¶ 1.C, 1.F, and 2.A.)

Finally, Norman alleges in the Complaint that the Insurers had the ability and duty to detect and stop Willis' wrongful acts, and that Willis' wrongful acts "could have been discovered and should have been discovered and stopped by the Defendants through reasonable direct supervision of Defendant Laura B. Willis' activities as well and through auditing computer programs which reveal fraud and/or misconduct of

agents and/or customers.” (Compl. at ¶ 17.) As noted above, any alleged ability by the Insurers to supervise Laura Willis exists, if at all, only via the Agency Agreements. In addition, the Insurers’ alleged ability to audit Willis’ work is provided solely pursuant to the Agency Agreements, which contemplate audits and other accounting devices. (See Ex. A at ¶¶ 6.C, 6.D, and 8.) Similarly, Willis’ and Southern Risk’s obligation to keep accurate records is an obligation imposed by the Agreement. (See *id.* at ¶ 15.A.)

In addition, Norman’s claims against the Insurers in turn lead to the Insurers’ rights to make a demand against the co-defendant Southern Risk for indemnification. (See *id.* at ¶ 7.B (requiring Southern Risk to indemnify the Insurers for any “liability, claims, losses, damages, costs, and expenses . . . arising out of or incurred by reason of any error or omission on the part of Agency, its directors, officers, agents, employees, affiliates or subproducers in placing business pursuant to or carrying out the terms and conditions of this Agreement”).) Norman’s claims against the Insurers are precisely the type of claims against which the agency must indemnify the Insurers and, pursuant to the Agency Agreement, this claim for indemnification is subject to arbitration. (*Id.* at ¶ 12.)

Because Norman’s allegations against the Insurers depend upon the terms, authority, and obligations created and imposed by the Agency Agreements, they fall within the broad scope of the Agency Agreement’s arbitration provision. The Agreement’s arbitration provision applies to “any dispute or disagreement [that] arises in connection with the interpretation of this Agreement, its performance or nonperformance.” (Ex. A at ¶ 12.A (emphasis added).) All of Norman’s claims against the Insurers are connected with the interpretation of the Insurers’ obligations under the

Agency Agreement and the alleged nonperformance of those obligations. Accordingly, the claims fall within the purview of the arbitration provision. See *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d at 213-14 (2013) (“A clause which provides for arbitration of all disputes ‘arising out of or relating to’ the contract is construed broadly” and is “capable of an expansive reach.”) (citations omitted); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603-04 (2010) (noting that because “[t]he policy of the United States and of South Carolina is to favor arbitration of disputes,” arbitration should generally be ordered, “[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute.”); see also *York v. Dodgeland of Columbia, Inc.*, __ S.C. __, __ S.E.2d __, 2013 WL 4734569, *13 (Ct. App. Sept. 4, 2013) (“[A] claim is within the scope of an arbitration clause that purports to cover all related disputes, so long as a significant relationship exists between the claim and the contract containing the arbitration agreement.”) (citing *Partain*, 386 S.C. at 493, 689 S.E.2d at 604).

In sum, Norman seeks to benefit, via the filing of a lawsuit, from the duties and responsibilities of the Insurers pursuant to the Agency Agreements. Having sought to benefit from some of the contracts’ provisions, she cannot avoid others.

II. South Carolina and other jurisdictions permit a defendant to compel arbitration of the claims of a plaintiff who was not a signatory to the arbitration agreement.

As the South Carolina Court of Appeals held in *Pearson*, a party may not argue that the lack of his signature on a contract precludes enforcement of the contract’s arbitration clause when his Complaint seeks the benefit of enforcing other provisions of

the same contract. *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601. Accordingly, Norman's claims should be compelled to arbitration.

Courts of other jurisdictions agree that a plaintiff who did not sign a contract but whose suit is premised on and seeks to enforce the contract's terms may not avoid the contract's arbitration clause. See *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005) (compelling non-signatory plaintiff to arbitration under equitable estoppel theory because "Mrs. Blinco may not rely upon the Note to establish her RESPA claims while avoiding her obligation under the Note to arbitrate such claims"), rev'd on other grounds by *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Flexi-Van Leasing Inc. v. Transp. Mut. Ins. Ass'n.*, 108 Fed. Appx. 35, 40 (3d Cir. 2004) ("[W]e have recognized that non-signatories to an arbitration agreement may be bound by that agreement through the application of traditional principles of contract and agency law." One such traditional principle, applicable in the arbitration context, is the principle that a third-party beneficiary is bound by the terms of a contract where its claim arises out of that contract."); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 838 (7th Cir. 1981) (holding that non-signatory plaintiff was equitably estopped from avoiding an arbitration agreement in a contract between defendant and a third party because the basis of the plaintiff's suit was that the defendant had breached the terms of that contract); *Carlin v. 3V, Inc.*, 928 S.W.2d 291 (Tex. Ct. App. 1996) (holding the defendant could compel arbitration of a non-signatory plaintiff's claims, which were premised on the contract containing an arbitration agreement).

III. The Federal Arbitration Act requires arbitration of this dispute.

In addition, the Federal Arbitration Act (FAA) governs enforcement of the arbitration agreement. In *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), the Supreme Court found that in enacting 9 U.S.C. § 2 of the FAA, Congress declared a national policy favoring arbitration and has "mandated the enforcement of arbitration agreements." Furthermore, the Supreme Court has held that the FAA preempts a state's arbitration statute with which it conflicts. See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). For the FAA to apply and displace the South Carolina Uniform Arbitration Act in this dispute, the contracts here must evidence a transaction involving interstate commerce. *Southland Corp.*, 465 U.S. at 10-11.

In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273 (1995), the United States Supreme Court held that for purposes of determining whether a written arbitration provision in a contract was a transaction "involving commerce" such that the FAA applied, the word "involving" was broad and the functional equivalent of "affecting commerce," which "normally signaled Congress' intent to exercise its Commerce Clause powers" in full.

Similarly here, the underlying agreements and alleged wrongful acts involve interstate commerce. The agreements each note that the Insurers are located outside of South Carolina, which is true, and which is alleged in the Complaint. In addition, some or all of the insurance premiums and resulting commissions that Norman alleged she was deprived of would have been sent out of or received from outside the State of South Carolina. Accordingly, because the arbitration agreement involves interstate commerce, it is therefore covered by the FAA.

CONCLUSION

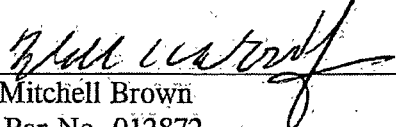
For the foregoing reasons, Montgomery and Peerless seek an Order providing the following:

- (1) Pursuant to 9 U.S.C. § 4 of the FAA, compelling the Plaintiff to arbitrate all claims against the Insurers in accordance with the Arbitration Agreement executed by the Plaintiff; and
- (2) Pursuant to 9 U.S.C. § 3 of the FAA, dismissing the claims against the Insurers with prejudice, or failing that, staying all proceedings in this action, including any further discovery, related to the claims against the Insurers until after the Plaintiff has submitted all claims to arbitration and the arbitration proceeding has been completed.

This motion is based on the South Carolina of Civil Procedure, the Federal Arbitration Act, applicable federal and state case law, and such other and further authorities and/or arguments as may be advanced in the memorandum in support of this motion and exhibits submitted to the Court prior to the hearing of this matter, and at any hearing.

[SIGNATURE PAGE ATTACHED]

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STATE OF SOUTH CAROLINA)
)
COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS

RICHARD WILSON,)

Civil Action No. 2012-CP-01-306

Plaintiff,)

vs.)

LAURA B. WILLIS and JESSE A.)
DANTICE, individually, and as agents)
and/or brokers for Southern Risk)
Insurance Services LLC, Travelers)
Casualty Insurance Company of America,)
Allied Property and Casualty Insurance)
Company, Peerless Insurance Company,)
Montgomery Mutual Insurance Company,)
Safeco Insurance Company of America,)
and Foremost Insurance Company,)
SOUTHERN RISK INSURANCE)
SERVICES, LLC, TRAVELERS)
CASUALTY INSURANCE COMPANY)
OF AMERICA, ALLIED PROPERTY)
AND CASUALTY INSURANCE)
COMPANY, PEERLESS INSURANCE)
COMPANY, MONTGOMERY)
MUTUAL INSURANCE COMPANY,)
SAFECO INSURANCE COMPANY OF)
AMERICA, AND FOREMOST)
INSURANCE COMPANY,)

Defendants.)

MOTION OF DEFENDANTS
MONTGOMERY INSURANCE
COMPANY, SAFECO INSURANCE
COMPANY, AND PEERLESS
INSURANCE COMPANY TO
COMPEL ARBITRATION AND
TO DISMISS CLAIMS

TRUE COPY
BY *[Signature]*
ABBEVILLE COUNTY CLERK OF COURT

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
OCT 21 11 16 AM '12
EMILY R. MONTGOMERY
CLERK OF COURT

Pursuant to the South Carolina Rules of Civil Procedure and the Federal Arbitration Act, and in response to Plaintiff's Complaint, Defendants Montgomery Insurance Company ("Montgomery"), Safeco Insurance Company ("Safeco"), and Peerless Insurance Company ("Peerless") (collectively "the Insurers"), by and through their undersigned attorneys, hereby move the Court for an Order compelling arbitration

and dismissing the claims against the Insurers.¹ Failing the above, the Court should compel arbitration and stay this matter.

This motion is based on the ground that each of Plaintiff Richard Wilson's claims against the Insurers in his Complaint is premised on the Insurers' alleged duties that would not exist but for the Insurers' agency agreement(s) with the agency, Southern Risk Insurance Services, LLC (the "Agency Agreement(s)"). Each of these Agency Agreements, however, contains broad, binding arbitration provisions. Wilson cannot rely on and seek to recover monies based on some provisions of the Agency Agreements while ignoring others such as the arbitration clause. Accordingly, because the arbitration provisions encompass the dispute at issue, this Court should compel arbitration and dismiss the action.

BACKGROUND

Wilson is the owner and operator of Richard W. Wilson Insurance Agency in Abbeville, South Carolina. (Compl. at ¶ 1.) He alleges that defendant Laura B. Willis was a licensed insurance agent operating under the direct supervision of the Insurers, the co-defendant insurers, the Southern Risk Insurance Agency ("Southern Risk"), and Jesse Dantice. (*Id.* at ¶ 2.) Wilson alleges that beginning in 2008, his business, which was a competitor to Laura Willis and Southern Risk, was hindered by Willis' tortious acts. (*Id.* at ¶¶ 12-13.) Wilson alleges the Insurers had a duty to properly investigate, train, and supervise Willis (*id.* at ¶ 11), that they failed to detect and stop her wrongdoing (*id.* at ¶ 13), and that they engaged in unfair trade practices (*id.* at ¶¶ 14-18), civil conspiracy

¹ The Insurers previously filed other merits-based motions to dismiss, but have withdrawn those without prejudice, depending on the outcome of the issues of arbitrability raised here.

(*id.* at ¶¶ 19-21), and tortious interference with contractual relationships (*id.* at ¶¶ 22-24).

During the entire period of Willis' alleged wrongdoing, the Insurers' relationship with Willis and Southern Risk was established and governed by four contracts:

- (1) A 2007 Limited Agency Agreement between Safeco and Southern Risk.
- (2) A 2007 "master" Agency Agreement between Safeco and Assure Alliance.
- (3) A 2007 Agency Agreement between Montgomery and Assure Alliance. (Ex. A.)
- (4) A 2010 Agency Agreement between Montgomery, Safeco, and Southern Risk. (Ex. B.)²

The first contract was entered on or around March 14, 2007, when Safeco entered a Limited Agency Agreement with Willis' employer Southern Risk. At that time, Southern Risk acted as a subproducer for the South Carolina Agent Network. On September 13, 2007, after the South Carolina Agent Network changed its name to Assure Alliance, Inc., Safeco renewed its "master" Agency Agreement with Assure Alliance. This master agreement, which contained an arbitration provision, expressly applied to Assure Alliance's subproducers and employees such as Southern Risk and Willis.

Similarly, Montgomery's relationship with Willis was grounded in contract. On August 15, 2007, Montgomery, acting through Liberty Mutual, entered an Agency Agreement with Assurance Alliance. (*See* Ex. A.) This Agreement contained an arbitration

² Because Peerless is a member of the Montgomery Insurance division of Liberty Mutual, any of Peerless' dealings with Southern Risk, Willis, or Assure Alliance would only be pursuant to and governed by the terms of Liberty Mutual/Montgomery's 2007 and 2010 Agency Agreements with Assure Alliance and Southern Risk. *See* www.montgomery-ins.com/omapps/ContentServer?pagename=MontgomeryInsurance/Views/MontgomeryInsurance&ft=1&fid=2237825802125 (identifying Peerless as one of Montgomery's underwriting companies) (last visited October 14, 2013).

agreement. (*Id.* at ¶ 12.) Subsequently, on or around April 1, 2010, Montgomery and Safeco, acting through Liberty Mutual, signed and sent an Agency Agreement directly to Southern Risk. (*See* Ex. B.) This Agreement contained an arbitration agreement. (*Id.* at ¶ 12.) The addenda with the Agreement noted that it replaced all prior agreements between the Insurers and Southern Risk. (*See id.*, Montgomery Addendum at 1-2 (stating that the Addendum and Agreement constitute the entire Agreement between the insurer and Southern Risk and replace all previous agreements, whether written or oral, between the insurer and the agency); *id.*, Safeco Addendum at 5 (same).)

THE ARBITRATION AGREEMENT

As noted above, the 2010 Agency Agreement between Liberty Mutual, acting for Montgomery and Safeco, and Southern Risk replaced and superseded any prior agreements between them, and thus the relevant arbitration provision is the one found in this Agreement. The 2010 Agreement requires the parties to attempt informal resolution when “any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance or nonperformance.” (Ex. B at ¶ 12.A.)³

If the disputing parties cannot informally resolve the dispute, it will be resolved by arbitrators who “have particular knowledge and experience with independent insurance agency/company issues” and who apply the American Arbitration Association’s (“AAA”) Commercial Arbitration Rules. (*Id.*) The arbitration will be conducted by a single arbitrator chosen impartially by the AAA unless the amount in controversy exceeds \$50,000, in which

³ The Insurers have been sued by Plaintiff Wilson. Separately, the Insurers have been sued by Southern Risk. No effort was made by Wilson or Southern Risk to informally resolve anything with the insurers prior to taking formal actions and filing lawsuits. Hence, it is not possible to “informally” resolve anything *prior* to formal action, since formal action has already been taken against the insurers.

case either party may demand a three-arbitrator panel and each party may select one of the arbitrators. (*Id.* at ¶ 12.B.) The costs of the arbitration are to be borne equally by the parties, and each party is responsible for its own attorneys' fees. (*Id.* at ¶ 12.C.)

ARGUMENT

Wilson's claims against the Insurers should be compelled to arbitration despite the fact that he did not personally sign the contracts containing the arbitration agreement. South Carolina courts have recognized that one who has not signed an arbitration agreement may nevertheless be bound by the agreement. *See Pearson v. Hilton Head Hospital*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). In such instances, the non-signatory may be bound on the basis of common law principles of contract and agency law such as estoppel. *Id.* at 289, 733 S.E.2d at 601 (quoting *Int'l Paper Co. v. Schwäbedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000)). Here, just like in *Pearson*, the doctrine of equitable estoppel permits the Insurers to compel arbitration of Wilson's claims because his claims against the Insurers are premised on the contract(s) containing the arbitration provision:

In the arbitration context, the doctrine 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 (quoting *Int'l Paper*, 206 F.3d at 418).

As explained below, the allegations of Wilson's Complaint against the Insurers depend on the terms, authority, and obligations created and imposed by the Agency Agreements.

I. Wilson's Complaint is premised on the Agency Agreements.

Each of Wilson's allegations against the Insurers is premised on the Insurers' alleged rights or duties that would not exist but for the Agency Agreement. First, Wilson alleges in the Complaint that the alleged wrongdoer, Willis, operated "under the direct supervision of" the Insurers. (Compl. at ¶ 2.) The supervisory authority, if any, belonging to the Insurers is grounded solely in the relevant Agency Agreements. Further, it is only pursuant to the Agency Agreements that Willis "is authorized to solicit and submit applications" for insurance from the Insurers. (See Ex. B at ¶ 1.B and Safeco Addendum ¶ 2 (noting that Southern Risk, "including its employees and subproducers, is authorized to solicit and submit business" for Safeco insurance products).)

Second, Wilson alleges in the Complaint that the corporate defendants had "a legal duty to fully investigate and do full background research on" Willis. (Compl. at ¶ 11.) The Insurers' alleged ability to perform or have the agency perform a background check on Willis is also derived from the Agency Agreements. Specifically, the Agreement contemplates background checks and investigations of Southern Risk's personnel, such as Willis. (See Ex. B at ¶ 2.F (requiring agency to assist insurer in completing background checks on agency personnel).) Similarly, it is the Agency Agreements that require the agents and their employees to be properly licensed and credentialed. (See Ex. B at ¶ 2.C (representing that all agency employees and subproducers have the requisite consents, authorizations licenses, certificates, and permits).) Thus, again, Wilson's claims here are dependent upon the existence of the Agency Agreements.

Third, Wilson alleges in the Complaint that the Insurers had "a legal duty to properly train and supervise" Willis. (Compl. at ¶ 11.) Yet again, this alleged duty, as far as it goes, is grounded in the Agency Agreements. (See Ex. B at ¶ 1.C ("Agency is only authorized to act as agent for Company and bind Company pursuant to written authority and guidelines furnished to Agency by Company."); Ex. B at Safeco Addendum ¶ 3 (limiting agency's and Willis' authority to situations outlined "in product underwriting and binding authority guides . . . or in other written instructions").)

Fourth, Wilson alleges in the Complaint that all of Willis' wrongful acts were performed "with the express or implied permission of the other Defendants." (Compl. at ¶ 13.) As noted above, the only source of Willis' authority or permission to act in relation to the Insurers is derived from the Agency Agreements. In addition, the Agency Agreements expressly limit the permission given to Willis to the acts expressly permitted by the Agreements. (See Ex. B at at ¶¶ 1.C, 1.F, and 2.A.)

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(See Ex. B at ¶¶ 6.C, 6.D, and 8.) Similarly, Willis' and Southern Risk's obligation to keep accurate records is an obligation imposed by the Agreement. (See Ex. B at ¶ 15.A.)

In addition, Wilson's claims against the Insurers in turn lead to the Insurers' rights to make a demand against the co-defendant Southern Risk for indemnification. (See Ex. B at ¶ 7.B. (requiring Southern Risk to indemnify the Insurers for any "liability, claims, losses, damages, costs, and expenses . . . arising out of or incurred by reason of any error or omission on the part of Agency, its directors, officers, agents, employees, affiliates or subproducers in placing business pursuant to or carrying out the terms and conditions of this Agreement").) Wilson's claims against the Insurers are precisely the type of claims against which the agency must indemnify the Insurers and, pursuant to the Agency Agreement, this claim for indemnification is subject to arbitration. (*Id.* at ¶ 12.)

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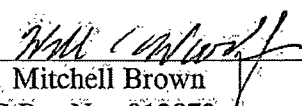
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Montgomery Mutual Insurance Company, and Safeco
Insurance Company of America.

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

BENJAMIN FRANKLIN WOFFORD,
JR. and REBECCA HAMMOND
WOFFORD,

Civil Action No. 2013-CP-01-045

Plaintiffs,

VS.

LAURA B. WILLIS, individually, and
as agent for Southern Risk Insurance
Services LLC and Safeco Insurance
Company, JESSE A. DANTICE,
individually and as broker/agent for
Southern Risk Insurance Services, LLC
and Safeco Insurance Company, and
SOUTHERN RISK INSURANCE
SERVICES, LLC, and SAFECO
INSURANCE COMPANY,

Defendants.

TRUE COPY
BY *[Signature]*
JULIE E. WOOD, CLERK OF COURT

MOTION OF DEFENDANT
SAFECO INSURANCE COMPANY
TO COMPEL ARBITRATION
AND TO DISMISS CLAIMS

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
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JULIE E. WOOD, CLERK OF COURT

Pursuant to the South Carolina Rules of Civil Procedure and the Federal Arbitration Act, and in response to Plaintiffs' Complaint, Defendant Safeco Insurance Company of America ("Safeco"), by and through its undersigned attorneys, hereby moves the Court for an Order compelling arbitration and dismissing the claims against Safeco. Failing the above, the Court should compel arbitration and stay this matter.

This motion is based on the ground that each of Plaintiffs Benjamin and Rebecca Woffords' claims against Safeco in their Complaint is premised on Safeco's alleged duties that would not exist but for Safeco's agency agreement with the agency, Southern Risk Insurance Services, LLC (the "Agency Agreement"). The Agency Agreement, however, contains a broad, binding arbitration provisions. The Woffords cannot rely on

and seek to recover monies based on some provisions of the Agency Agreement while ignoring others such as the arbitration clause. Accordingly, because the arbitration provisions encompass the dispute at issue, this Court should compel arbitration and dismiss the action.

BACKGROUND

The Woffords are residents of Spartanburg County, South Carolina. (Compl. at ¶ 1.) They allege that defendant Laura B. Willis was a licensed insurance agent operating under the direct supervision of Safeco, the Southern Risk Insurance Services agency ("Southern Risk"), and Jesse Dantice. (*Id.* at ¶ 2.) The Woffords allege that on or around April 26, 2012, they contacted Willis to make a claim for hail damage to the rental house they occupied. (*Id.* at ¶ 7.) They allege that Safeco's adjustment of the claim and the amount they were paid was erroneous due to Willis' alleged tortious acts. (*Id.* at ¶ 8.) The Woffords allege Safeco had a duty to properly investigate, train, and supervise Willis (*id.* at ¶ 6), failed to detect and stop her wrongdoing (*id.* at ¶ 19), and that Safeco breached its contract (*id.* at ¶¶ 7-8), acted in bad faith (*id.* at ¶¶ 9-11), violated S.C. Code Ann. § 38-59-40 (*id.* at ¶¶ 12-15), engaged in statutory unfair trade practices (*id.* at ¶¶ 16-21), common law unfair trade practices (*id.* at ¶¶ 22-25), conversion (*id.* at ¶¶ 26-23),¹ and fraud (*id.* at ¶¶ 24-26).

During the entire period of Willis' alleged wrongdoing, Safeco's relationship with Willis and Southern Risk was established and governed by three contracts:

- (1) A 2007 Limited Agency Agreement between Safeco and Southern Risk.

¹ The numbering of the Complaint's paragraphs suffers from some inaccuracies. See Compl. at ¶ 26 and following.

- (2) A 2007 "master" Agency Agreement between Safeco and Assure Alliance.
- (3) A 2010 Agency Agreement between Safeco and Southern Risk. (Ex. A.)

The first contract was entered on or around March 14, 2007, when Safeco entered a Limited Agency Agreement with Willis' employer Southern Risk. At that time, Southern Risk acted as a subproducer for the South Carolina Agent Network. On September 13, 2007, after the South Carolina Agent Network changed its name to Assure Alliance, Inc., Safeco renewed its "master" Agency Agreement with Assure Alliance. This master agreement, which contained an arbitration provision, expressly applied to Assure Alliance's subproducers and employees such as Southern Risk and Willis.

Subsequently, on or around April 1, 2010, Safeco, acting through Liberty Mutual, signed and sent an Agency Agreement directly to Southern Risk. (*See* Ex. A.) This Agreement contained an arbitration agreement. (*Id.* at ¶ 12.) The addenda with the Agreement noted that it replaced all prior agreements between Safeco and Southern Risk. (*See id.*, Safeco Addendum at 5 (stating that the Addendum and Agreement constitute the entire Agreement between the insurer and Southern Risk and replace all previous agreements, whether written or oral, between the insurer and the agency).)

THE ARBITRATION AGREEMENT

As noted above, the 2010 Agency Agreement between Liberty Mutual, acting for Safeco, and Southern Risk replaced and superseded any prior agreements between them, and thus the relevant arbitration provision is the one found in this Agreement. The 2010 Agreement requires the parties to attempt informal resolution when "any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance

or nonperformance.” (Ex. A at ¶ 12.A.)² If the disputing parties cannot informally resolve the dispute, it will be resolved by arbitrators who “have particular knowledge and experience with independent insurance agency/company issues” and who apply the American Arbitration Association’s (“AAA”) Commercial Arbitration Rules. (*Id.*) The arbitration will be conducted by a single arbitrator chosen impartially by the AAA unless the amount in controversy exceeds \$50,000, in which case either party may demand a three-arbitrator panel and each party may select one of the arbitrators. (*Id.* at ¶ 12.B.) The costs of the arbitration are to be borne equally by the parties, and each party is responsible for its own attorneys’ fees. (*Id.* at ¶ 12.C.)

ARGUMENT

The Woffords’ claims against Safeco should be compelled to arbitration despite the fact that they did not personally sign the contracts containing the arbitration agreement. South Carolina courts have recognized that one who has not signed an arbitration agreement may nevertheless be bound by the agreement. *See Pearson v. Hilton Head Hospital*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). In such instances, the non-signatory may be bound on the basis of common law principles of contract and agency law such as estoppel. *Id.* at 289, 733 S.E.2d at 601 (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000)). Here, just like in *Pearson*, the doctrine of equitable estoppel permits Safeco to compel arbitration of the

² Safeco has been sued by Plaintiff Woffords. Separately, Safeco has been sued by Southern Risk. No effort was made by the Woffords or Southern Risk to informally resolve anything with Safeco prior to taking formal actions and filing lawsuits. Hence, it is not possible to “informally” resolve anything *prior* to formal action, since formal action has already been taken against Safeco.

Woffords' claims because their claims against Safeco are premised on the contract containing the arbitration provision.

In the arbitration context, the doctrine 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 (quoting *Int'l Paper*, 206 F.3d at 418).

As explained below, the allegations of the Woffords' Complaint against Safeco depend on the terms, authority, and obligations created and imposed by the Agency Agreement.

I. The Woffords' Complaint is premised on the Agency Agreement.

Each of the Woffords' allegations against Safeco is premised on Safeco's alleged rights or duties that would not exist but for the Agency Agreement. First, the Woffords allege in the Complaint that the alleged wrongdoer, Willis, operated "under the direct supervision of" Safeco. (Compl. at ¶ 2.) The supervisory authority, if any, belonging to Safeco is grounded solely in the relevant Agency Agreements. Further, it is only pursuant to the Agency Agreement that Willis "is authorized to solicit and submit applications" for insurance from Safeco. (*See* Ex. A at ¶ 1.B.)

Second, the Woffords allege in the Complaint that Safeco had "a legal duty to fully investigate" Willis. (Compl. at ¶ 6.) Safeco's alleged ability to investigate, perform, or have the agency perform a background check on Willis is also derived from the Agency Agreement. Specifically, the Agreement contemplates background checks and investigations of Southern Risk's personnel, such as Willis. (*See* Ex. A at ¶ 2.F (requiring agency to assist insurer in completing background checks on agency personnel).) Similarly, it is the Agency Agreements that require the agents and their

employees to be properly licensed and credentialed. (*See id.* at ¶ 2.C (representing that all agency employees and subproducers have the requisite consents, authorizations, licenses, certificates, and permits).) Thus, again, the Woffords' claims here are dependent upon the existence of the Agency Agreement.

Third, the Woffords allege in the Complaint that Safeco had a legal duty to "properly train and supervise" Willis. (Compl. at ¶ 6.) Yet again, this alleged duty, as far as it goes, is grounded in the Agency Agreement. (*See* Ex. A at ¶ 1.C ("Agency is only authorized to act as agent for Company and bind Company pursuant to written authority and guidelines furnished to Agency by Company.").)

Fourth, the Woffords allege in the Complaint that all of Willis' wrongful acts were performed "with the express or implied permission of the other Defendants." (Second Amend. Compl. at ¶ 19.) As noted above, the only source of Willis' authority or permission to act in relation to Safeco is derived from the Agency Agreements. In addition, the Agency Agreement expressly limits the permission given to Willis to the acts expressly permitted by the Agreement. (*See* Ex. A at ¶¶ 1.C, 1.F, and 2.A.)

Finally, the Woffords allege in the Complaint that Safeco had the ability and duty to detect and stop Willis' wrongful acts, and that Willis' wrongful acts "could have been discovered and should have been discovered and stopped by the Defendants through reasonable direct supervision of Defendant Laura B. Willis' activities as well and through auditing computer programs which reveal fraud and/or misconduct of agents and/or customers." (Compl. at ¶ 19.) As noted above, any alleged ability by Safeco to supervise Laura Willis exists, if at all, only via the Agency Agreement. In addition, Safeco's alleged ability to audit Willis' work is provided solely pursuant to the

Agency Agreement, which contemplate audits and other accounting devices. (*See* Ex. A at ¶¶ 6.C, 6.D, and 8.) Similarly, Willis' and Southern Risk's obligation to keep accurate records is an obligation imposed by the Agreement. (*See id.* at ¶ 15.A.)

In addition, the Woffords' claims against Safeco in turn lead to Safeco's rights to make a demand against the co-defendant Southern Risk for indemnification. (*See id.* at ¶ 7.B (requiring Southern Risk to indemnify the Insurers for any "liability, claims, losses, damages, costs, and expenses . . . arising out of or incurred by reason of any error or omission on the part of Agency, its directors, officers, agents, employees, affiliates or subproducers in placing business pursuant to or carrying out the terms and conditions of this Agreement").) The Woffords' claims against Safeco are precisely the type of claims against which the agency must indemnify Safeco and, pursuant to the Agency Agreement, this claim for indemnification is subject to arbitration. (*Id.* at ¶ 12.)

Because the Woffords' allegations against Safeco depend upon the terms, authority, and obligations created and imposed by the Agency Agreement, they fall within the broad scope of the Agency Agreement's arbitration provision. The Agreement's arbitration provision applies to "*any* dispute or disagreement [that] arises *in connection with* the interpretation of this Agreement, its performance or nonperformance." (*Id.* at ¶ 12.A (emphasis added).) All of the Woffords' claims against Safeco are connected with the interpretation of Safeco's obligations under the Agency Agreement and the alleged nonperformance of those obligations. Accordingly, the claims fall within the purview of the arbitration provision. *See Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d at 213-14 (2013) ("A clause which provides for arbitration

of all disputes 'arising out of or relating to' the contract is construed broadly" and is "capable of an expansive reach.") (citations omitted); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603-04 (2010) (noting that because "[t]he policy of the United States and of South Carolina is to favor arbitration of disputes," arbitration should generally be ordered, "[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute."); *see also York v. Dodgeland of Columbia, Inc.*, __ S.C. __, __ S.E.2d __, 2013 WL 4734569, *13 (Ct. App. Sept. 4, 2013) ("[A] claim is within the scope of an arbitration clause that purports to cover all related disputes, so long as a significant relationship exists between the claim and the contract containing the arbitration agreement.") (citing *Partain*, 386 S.C. at 493, 689 S.E.2d at 604).

In sum, the Woffords seek to benefit, via the filing of a lawsuit, from the duties and responsibilities of Safeco pursuant to the Agency Agreements. Having sought to benefit from some of the contracts' provisions, they cannot avoid others.

II. South Carolina and other jurisdictions permit a defendant to compel arbitration of the claims of a plaintiff who was not a signatory to the arbitration agreement.

As the South Carolina Court of Appeals held in *Pearson*, a party may not argue that the lack of his signature on a contract precludes enforcement of the contract's arbitration clause when his Complaint seeks the benefit of enforcing other provisions of the same contract. *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601. Accordingly, the Woffords' claims should be compelled to arbitration.

Courts of other jurisdictions agree that a plaintiff who did not sign a contract but whose suit is premised on and seeks to enforce the contract's terms may not avoid the

contract's arbitration clause. *See Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005) (compelling non-signatory plaintiff to arbitration under equitable estoppel theory because "Mrs. Blinco may not rely upon the Note to establish her RESPA claims while avoiding her obligation under the Note to arbitrate such claims"), rev'd on other grounds by *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Flexi-Van Leasing Inc. v. Transp. Mut. Ins. Ass'n.*, 108 Fed. Appx. 35, 40 (3d Cir. 2004) ("[W]e have recognized that non-signatories to an arbitration agreement may be bound by that agreement through the application of 'traditional principles of contract and agency law.' One such traditional principle, applicable in the arbitration context, is the principle that a third-party beneficiary is bound by the terms of a contract where its claim arises out of that contract."); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 838 (7th Cir. 1981) (holding that non-signatory plaintiff was equitably estopped from avoiding an arbitration agreement in a contract between defendant and a third party because the basis of the plaintiff's suit was that the defendant had breached the terms of that contract); *Carlin v. 3V, Inc.*, 928 S.W.2d 291 (Tex. Ct. App. 1996) (holding the defendant could compel arbitration of a non-signatory plaintiff's claims, which were premised on the contract containing an arbitration agreement).

III. The Federal Arbitration Act requires arbitration of this dispute.

In addition, the Federal Arbitration Act (FAA) governs enforcement of the arbitration agreement. In *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), the Supreme Court found that in enacting 9 U.S.C. § 2 of the FAA, Congress declared a national policy favoring arbitration and has "mandated the enforcement of arbitration

agreements.” Furthermore, the Supreme Court has held that the FAA preempts a state’s arbitration statute with which it conflicts. *See Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). For the FAA to apply and displace the South Carolina Uniform Arbitration Act in this dispute, the contracts here must evidence a transaction involving interstate commerce. *Southland Corp.*, 465 U.S. at 10-11.

In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273 (1995), the United States Supreme Court held that for purposes of determining whether a written arbitration provision in a contract was a transaction “involving commerce” such that the FAA applied, the word “involving” was broad and the functional equivalent of “affecting commerce,” which “normally signaled Congress’ intent to exercise its Commerce Clause powers” in full.

Similarly here, the underlying agreements and alleged wrongful acts involve interstate commerce. The agreements each note that Safeco is located outside of South Carolina, which is true, and which is alleged in the Complaint. In addition, some or all of the insurance premiums the Woffords did or should have paid would have been sent out of or received from outside the State of South Carolina. Accordingly, because the arbitration agreement involves interstate commerce, it is therefore covered by the FAA.

CONCLUSION

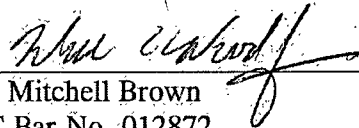
For the foregoing reasons, Safeco seeks an Order providing the following:

- (1) Pursuant to 9 U.S.C. § 4 of the FAA, compelling the Plaintiffs to arbitrate all claims against Safeco in accordance with the Arbitration Agreement executed by the Plaintiffs; and
- (2) Pursuant to 9 U.S.C. § 3 of the FAA, dismissing the claims against Safeco with prejudice, or failing that, staying all proceedings in this action, including any further discovery, related to the claims against

Safeco until after the Plaintiffs have submitted all claims to arbitration and the arbitration proceeding has been completed.

This motion is based on the South Carolina of Civil Procedure, the Federal Arbitration Act, applicable federal and state case law, and such other and further authorities and/or arguments as may be advanced in the memorandum in support of this motion and exhibits submitted to the Court prior to the hearing of this matter, and at any hearing.

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Attorneys for Defendant Safeco Insurance
Company.

STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

Robert W. Spires,

Plaintiff,

vs.

Laura B. Willis, individually, and as
agent for Southern Risk Insurance
Company and Montgomery Insurance
Company, Jesse A. Dantice,
individually and as broker/agent for
Southern Risk Insurance Services, LLC
and Montgomery Insurance Company,
Southern Risk Insurance Services,
LLC, and Montgomery Insurance
Company,

Defendants.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Civil Action No: 2012-CP-01-342

TRUE COPY

BY *[Signature]*
ABBEVILLE COUNTY CLERK OF COURT

MOTION OF DEFENDANT
MONTGOMERY INSURANCE
COMPANY TO COMPEL
ARBITRATION AND TO
DISMISS CLAIMS

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
OCT 21 AM 10:01
EMILY W. MCNICHOLAN
CLERK OF COURT

Pursuant to the South Carolina Rules of Civil Procedure and the Federal Arbitration Act, and in response to Plaintiff's Second Amended Complaint, Defendant Montgomery Insurance Company ("Montgomery"), by and through its undersigned attorneys, hereby move the Court for an Order compelling arbitration and dismissing the claims against Montgomery. Failing the above, the Court should compel arbitration and stay this matter.

This motion is based on the ground that each of Plaintiff Robert W. Spires claims against Montgomery in his Complaint is premised on Montgomery's alleged duties that would not exist but for Montgomery's agency agreement with the agency, Southern Risk Insurance Services, LLC (the "Agency Agreement"). The Agency Agreement, however, contains a broad, binding arbitration provisions. Spires cannot rely on and

seek to recover monies based on some provisions of the Agency Agreement while ignoring others such as the arbitration clause. Accordingly, because the arbitration provisions encompass the dispute at issue, this Court should compel arbitration and dismiss the action.

BACKGROUND

Spires is a resident of Abbeville County, South Carolina. (Second Amend. Compl. at ¶ 1.) He alleges that defendant Laura B. Willis was a licensed insurance agent operating under the direct supervision of Montgomery, the Southern Risk Insurance Agency ("Southern Risk"), and Jesse Dantice. (*Id.* at ¶ 2.) Spires alleges that around September 29, 2012, he contacted Willis to discuss purchasing insurance on his vehicle and motorcycle. (*Id.* at ¶ 7.) He alleges he paid Willis what he believed was the premium for the insurance policies. (*Id.*) He subsequently discovered that, due to Willis' alleged tortious acts, neither his vehicle nor his motorcycle were insured. (*Id.*) Spires alleges Montgomery had a duty to properly investigate, train, and supervise Willis (*id.* at ¶ 6), that it failed to detect and stop her wrongdoing (*id.* at ¶ 8), and that it engaged in statutory unfair trade practices (*id.* at ¶¶ 9-14), common law unfair trade practices (*id.* at ¶¶ 15-19), conversion (*id.* at ¶¶ 20-22), and fraud (*id.* at ¶¶ 23-25).

During the entire period of Willis' alleged wrongdoing, Montgomery's relationship with Willis and Southern Risk was established and governed by contract, namely a 2010 Agency Agreement between Montgomery, Safeco, and Southern Risk. (Ex. A.) Specifically, on or around April 1, 2010, Montgomery, acting through Liberty Mutual, signed and sent an Agency Agreement to Southern Risk. (*See id.*) This Agreement contained an arbitration agreement. (*Id.* at ¶ 12.) The addenda with the Agreement noted that it replaced all prior

agreements between Montgomery and Southern Risk. (*See id.*, Montgomery Addendum at 1-2 (stating that the Addendum and Agreement constitute the entire Agreement between the insurer and Southern Risk and replace all previous agreements, whether written or oral, between the insurer and the agency).)

THE ARBITRATION AGREEMENT

As noted above, the 2010 Agency Agreement between Liberty Mutual, acting for Montgomery, and Southern Risk replaced and superseded any prior agreements between them, and thus the relevant arbitration provision is the one found in this Agreement. The 2010 Agreement requires the parties to attempt informal resolution when “any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance or nonperformance.” (Ex. A at ¶ 12.A.)¹ If the disputing parties cannot informally resolve the dispute, it will be resolved by arbitrators who “have particular knowledge and experience with independent insurance agency/company issues” and who apply the American Arbitration Association’s (“AAA”) Commercial Arbitration Rules. (*Id.*) The arbitration will be conducted by a single arbitrator chosen impartially by the AAA unless the amount in controversy exceeds \$50,000, in which case either party may demand a three-arbitrator panel and each party may select one of the arbitrators. (*Id.* at ¶ 12.B.) The costs of the arbitration are to be borne equally by the parties, and each party is responsible for its own attorneys’ fees. (*Id.* at ¶ 12.C.)

¹ Montgomery has been sued by Plaintiff Spires. Separately, Montgomery has been sued by Southern Risk. No effort was made by Spires or Southern Risk to informally resolve anything with Montgomery prior to taking formal actions and filing lawsuits. Hence, it is not possible to “informally” resolve anything *prior* to formal action, since formal action has already been taken against Montgomery.

ARGUMENT

Spires' claims against Montgomery should be compelled to arbitration despite the fact that he did not personally sign the contracts containing the arbitration agreement. South Carolina courts have recognized that one who has not signed an arbitration agreement may nevertheless be bound by the agreement. *See Pearson v. Hilton Head Hospital*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). In such instances, the non-signatory may be bound on the basis of common law principles of contract and agency law such as estoppel. *Id.* at 289, 733 S.E.2d at 601 (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000)). Here, just like in *Pearson*, the doctrine of equitable estoppel permits Montgomery to compel arbitration of Spires' claims because his claims against Montgomery are premised on the contract(s) containing the arbitration provision:

In the arbitration context, the doctrine 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 (quoting *Int'l Paper*, 206 F.3d at 418). As explained below, the allegations of Spires' Complaint against Montgomery depend on the terms, authority, and obligations created and imposed by the Agency Agreement.

I. Spires' Complaint is premised on the Agency Agreement.

Each of Spires' allegations against Montgomery is premised on Montgomery's alleged rights or duties that would not exist but for the Agency Agreement. First, Spires alleges in the Complaint that the alleged wrongdoer, Willis, operated "under the direct supervision of" Montgomery. (Second Amend. Compl. at ¶ 2.) The supervisory

authority, if any, belonging to Montgomery is grounded solely in the relevant Agency Agreements. Further, it is only pursuant to the Agency Agreement that Willis "is authorized to solicit and submit applications" for insurance from Montgomery. (See Ex. A at ¶ 1.B.)

Second, Spires alleges in the Complaint that Montgomery had "a legal duty to fully investigate and do full background research on" Willis. (Second Amend. Compl. at ¶ 6.) Montgomery's alleged ability to perform or have the agency perform a background check on Willis is also derived from the Agency Agreement. Specifically, the Agreement contemplates background checks and investigations of Southern Risk's personnel, such as Willis. (See Ex. A at ¶ 2.F (requiring agency to assist insurer in completing background checks on agency personnel).) Similarly, it is the Agency Agreements that require the agents and their employees to be properly licensed and credentialed. (See *id.* at ¶ 2.C (representing that all agency employees and subproducers have the requisite consents, authorizations licenses, certificates, and permits).) Thus, again, Spires' claims here are dependent upon the existence of the Agency Agreement.

Third, Spires alleges in the Complaint that Montgomery had "a legal duty to properly train and supervise" Willis. (Second Amend. Compl. at ¶ 6.) Yet again, this alleged duty, as far as it goes, is grounded in the Agency Agreement. (See Ex. A at ¶ 1.C ("Agency is only authorized to act as agent for Company and bind Company pursuant to written authority and guidelines furnished to Agency by Company.").)

Fourth, Spires alleges in the Complaint that all of Willis' wrongful acts were performed "with the express or implied permission of the other Defendants." (Second

Amend. Compl. at ¶ 8.) As noted above, the only source of Willis' authority or permission to act in relation to Montgomery is derived from the Agency Agreements. In addition, the Agency Agreement expressly limits the permission given to Willis to the acts expressly permitted by the Agreement. (See Ex. A at at ¶¶ 1.C, 1.F, and 2.A.)

Finally, Spires alleges in the Complaint that Montgomery had the ability and duty to detect and stop Willis' wrongful acts, and that Willis' wrongful acts "could have been discovered and should have been discovered and stopped by the Defendants through reasonable direct supervision of Defendant Laura B. Willis' activities as well and through auditing computer programs which reveal fraud and/or misconduct of agents and/or customers." (Second Amend. Compl. at ¶ 8.) As noted above, any alleged ability by Montgomery to supervise Laura Willis exists, if at all, only via the Agency Agreement. In addition, Montgomery's alleged ability to audit Willis' work is provided solely pursuant to the Agency Agreement, which contemplate audits and other accounting devices. (See Ex. A at ¶¶ 6.C, 6.D, and 8.) Similarly, Willis' and Southern Risk's obligation to keep accurate records is an obligation imposed by the Agreement. (See *id.* at ¶ 15.A.)

In addition, Spires' claims against Montgomery in turn lead to Montgomery's rights to make a demand against the co-defendant Southern Risk for indemnification. (See *id.* at ¶ 7.B (requiring Southern Risk to indemnify the Insurers for any "liability, claims, losses, damages, costs, and expenses . . . arising out of or incurred by reason of any error or omission on the part of Agency, its directors, officers, agents, employees, affiliates or subproducers in placing business pursuant to or carrying out the terms and conditions of this Agreement").) Spires' claims against Montgomery are

precisely the type of claims against which the agency must indemnify Montgomery and, pursuant to the Agency Agreement, this claim for indemnification is subject to arbitration. (*Id.* at ¶ 12.)

Because Spires' allegations against Montgomery depend upon the terms, authority, and obligations created and imposed by the Agency Agreement, they fall within the broad scope of the Agency Agreement's arbitration provision. The Agreement's arbitration provision applies to "any dispute or disagreement [that] arises in connection with the interpretation of this Agreement, its performance or nonperformance." (*Id.* at ¶ 12.A (emphasis added).) All of Spires' claims against Montgomery are connected with the interpretation of Montgomery's obligations under the Agency Agreement and the alleged nonperformance of those obligations. Accordingly, the claims fall within the purview of the arbitration provision. See *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d at 213-14 (2013) ("A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly" and is "capable of an expansive reach.") (citations omitted); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603-04 (2010) (noting that because "[t]he policy of the United States and of South Carolina is to favor arbitration of disputes," arbitration should generally be ordered, "[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute."); see also *York v. Dodgeland of Columbia, Inc.*, __ S.C. __, __ S.E.2d __, 2013 WL 4734569, *13 (Ct. App. Sept. 4, 2013) ("[A] claim is within the scope of an arbitration clause that purports to cover all related disputes, so long as a

significant relationship exists between the claim and the contract containing the arbitration agreement.”) (citing *Partain*, 386 S.C. at 493, 689 S.E.2d at 604).

In sum, Spires seeks to benefit, via the filing of a lawsuit, from the duties and responsibilities of Montgomery pursuant to the Agency Agreements. Having sought to benefit from some of the contracts’ provisions, he cannot avoid others.

II. South Carolina and other jurisdictions permit a defendant to compel arbitration of the claims of a plaintiff who was not a signatory to the arbitration agreement.

As the South Carolina Court of Appeals held in *Pearson*, a party may not argue that the lack of his signature on a contract precludes enforcement of the contract’s arbitration clause when his Complaint seeks the benefit of enforcing other provisions of the same contract. *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601. Accordingly, Spires’ claims should be compelled to arbitration.

Courts of other jurisdictions agree that a plaintiff who did not sign a contract but whose suit is premised on and seeks to enforce the contract’s terms may not avoid the contract’s arbitration clause. See *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005) (compelling non-signatory plaintiff to arbitration under equitable estoppel theory because “Mrs. Blinco may not rely upon the Note to establish her RESPA claims while avoiding her obligation under the Note to arbitrate such claims”), rev’d on other grounds by *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Flexi-Van Leasing Inc. v. Transp. Mut. Ins. Ass’n.*, 108 Fed. Appx. 35, 40 (3d Cir. 2004) (“[W]e have recognized that non-signatories to an arbitration agreement may be bound by that agreement through the application of ‘traditional principles of contract and agency law.’ One such traditional principle, applicable in the arbitration context, is

the principle that a third-party beneficiary is bound by the terms of a contract where its claim arises out of that contract.”); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 838 (7th Cir. 1981) (holding that non-signatory plaintiff was equitably estopped from avoiding an arbitration agreement in a contract between defendant and a third party because the basis of the plaintiff’s suit was that the defendant had breached the terms of that contract); *Carlin v. 3V, Inc.*, 928 S.W.2d 291 (Tex. Ct. App. 1996) (holding the defendant could compel arbitration of a non-signatory plaintiff’s claims, which were premised on the contract containing an arbitration agreement).

III. The Federal Arbitration Act requires arbitration of this dispute.

In addition, the Federal Arbitration Act (FAA) governs enforcement of the arbitration agreement. In *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), the Supreme Court found that in enacting 9 U.S.C. § 2 of the FAA, Congress declared a national policy favoring arbitration and has “mandated the enforcement of arbitration agreements.” Furthermore, the Supreme Court has held that the FAA preempts a state’s arbitration statute with which it conflicts. See *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). For the FAA to apply and displace the South Carolina Uniform Arbitration Act in this dispute, the contracts here must evidence a transaction involving interstate commerce. *Southland Corp.*, 465 U.S. at 10-11.

In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273 (1995), the United States Supreme Court held that for purposes of determining whether a written arbitration provision in a contract was a transaction “involving commerce” such that the FAA applied, the word “involving” was broad and the functional

equivalent of "affecting commerce," which "normally signaled Congress' intent to exercise its Commerce Clause powers" in full.

Similarly here, the underlying agreements and alleged wrongful acts involve interstate commerce. The agreements each note that Montgomery is located outside of South Carolina, which is true, and which is alleged in the Complaint. In addition, some or all of the insurance premiums Spires did or should have paid would have been sent out of or received from outside the State of South Carolina. Accordingly, because the arbitration agreement involves interstate commerce, it is therefore covered by the FAA.

CONCLUSION

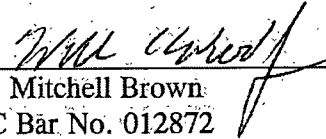
For the foregoing reasons, Montgomery seeks an Order providing the following:

- (1) Pursuant to 9 U.S.C. § 4 of the FAA, compelling the Plaintiff to arbitrate all claims against Montgomery in accordance with the Arbitration Agreement executed by the Plaintiff; and
- (2) Pursuant to 9 U.S.C. § 3 of the FAA, dismissing the claims against Montgomery with prejudice, or failing that, staying all proceedings in this action, including any further discovery, related to the claims against Montgomery until after the Plaintiff has submitted all claims to arbitration and the arbitration proceeding has been completed.

This motion is based on the South Carolina of Civil Procedure, the Federal Arbitration Act, applicable federal and state case law, and such other and further authorities and/or arguments as may be advanced in the memorandum in support of this motion and exhibits submitted to the Court prior to the hearing of this matter, and at any hearing.

[SIGNATURE PAGE ATTACHED]

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STATE OF SOUTH CAROLINA)

COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

Eugene P. Lawton, Jr.,)

Plaintiff,)

vs.)

Laura B. Willis, individually, and as)
agent for Southern Risk Insurance)
Services, LLC and Peerless Insurance)
Company, Jesse A. Dantice,)
individually and as broker/agent for)
Southern Risk Insurance Services, LLC)
and Peerless Insurance Company,)
Southern Risk Insurance Services,)
LLC, and Peerless Insurance)
Company,)

Defendants.)

Civil Action No. 2013-CP-01-124

TRUE COPY

BY *[Signature]*
ABBEVILLE COUNTY CLERK OF COURT

MOTION OF DEFENDANT

PEERLESS INSURANCE

COMPANY TO COMPEL

ARBITRATION AND TO

DISMISS CLAIMS

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

2013 NOV-1 10 54

FILED BY
CLERK OF COURT

Pursuant to the South Carolina Rules of Civil Procedure and the Federal Arbitration Act, and in response to Plaintiff's Complaint, Defendant Peerless Insurance Company ("Peerless"), by and through its undersigned attorneys, hereby moves the Court for an Order compelling arbitration and dismissing the claims against Peerless. Failing the above, the Court should compel arbitration and stay this matter.

This motion is based on the ground that each of Plaintiff Eugene P. Lawton, Jr.'s claims against Peerless in his Complaint is premised on Peerless' alleged duties that would not exist but for Peerless' agency agreement with the agency, Southern Risk Insurance Services, LLC (the "Agency Agreement"). The Agency Agreement, however, contains a broad, binding arbitration provisions. Lawton cannot rely on and seek to recover monies based on some provisions of the Agency Agreement while

ignoring others such as the arbitration clause. Accordingly, because the arbitration provisions encompass the dispute at issue, this Court should compel arbitration and dismiss the action.

BACKGROUND

Lawton is a resident of Abbeville County, South Carolina. (Compl. at ¶ 1.) He alleges that defendant Laura B. Willis was a licensed insurance agent operating under the direct supervision of Peerless, the Southern Risk Insurance Agency ("Southern Risk"), and Jesse Dantice. (*Id.* at ¶ 2.) Lawton alleges that on or around February 9, 2010, he contacted Willis to discuss purchasing homeowners' insurance and automobile insurance. (*Id.* at ¶ 7.) He alleges he paid Willis what he believed was the premium for the insurance policies. (*Id.*) He subsequently discovered that, due to Willis' alleged tortious acts, his vehicle was not insured. (*Id.* at ¶ 8.) Lawton alleges Peerless had a duty to properly investigate, train, and supervise Willis (*id.* at ¶ 6), that it failed to detect and stop her wrongdoing (*id.* at ¶ 9), and that it engaged in statutory unfair trade practices (*id.* at ¶¶ 10-14), common law unfair trade practices (*id.* at ¶¶ 15-19), conversion (*id.* at ¶¶ 20-22), and fraud (*id.* at ¶¶ 23-30).

During the entire period of Willis' alleged wrongdoing, Peerless' relationship with Willis and Southern Risk was established and governed by two contracts:

- (1) A 2007 Agency Agreement between Montgomery and Assure Alliance. (Ex. A.)
- (2) A 2010 Agency Agreement between Montgomery and Southern Risk. (Ex. B.)¹

¹ Because Peerless is a member of the Montgomery Insurance division of Liberty Mutual, any of Peerless' dealings with Southern Risk, Willis, or Assure Alliance would only be pursuant to and governed by the terms of Liberty Mutual/Montgomery's 2007 and 2010 Agency Agreements with Assure Alliance and Southern Risk. See

The first contract was entered on or around August 15, 2007, when Montgomery, acting through Liberty Mutual, entered an Agency Agreement with Assurance Alliance.² (See Ex. A.) This Agreement contained an arbitration agreement. (*Id.* at ¶ 12.) Subsequently, on or around April 1, 2010, Montgomery, acting through Liberty Mutual, signed and sent an Agency Agreement directly to Southern Risk. (See Ex. B.) This Agreement contained an arbitration agreement. (*Id.* at ¶ 12.) The addenda with the Agreement noted that it replaced all prior agreements between the Insurers and Southern Risk. (See *id.*, Montgomery Addendum at 1-2 (stating that the Addendum and Agreement constitute the entire Agreement between the insurer and Southern Risk and replace all previous agreements, whether written or oral, between the insurer and the agency).)

THE ARBITRATION AGREEMENT

As noted above, the 2010 Agency Agreement between Liberty Mutual, acting for Montgomery, and Southern Risk replaced and superseded any prior agreements between them, and thus the relevant arbitration provision is the one found in this Agreement. The 2010 Agreement requires the parties to attempt informal resolution when “any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance or nonperformance.” (Ex. B at ¶ 12.A.)³ If the disputing parties cannot informally resolve

www.montgomery-ins.com/omapps/ContentServer?pagename=MontgomeryInsurance/Views/MontgomeryInsurance&ft=1&fid=2237825802125 (identifying Peerless as one of Montgomery’s underwriting companies) (last visited October 14, 2013).

² At that time, Southern Risk acted as a subproducer for Assure Alliance.

³ Peerless has been sued by Plaintiff Lawton. Separately, Peerless has been sued by Southern Risk. No effort was made by Lawton or Southern Risk to informally resolve anything with Peerless prior to taking formal actions and filing lawsuits. Hence, it is

the dispute, it will be resolved by arbitrators who "have particular knowledge and experience with independent insurance agency/company issues" and who apply the American Arbitration Association's ("AAA") Commercial Arbitration Rules. (*Id.*) The arbitration will be conducted by a single arbitrator chosen impartially by the AAA unless the amount in controversy exceeds \$50,000, in which case either party may demand a three-arbitrator panel and each party may select one of the arbitrators. (*Id.* at ¶ 12.B.) The costs of the arbitration are to be borne equally by the parties, and each party is responsible for its own attorneys' fees. (*Id.* at ¶ 12.C.)

ARGUMENT

Lawton's claims against Peerless should be compelled to arbitration despite the fact that he did not personally sign the contracts containing the arbitration agreement. South Carolina courts have recognized that one who has not signed an arbitration agreement may nevertheless be bound by the agreement. See *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). In such instances, the non-signatory may be bound on the basis of common law principles of contract and agency law such as estoppel. *Id.* at 289, 733 S.E.2d at 601 (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000)). Here, just like in *Pearson*, the doctrine of equitable estoppel permits Peerless to compel arbitration of Lawton's claims because his claims against Peerless are premised on the contract containing the arbitration provision:

In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his

not possible to "informally" resolve anything *prior* to formal action, since formal action has already been taken against Peerless.

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 (quoting *Int'l Paper*, 206 F.3d at 418).

As explained below, the allegations of Lawton's Complaint against Peerless depend on the terms, authority, and obligations created and imposed by the Agency Agreement.

I. Lawton's Complaint is premised on the Agency Agreement.

Each of Lawton's allegations against Peerless is premised on Peerless' alleged rights or duties that would not exist but for the Agency Agreement. First, Lawton alleges in the Complaint that the alleged wrongdoer, Willis, operated "under the direct supervision of" Peerless. (Compl. at ¶ 2.) The supervisory authority, if any, belonging to Peerless is grounded solely in the relevant Agency Agreements. Further, it is only pursuant to the Agency Agreement that Willis "is authorized to solicit and submit applications" for insurance from Peerless. (See Ex. B at ¶ 1.B.)

Second, Lawton alleges in the Complaint that Peerless had "a legal duty to fully investigate" Willis. (Compl. at ¶ 6.) Peerless' alleged ability to investigate, perform, or have the agency perform a background check on Willis is also derived from the Agency Agreement. Specifically, the Agreement contemplates background checks and investigations of Southern Risk's personnel, such as Willis. (See Ex. B at ¶ 2.F (requiring agency to assist insurer in completing background checks on agency personnel).) Similarly, it is the Agency Agreements that require the agents and their employees to be properly licensed and credentialed. (See *id.* at ¶ 2.C (representing that all agency employees and subproducers have the requisite consents, authorizations

licenses, certificates, and permits).) Thus, again, Lawton's claims here are dependent upon the existence of the Agency Agreement.

Third, Lawton alleges in the Complaint that Peerless had a legal duty to "properly train and supervise" Willis. (Compl. at ¶ 6.) Yet again, this alleged duty, as far as it goes, is grounded in the Agency Agreement. (See Ex. B at ¶ 1.C ("Agency is only authorized to act as agent for Company and bind Company pursuant to written authority and guidelines furnished to Agency by Company.").)

Fourth, Lawton alleges in the Complaint that all of Willis' wrongful acts were performed "with the express or implied permission of the other Defendants." (Compl. at ¶ 9.) As noted above, the only source of Willis' authority or permission to act in relation to Peerless is derived from the Agency Agreements. In addition, the Agency Agreement expressly limits the permission given to Willis to the acts expressly permitted by the Agreement. (See Ex. B at at ¶¶ 1.C, 1.F, and 2.A.)

Finally, Lawton alleges in the Complaint that Peerless had the ability and duty to detect and stop Willis' wrongful acts, and that Willis' wrongful acts "could have been discovered and should have been discovered and stopped by the Defendants through reasonable direct supervision of Defendant Laura B. Willis' activities as well and through auditing computer programs which reveal fraud and/or misconduct of agents and/or customers." (Second Amend. Compl. at ¶ 9.) As noted above, any alleged ability by Peerless to supervise Laura Willis exists, if at all, only via the Agency Agreement. In addition, Peerless' alleged ability to audit Willis' work is provided solely pursuant to the Agency Agreement, which contemplate audits and other accounting devices. (See Ex. B at ¶¶ 6.C, 6.D, and 8.) Similarly, Willis' and Southern

Risk's obligation to keep accurate records is an obligation imposed by the Agreement. (See *id.* at ¶ 15.A.)

In addition, Lawton's claims against Peerless in turn lead to Peerless' rights to make a demand against the co-defendant Southern Risk for indemnification. (See *id.* at ¶ 7.B (requiring Southern Risk to indemnify the Insurers for any "liability, claims, losses, damages, costs, and expenses . . . arising out of or incurred by reason of any error or omission on the part of Agency, its directors, officers, agents, employees, affiliates or subproducers in placing business pursuant to or carrying out the terms and conditions of this Agreement").) Lawton's claims against Peerless are precisely the type of claims against which the agency must indemnify Peerless and, pursuant to the Agency Agreement, this claim for indemnification is subject to arbitration. (*Id.* at ¶ 12.)

Because Lawton's allegations against Peerless depend upon the terms, authority, and obligations created and imposed by the Agency Agreement, they fall within the broad scope of the Agency Agreement's arbitration provision. The Agreement's arbitration provision applies to "*any dispute or disagreement [that] arises in connection with the interpretation of this Agreement, its performance or nonperformance.*" (*Id.* at ¶ 12.A (emphasis added).) All of Lawton's claims against Peerless are connected with the interpretation of Peerless' obligations under the Agency Agreement and the alleged nonperformance of those obligations. Accordingly, the claims fall within the purview of the arbitration provision. See *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d at 213-14 (2013) ("A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly" and is "capable of an expansive reach.")

(citations omitted); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603-04 (2010) (noting that because “[t]he policy of the United States and of South Carolina is to favor arbitration of disputes,” arbitration should generally be ordered, “[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute.”); *see also York v. Dodgeland of Columbia, Inc.*, __ S.C. __, __ S.E.2d __, 2013 WL 4734569, *13 (Ct. App. Sept. 4, 2013) (“[A] claim is within the scope of an arbitration clause that purports to cover all related disputes, so long as a significant relationship exists between the claim and the contract containing the arbitration agreement.”) (citing *Partain*, 386 S.C. at 493, 689 S.E.2d at 604).

In sum, Lawton seeks to benefit, via the filing of a lawsuit, from the duties and responsibilities of Peerless pursuant to the Agency Agreements. Having sought to benefit from some of the contracts’ provisions, he cannot avoid others.

II. South Carolina and other jurisdictions permit a defendant to compel arbitration of the claims of a plaintiff who was not a signatory to the arbitration agreement.

As the South Carolina Court of Appeals held in *Pearson*, a party may not argue that the lack of his signature on a contract precludes enforcement of the contract’s arbitration clause when his Complaint seeks the benefit of enforcing other provisions of the same contract. *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601. Accordingly, Lawton’s claims should be compelled to arbitration.

Courts of other jurisdictions agree that a plaintiff who did not sign a contract but whose suit is premised on and seeks to enforce the contract’s terms may not avoid the contract’s arbitration clause. *See Blincó v. Green Tree Servicing LLC*, 400 F.3d 1308,

1312 (11th Cir. 2005) (compelling non-signatory plaintiff to arbitration under equitable estoppel theory because "Mrs. Blinco may not rely upon the Note to establish her RESPA claims while avoiding her obligation under the Note to arbitrate such claims"), rev'd on other grounds by *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Flexi-Van Leasing Inc. v. Transp. Mut. Ins. Ass'n.*, 108 Fed. Appx. 35, 40 (3d Cir. 2004) ("[W]e have recognized that non-signatories to an arbitration agreement may be bound by that agreement through the application of 'traditional principles of contract and agency law.' One such traditional principle, applicable in the arbitration context, is the principle that a third-party beneficiary is bound by the terms of a contract where its claim arises out of that contract."); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 838 (7th Cir. 1981) (holding that non-signatory plaintiff was equitably estopped from avoiding an arbitration agreement in a contract between defendant and a third party because the basis of the plaintiff's suit was that the defendant had breached the terms of that contract); *Carlin v. 3V, Inc.*, 928 S.W.2d 291 (Tex. Ct. App. 1996) (holding the defendant could compel arbitration of a non-signatory plaintiff's claims, which were premised on the contract containing an arbitration agreement).

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In addition, the Federal Arbitration Act (FAA) governs enforcement of the arbitration agreement. In *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), the Supreme Court found that in enacting 9 U.S.C. § 2 of the FAA, Congress declared a national policy favoring arbitration and has "mandated the enforcement of arbitration agreements." Furthermore, the Supreme Court has held that the FAA preempts a state's

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CONCLUSION

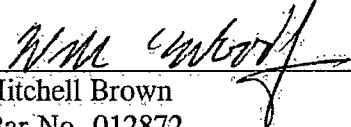
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- (1) Pursuant to 9 U.S.C. § 4 of the FAA, compelling the Plaintiff to arbitrate all claims against Peerless in accordance with the Arbitration Agreement executed by the Plaintiff; and
- (2) Pursuant to 9 U.S.C. § 3 of the FAA, dismissing the claims against Peerless with prejudice, or failing that, staying all proceedings in this action, including any further discovery, related to the claims against Peerless until after the Plaintiff has submitted all claims to arbitration and the arbitration proceeding has been completed.

This motion is based on the South Carolina of Civil Procedure, the Federal Arbitration Act, applicable federal and state case law, and such other and further authorities and/or arguments as may be advanced in the memorandum in support of this motion and exhibits submitted to the Court prior to the hearing of this matter, and at any hearing.

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Attorneys for Defendant Peerless Mutual Insurance
Company.

rec'd 1/28/14

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE) Civil Action Nos.

- 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-01-123
- 2013-CP-01-124
- 2013-CP-01-220
- 2013-CP-01-221

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

2013 JAN 21 10:09:19

EMILY Y MCRAHAN
CLERK OF COURT

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[Signature]
ABBEVILLE COUNTY CLERK OF COURT

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTIONS TO COMPEL ARBITRATION OF NON-SIGNATORY TO
ARBITRATION AGREEMENT**

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 ("Plaintiffs"), in opposition to the Motions to Compel Arbitration and Dismiss Claims filed by Defendants Montgomery Insurance Company, Safeco Insurance Company and Peerless Insurance Company ("Defendants"), submit this joint brief and would respectfully show unto the Court that the pending Motions to Compel Arbitration and Motions to Dismiss should be denied.

STATEMENT OF FACTS

Plaintiffs in the above-referenced companion cases filed suit in Abbeville County against two local insurance agents, Defendants Laura Willis and Jesse Dantice, and various insurance companies including the 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 were customers of Defendants Laura Willis and Southern Risk and insureds of Defendants Peerless, Montgomery and Safeco. Plaintiffs each sought insurance coverage from the Defendants and allege that although they were assured by Defendant Willis that the policies she offered were the least expensive and with the most coverage in the insurance market, Plaintiffs in fact were issued bogus insurance policies and left without coverage, despite paying premiums for the same.

Plaintiffs submit this brief in opposition to the instant motion on the grounds none of the Plaintiffs signed any arbitration agreement nor do they rely on the provisions of any contract between the Defendants and Southern Risk to support the allegations contained within the Complaints. As such, there is no basis to apply the doctrine of equitable estoppel to this case and force the Plaintiffs, injured consumers 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). “The determination whether a claim is subject to arbitration is subject to *de novo* review.” *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). “Nevertheless, a circuit court’s factual findings will *not* be reversed on appeal if any evidence reasonably supports the findings.” *Id.* (citing *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007)) (emphasis added); *see also Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010).

ARGUMENT

I. THE MATTER OF WHETHER THE COURT SHOULD FORCE THESE PARTIES TO ARBITRATE SUBJECT TO THE DEFENDANTS' CONTRACT IS NOT PROPERLY BEFORE THE COURT.

Rule 8, South Carolina Rules of Civil Procedure, clearly lists arbitration as an affirmative defense. Affirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading. *Wright v. Craft*, 372 S.C. 1, 20-21, 640 S.E.2d 486, 497 (Ct.App. 2006) (quoting Rule 12, SCRCP); *see also Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007). Here the Defendants fail to assert arbitration as an affirmative defense and instead seek to raise it at as a motion to compel after the majority of these cases had been pending approximately nine months at the time of filing the motion, with some pending since December 2012. The Court should deny the motion based upon this ground alone.

II. DEFENDANTS RELY ON AN *UNSIGNED*, INVALID CONTRACT IN SUPPORT OF THEIR MOTION IN VIOLATION OF THE STATUTE OF FRAUDS.

In support of their motion, Defendants rely exclusively on the "Liberty Mutual Agency Markets Agency Agreement" allegedly entered into by Defendants and Southern Risk. *See* Exhibit A to Defendants' Motion to Compel. This Agreement that is at the center of Defendants' claim for arbitration, however, is unsigned. Defendants have put forth no other evidence in support of their motion.

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.* Plaintiffs submit in the instant case, the Agreement at issue, and its provisions regarding arbitration, 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, Defendants have failed to meet their burden and this Court should deny the Motion to Compel Arbitration.

III. EVEN IF COMPELLING ARBITRATION ON A NON-SIGNATORY WERE PROPER IN THIS CASE, DEFENDANTS HAVE WAIVED THE ABILITY TO ASSERT SUCH A RIGHT.

"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 arbitrate; the question depends on the facts of each case." *Hyload, Inc.*, 308 S.C. at 280, 417 S.E.2d at 624.

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 Williams, Calhouns, Spires, Wiley, Bosler, Woffords, Garys, Wiltshire, Antoniaks and Lawton, these Plaintiffs submit all three relevant factors are met and therefore the Court should deny Defendants’ Motion 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. Plaintiffs Williams, Calhouns, Spires and Wiley filed the Summons & Complaint in their respective cases on December 13, 2012. On approximately April 4, 2013, the Defendants answered. On October 31, 2013, almost seven month after appearing and answering and after serving Plaintiffs with extensive discovery requests, Defendants filed the instant motion. These cases currently have been pending since December 2012, approximately thirteen months. Plaintiffs argue that thirteen months, or more than one year, is an unreasonable length of time for Defendants to seek arbitration, particularly given the nature of the instant case, the amount of discovery served, and the time devoted by counsel in establishing (or defending) the instant claims. Likewise, Plaintiffs Bosler, Woffords, Garys and Wiltshire filed their Complaints in February 2013. By April 2013, Defendants had served and filed answers. After these cases had been pending in excess of six months and after Defendants served Plaintiffs with extensive discovery requests, Defendants filed the instant motion. At the time of the hearing, these cases too will have been pending for almost one year. Additionally, Plaintiffs Antoniaks and Lawton join the instant argument because they filed Summons and Complaints in April 2013 and Defendants answered only a short time later in May 2013. Defendants waited until November 5 and

November 1, respectively, to file their Motions to Compel, after the cases had been pending for almost seven months.

In *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 668, 521 S.E.2d 749, 754-55 (Ct. App. 1999), the Court of Appeals affirmed the trial court's denial of plaintiff's motion to compel arbitration, finding plaintiff waived its right to arbitration given the two and half years in which the case was pending. The Court found by availing itself of the system for two and a half years before seeking to compel arbitration, the plaintiff waived its right. *Liberty*, 336 S.C. at 668, 521 S.E.2d at 754 (citing *Gateway Drywall & Decorating, Inc. v. Village Constr. Co.*, 395 N.E.2d 613, 616 (Ill. 1979) (finding "an arbitrable issue may in some circumstances be found to have been submitted to the court so as to waive a right to arbitration where a defendant has presented a factual issue to the court by filing an answer without asserting therein his right to arbitration.)). Other South Carolina Courts have held nineteen months, *see Evans v. Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct. App. 2003), a sufficient length of time to support waiver where the parties had exchanged discovery and conducted at least two depositions.

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 this case, Defendants have served Plaintiffs with extensive discovery requests, and Plaintiffs have spent months gathering documents to respond to such discovery. Additionally, Plaintiffs' counsel has begun consultation with expert witnesses and spent considerable amounts of time preparing these cases. To allow Defendants to seek arbitration this late in the game, when they have known all along that this defense was available to them, would be

highly prejudicial to the Plaintiffs and meets the second and third factors of the *Rhodes* test. For these reasons, Defendants' Motion to Compel Arbitration as to Plaintiffs Williams, Calhouns, Spires, Wiley, Bosler, Woffords, Garys, Wiltshire, Antoniaks and Lawton should be denied on the basis of waiver.

IV. PLAINTIFFS ARE NOT RELYING, IN ANY WAY, ON DEFENDANTS' CONTRACTS, WHICH CONTAIN AN ARBITRATION CLAUSE.

The fatal flaw in the Defendants' argument to compel arbitration on a non-signatory is their reliance on the assertion that the Plaintiffs' "claims against the Insurers are premised on the contract(s) containing the arbitration provision." Defendants' Memorandum, p. 5; *see also* pp. 6-9. **Nothing could be further from the truth.** (Emphasis added). The Plaintiffs' tort claims rely exclusively on S.C. Code § 38-43-10 to establish the Defendants' liability for the acts of agents Laura Willis and Jesse Dantice. As set forth in the respective Complaints, Defendants Laura Willis and Jesse Dantice are producers of insurance and therefore meet the definition of § 38-43-10 by engaging in the following conduct: selling, soliciting, or negotiating insurance on behalf of an insurer; taking or transmitting other than for himself an application for insurance or a policy of insurance to or from an insurer; advertising or otherwise giving notice that he will receive or transmit insurance applications or policies; receiving or delivering a policy of insurance of an insurer, receiving, collecting, or transmitting any premium of insurance; or performing any other act in the making of an insurance contract for or with an insurer, other than for himself.

Further, § 38-51-10 establishes that Defendants Willis and Dantice are agents of the Defendant insurance companies. Pursuant to this statute, "Any person who ... (h) shall do or perform any ... act or thing in the making or the consummating of any contract of insurance for or with any such [insurance] company, other than for himself ... whether any such acts

shall be done by an employee of such insurance company or at the instance or request of such insurance company, shall be held to be acting as the agent of such insurance company for which such act is done or risk is taken.” § 38-51-10(h). As the Court of Appeals has held, “[i]n the interpretation of statutes, [the] court must determine and give effect to the intention of the legislature.” *Republic Textile Equip. Co. of S.C., Inc. v. Aetna Ins. Co.*, 293 S.C. 381, 386, 360 S.E.2d 540, 543 (Ct.App.1987). “The purpose of statutes such as § 38-51-10 is to protect the insuring public.” *Id.* The Court further explained, “[this] statute encompasses two classes of persons: insurance company employees and those acting ‘at the instance or request of’ an insurer.” *Id.* at 386, 360 S.E.2d at 543; *see also Hiott v. Guar. Nat. Ins. Co.*, 329 S.C. 522, 530, 496 S.E.2d 417, 421 (Ct. App. 1997).

For purposes of this statute, Defendants Laura Willis and/or Jesse Dantice are agents of the Defendant insurance companies and as such, the companies are liable for the wrongful acts of their agents under the doctrine of respondeat superior. As is well-established in South Carolina, a principal is liable under the doctrine of respondeat superior for the acts of his agent acting within the scope of employment, even where the agent acts against the express instructions of his principal. *See S. Carolina Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 180, 348 S.E.2d 617, 622 (Ct. App. 1986) (holding if a master-servant relationship exists between the defendant and the tortfeasor, the law imputes the negligent act of the servant to the master). Defendants apparently concede this point at this stage of the case, because no argument has been presented that the Defendant insurance companies are not responsible for the acts of Laura Willis or Jesse Dantice. Instead, Defendants are attempting to escape liability by relying on an agency contract that has nothing to do with the Plaintiffs or the claims at issue in this litigation.

V. THE DEFENDANTS' NARROWLY WORDED ARBITRATION CLAUSE IS NOT RELATED IN ANY WAY TO THE ALLEGATIONS OF THE PLAINTIFFS' COMPLAINTS AND AS SUCH HAS NO APPLICATION TO THIS CASE.

Plaintiffs would submit that a "normal or broadly worded" arbitration clause between parties to an agreement would be substantially similar to the following: "The parties to this contract acknowledge and agree that all claims, demands, disputes, or controversies of every kind or nature that may arise between them concerning any of terms of this contract shall be settled by binding arbitration." (Emphasis added). Here the Defendants' agency agreement is a "narrowly worded" document, only compelling arbitration in the following instance: "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 A to Defendants' Memorandum, ¶ 12(A) p. 6 (emphasis added).

Whether an arbitration agreement is "broadly worded" or "narrowly worded" makes a big difference to the State and Federal Courts interpreting the contract provision. 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. 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). Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. *J.J. Ryan & Sons, Inc. v. Rhone*

Poulenc Textile, S.A., 863 F.2d 315, 319 (4th Cir.1988); *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. Thus, the scope of the clause does “not limit arbitration to the literal interpretation or performance of the contract [but] embraces every dispute between the parties having a significant relationship to the contract.” *J.J. Ryan*, 863 F.2d at 321. In applying this standard, this Court “must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim.” *Id.* at 319; *see also Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109-10, 739 S.E.2d 209, 213 (2013) and *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

Unlike broad arbitration clauses as analyzed above, our courts have held “narrowly worded” arbitration clauses, as found in the case at hand, are subject to strict scrutiny. Therefore, 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). 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 and therefore the contract and the arbitration agreement contained therein ‘is not susceptible of an interpretation that cover this dispute’ and therefore clearly does not apply to these cases.

Plaintiffs would also point out to the Court that prior to the filing of the instant motion, Plaintiffs had neither seen the contract at issue nor had any knowledge of its presence.

Defendants attached the contract to the instant motion and presented it to Plaintiffs for the first time as part of the Motion to Compel Arbitration.

VI. THE DOCTRINE OF EQUITABLE ESTOPPEL, WHICH COULD BE USED TO COMPEL A NON-SIGNATORY TO ARBITRATE, DOES NOT APPLY TO THE FACTS OF THIS CASE.

As discussed in a recent case regarding arbitration and equitable estoppel, *Zabinski v. Bright Acres Associates*, the South Carolina Supreme Court explained, “[t]he elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts.” *Zabinski*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001) (citing *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287 n. 2 (2000)). The court further explained, the “elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position.” *Id.* (citing *Mayes v. Paxton*, 313 S.C. 109, 437 S.E.2d 66 (1993)). “Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other.” *Id.* (citing *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 15, 532 S.E.2d 876, 878 (2000)).

Whether a party has agreed to submit a dispute to arbitration generally depends on the terms of the contract, if any, made between the parties to that dispute. It has, however, been accepted as a general principle that non-signatories to an arbitration agreement can be compelled to arbitrate their claims with a signatory in certain circumstances, such as where the non-signatory is suing directly under the agreement containing the arbitration clause or has directly benefited from such agreement. 43 A.L.R. Fed. 2d 275 (2010). In the case at

hand, the Plaintiffs are neither suing under the agency agreements nor have they benefitted in any way from such agreements.

In *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), our appeals court recently addressed the very 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)) (emphasis added). In these cases, unlike the factual pattern in *Pearson*, there is absolutely no evidence whatsoever that the Plaintiffs have consistently maintained that the provisions of the agency contract between Defendants and Southern Risk should be enforced to benefit them. In fact, as mentioned above, Plaintiffs 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.

Finally, 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. Plaintiffs do not seek to receive any benefits from the agency agreement (nor have they received any benefits from this agreement) and do not utilize its terms to support the allegations in the Complaint. Plaintiffs’ claims do not hinge on any alleged rights found in the agency agreement but instead are grounded in South Carolina law. *See R.J. Griffin*, 384 F.3d at 163-64 (holding where the plaintiff did not seek a direct benefit from a contract it did not sign but instead sought to recover under South Carolina common law, the doctrine of equitable estoppel is inapplicable to enforce an arbitration provision of such contract). In this case, as described above, Plaintiffs seek *no direct benefit* from the agency agreement; therefore equitable estoppel should not apply to enforce the agreement’s arbitration provision and Defendants’ Motion should be denied.

VII. EVEN IF ARBITRATION WERE OTHERWISE PROPER UNDER THE FACTS OF THIS CASE, THE COURT SHOULD STILL REFUSE TO ENFORCE THE ARBITRATION CLAUSE BECAUSE THE ALLEGED ACTIONS OF DEFENDANTS CONSTITUTE ILLEGAL AND OUTRAGEOUS ACTS UNFORESEEABLE TO A REASONABLE CONSUMER IN THE CONTEXT OF NORMAL BUSINESS DEALINGS.

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 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.

Relying on *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007), the *Partain* court quoted the S.C. Supreme Court in *Aiken*, noting “[b]ecause even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.” *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709. The *Aiken* court provided that it did not seek to exclude all intentional torts from the scope of arbitration, but only “those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties.” *Id.* at 152, 644 S.E.2d at 709. After all, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Aiken*, 373 S.C. at 149, 644 S.E.2d at 708 (citations omitted). The Court found in *Partain* that the Plaintiff cannot be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct, and further held South Carolina Courts should not enforce an otherwise proper arbitration agreement where the claim presented was clearly not within the contemplation of the parties. *Partain*, 386 SC at 494, 689 S.E.2d at 605. The exact scenario has taken place here, and for this reason as well as each of the other grounds stated above, the Court should deny Defendants’ motion.

VIII. DEFENDANTS' MOTION SHOULD BE DENIED ON THE BASIS OF S.C. CODE ANN. § 15-48-10, WHICH SPECIFICALLY EXEMPTS ANY INSURED OR BENEFICIARY UNDER ANY INSURANCE POLICY FROM ARBITRATION.

South Carolina's Uniform Arbitration Act specifically exempts any insured under any insurance policy from being bound by arbitration provisions. S.C. Code Ann. § 15-48-10(b)(4). This section further exempts from arbitration "any claim arising out of personal injury, based on contract or tort...." *Id.* The South Carolina Court of Appeals has held the purpose of § 15-48-10(b)(4) is to regulate the business of insurance. *Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 401 (Ct. App. 2001). Thus, this statutory section "reverse preempts" the FAA through the application of the McCarran-Ferguson Act and specifically exempts insurance arbitration clauses. *Id.* Each of the Plaintiffs were insureds under policies of insurance issued by Defendants. Therefore, the exception outlined in § 15-48-10(b)(4) applies to this action and demands Defendants' Motion to Compel Arbitration be denied.

CONCLUSION

For the reasons stated above the Defendants' motions should be denied.

Respectfully Submitted,

HITE AND STONE



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Abbeville, South Carolina
January 21, 2014

rec'd 1/28/14

TRUE COPY
BY: [Signature]
ABBEVILLE COUNTY CLERK OF COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE) Civil Action Nos. 2012-CP-01-306
2013-CP-01-094

**PLAINTIFFS RICHARD WILSON AND ROBERT SHIRLEY'S
MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO COMPEL
ARBITRATION ON NON-SIGNATORY TO ARBITRATION AGREEMENT**

Plaintiffs Richard Wilson and Robert Shirley ("Plaintiffs"), in opposition to the Motions to Compel Arbitration and Dismiss Claims filed by Defendants Montgomery Insurance Company, Safeco Insurance Company and Peerless Insurance Company ("Defendants"), submit this joint brief and would respectfully show unto the Court that the pending Motions to Compel Arbitration and Motions to Dismiss should be denied.

STATEMENT OF FACTS

Plaintiffs in the above-referenced companion cases filed suit in Abbeville County against two local insurance agents, Defendants Laura Willis and Jesse Dantice, and various insurance companies including the Defendants, alleging, among other causes of action, violations of the S.C. Unfair Trade Practices Act, common law unfair trade practices, and civil conspiracy. Plaintiffs Richard Wilson and Robert Shirley ground their Complaints on the fact the Defendants engaged in illegal underwriting practices, effectively prohibiting Plaintiffs from competing in the local insurance market.

Plaintiff Wilson initially filed suit on November 1, 2012. On approximately January 16, 2013, Defendants Montgomery, Safeco and Peerless filed a Motion for Judgment on the Pleadings and an Answer to Wilson's Complaint. The Answer did not include arbitration as an affirmative defense to Wilson's causes of action. On February 13, 2013, Plaintiff Wilson filed an Amended Summons and Complaint, to which Defendants Montgomery, Safeco and Peerless answered on March 15, 2013, again omitting arbitration as an affirmative defense.

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COUNTY OF ABBEVILLE

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The parties have served and answered initial discovery requests. The Court entered a Confidentiality Order on August 9, 2013, and Defendants filed the instant motion on October 31, 2013, almost a full year after the filing of Plaintiff's initial Complaint.

Plaintiff Shirley initially filed suit on March 19, 2013. On August 28, 2013, Plaintiff Shirley filed an Amended Complaint, adding Defendants Montgomery, Safeco and Peerless. These Defendants filed an Answer around October 15, 2013. Defendants did not raise arbitration as an affirmative defense. Shortly after filing their Answer, Defendants filed the instant Motion to Compel Arbitration and Dismiss Claims.

Plaintiffs submit this brief in opposition to the instant motion on the grounds neither Plaintiff signed any arbitration agreement nor do they rely on the provisions of any contract between the Defendants and Southern Risk to support the allegations contained within the Complaints. As such, there is no basis to apply the doctrine of equitable estoppel to this case and force the Plaintiffs 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). "The determination whether a claim is subject to arbitration is subject to *de novo* review." *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* (citing *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007)); see also *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010).

ARGUMENT

I. THE MATTER OF WHETHER THE COURT SHOULD FORCE THESE PARTIES TO ARBITRATE SUBJECT TO THE DEFENDANTS' CONTRACT IS NOT PROPERLY BEFORE THE COURT.

Rule 8, South Carolina Rules of Civil Procedure, clearly lists arbitration as an affirmative defense. Affirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading. *Wright v. Craft*, 372 S.C. 1, 20–21, 640 S.E.2d 486, 497 (Ct.App. 2006) (quoting Rule 12, SCRCP); *see also Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007). Here the Defendants fail to assert arbitration as an affirmative defense and instead seek to raise it at as a motion to compel in the eleventh hour, after Plaintiff Wilson's case has been pending for 11 months and Plaintiff Shirley's case against the Defendants has been pending since August. The Court should deny the motion based upon this ground alone.

II. DEFENDANTS RELY ON AN *UNSIGNED*, INVALID CONTRACT IN SUPPORT OF THEIR MOTION IN VIOLATION OF THE STATUTE OF FRAUDS.

In support of their motion, Defendants rely exclusively on the "Liberty Mutual Agency Markets Agency Agreement" allegedly entered into by Defendants and Southern Risk. *See* Exhibit A to Defendants' Motion to Compel. This Agreement that is at the center of Defendants' claim for arbitration, however, is unsigned. Defendants have put forth no other evidence in support of their motion.

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.* Plaintiffs submit in the instant case, the Agreement at issue, and its provisions regarding arbitration, 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, Defendants have failed to meet their burden and this Court should deny the Motion to Compel Arbitration.

III. EVEN IF COMPELLING ARBITRATION ON A NON-SIGNATORY WERE PROPER IN THIS CASE, DEFENDANTS HAVE WAIVED ANY RIGHT TO ASSERT SUCH A RIGHT.

"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 arbitrate; the question depends on the facts of each case." *Hyload, Inc.*, 308 S.C. at 280, 417 S.E.2d at 624.

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 case of Plaintiff Richard Wilson, Plaintiff Wilson submits all three relevant factors are met and therefore the Court should deny Defendants’ Motion to Compel Arbitration.

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. Plaintiff Wilson filed this action in November 2012. Approximately 11 months later, and after answering the Complaint, serving and responding to extensive discovery, and filing a Motion for Judgment on the Pleadings and/or Motion to Dismiss, Defendants filed the Motion to Compel Arbitration. Eleven months is an unreasonable length of time to seek arbitration, particularly given the nature of the instant case, the extensive amount of documents produced in discovery, and the time devoted by counsel in establishing (or defending) the instant claims. In *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 668, 521 S.E.2d 749, 754-55 (Ct. App. 1999), the Court of Appeals affirmed the trial court’s denial of plaintiff’s motion to compel arbitration, finding plaintiff waived its right to arbitration given the two and half years in which the case was pending. The Court found by availing itself of the system for two and a half years before seeking to compel arbitration, the plaintiff waived its right. *Liberty*, 336 S.C. at 668, 521 S.E.2d at 754 (citing *Gateway Drywall & Decorating, Inc. v. Village Constr. Co.*, 395 N.E.2d 613, 616 (Ill. 1979) (finding “an arbitrable issue may in some circumstances be found to have been submitted to the court so as to waive a right to arbitration where a defendant has presented a factual issue to the court by filing an answer without asserting therein his right to arbitration.)). Other South Carolina Courts have held nineteen months, see *Evans v. Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct. App.

2003), a sufficient length of time to support waiver where the parties had exchanged discovery and conducted at least two depositions.

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 this case, the parties have asked and answered extensive discovery requests, sought the Court’s assistance in entering a Confidentiality Order, circulated a proposed Scheduling Order, scheduled the deposition of Plaintiff Wilson and begun consultation with expert witnesses. To allow Defendants to seek arbitration this late in the game, when they have known all along that this defense was available to them, would be highly prejudicial to the Plaintiff and meets the second and third factors of the *Rhodes* test. For these reasons, Defendants’ Motion to Compel Arbitration as to Plaintiff Wilson should be denied on the basis of waiver.

IV. PLAINTIFFS ARE NOT RELYING, IN ANY WAY, ON DEFENDANTS’ CONTRACTS, WHICH CONTAIN AN ARBITRATION CLAUSE.

The fatal flaw in the Defendants’ argument to compel arbitration on a non-signatory is that the Plaintiffs’ “claims against the Insurers are premised on the contract(s) containing the arbitration provision.” Defendants’ Memorandum, p. 5; *see also* pp. 6-9. **Nothing could be further from the truth.** (Emphasis added). The Plaintiffs’ tort claims rely exclusively on S.C. Code § 38-43-10 to establish the Defendants’ liability for the acts of agents Laura Willis and Jesse Dantice. As set forth in the respective Complaints, Defendants Laura Willis and Jesse Dantice are producers of insurance and therefore meet the definition of § 38-43-10 by engaging in the following conduct: selling, soliciting, or negotiating insurance on behalf of an insurer; taking or transmitting other than for himself an application for insurance or a policy

of insurance to or from an insurer; advertising or otherwise giving notice that he will receive or transmit insurance applications or policies; receiving or delivering a policy of insurance of an insurer, receiving, collecting, or transmitting any premium of insurance; or performing any other act in the making of an insurance contract for or with an insurer, other than for himself.

Further, § 38-51-10 establishes that Defendants Willis and Dantice are agents of Defendant insurance companies. Pursuant to this statute, "Any person who ... (h) shall do or perform any ... act or thing in the making or the consummating of any contract of insurance for or with any such [insurance] company, other than for himself ... whether any such acts shall be done by an employee of such insurance company or at the instance or request of such insurance company, shall be held to be acting as the agent of such insurance company for which such act is done or risk is taken." § 38-51-10(h). As the Court of Appeals has held, "[i]n the interpretation of statutes, [the] court must determine and give effect to the intention of the legislature." *Republic Textile Equip. Co. of S.C., Inc. v. Aetna Ins. Co.*, 293 S.C. 381, 386, 360 S.E.2d 540, 543 (Ct.App.1987). "The purpose of statutes such as § 38-51-10 is to protect the insuring public." *Id.* The Court further explained, "[this] statute encompasses two classes of persons: insurance company employees and those acting 'at the instance or request of' an insurer." *Id.* at 386, 360 S.E.2d at 543; *see also Hiott v. Guar. Nat. Ins. Co.*, 329 S.C. 522, 530, 496 S.E.2d 417, 421 (Ct. App. 1997).

For purposes of this statute, Defendants Laura Willis and/or Jesse Dantice are agents of the Defendant insurance companies and as such, the companies are liable for the wrongful acts of their agents under the doctrine of respondeat superior. As is well-established in South Carolina, a principal is liable under the doctrine of respondeat superior for the acts of his agent acting within the scope of employment, even where the agent acts against the express

instructions of his principal. *See S. Carolina Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 180, 348 S.E.2d 617, 622 (Ct. App. 1986) (holding if a master-servant relationship exists between the defendant and the tortfeasor, the law imputes the negligent act of the servant to the master). Defendants apparently concede this point at this stage of the case, because no argument has been presented that the Defendant insurance companies are not responsible for the acts of Laura Willis or Jesse Dantice.

V. THE DEFENDANTS' NARROWLY WORDED ARBITRATION CLAUSE IS NOT RELATED IN ANY WAY TO THE ALLEGATIONS OF THE PLAINTIFFS' COMPLAINTS AND AS SUCH HAS NO APPLICATION TO THIS CASE.

Plaintiffs would submit that a "normal or broadly worded" arbitration clause between parties to an agreement would be substantially similar to the following: "The parties to this contract acknowledge and agree that all claims, demands, disputes, or controversies of every kind or nature that may arise between them concerning any of terms of this contract shall be settled by binding arbitration." (Emphasis added). Here the Defendants' agency agreements are "narrowly worded" documents, only compelling arbitration in the following instance: "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 A to Defendants' Memorandum, ¶ 12(A) p. 6 (emphasis added).

Whether an arbitration agreement is "broadly worded" or "narrowly worded" makes a big difference to the State and Federal Courts interpreting the contract provision. 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. 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). Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir.1988); *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. Thus, the scope of the clause does “not limit arbitration to the literal interpretation or performance of the contract [but] embraces every dispute between the parties having a significant relationship to the contract.” *J.J. Ryan*, 863 F.2d at 321. In applying this standard, this Court “must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim.” *Id.* at 319; *see also Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109-10, 739 S.E.2d 209, 213 (2013) and *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

Unlike broad arbitration clauses as analyzed above, our courts have held “narrowly worded” arbitration clauses, as found in the case at hand, are subject to strict scrutiny. Therefore, 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). 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 and therefore the contract and the arbitration agreement contained therein clearly do not apply to these cases.

Plaintiffs would also point out to the Court that prior to the filing of the instant motion, Plaintiffs had never seen this contract at issue nor had any knowledge of its presence. Defendants objected to answering Plaintiff Wilson's discovery request for this very contract and refused to produce the contract in discovery. Instead, Defendants attached the contract to their motion and presented it to Plaintiffs for the first time as part of the Motion to Compel Arbitration.

VI. THE DOCTRINE OF EQUITABLE ESTOPPEL, WHICH COULD BE USED TO COMPEL A NON-SIGNATORY TO ARBITRATE, DOES NOT APPLY TO THE FACTS OF THIS CASE.

As discussed in a recent case regarding arbitration and equitable estoppel, *Zabinski v. Bright Acres Associates*, the South Carolina Supreme Court explained, "[t]he elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts." *Zabinski*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001) (citing *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287 n. 2 (2000)). The court further explained, the "elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." *Id.* (citing *Mayes v. Paxton*, 313 S.C. 109, 437 S.E.2d 66 (1993)). "Estoppel cannot exist if the knowledge of both parties is equal

and nothing is done by one to mislead the other.” *Id.* (citing *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 15, 532 S.E.2d 876, 878 (2000)).

Whether a party has agreed to submit a dispute to arbitration generally depends on the terms of the contract, if any, made between the parties to that dispute. It has, however, been accepted as a general principle that non-signatories to an arbitration agreement can be compelled to arbitrate their claims with a signatory in certain circumstances, such as where the non-signatory is suing directly under the agreement containing the arbitration clause or has directly benefited from such agreement. 43 A.L.R. Fed. 2d 275 (2010). In the case at hand, the Plaintiffs are neither suing under the agency agreements nor have they benefitted in any way from such agreements.

In *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), our appeals court recently addressed the very 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)) (emphasis added).

In this case, unlike the factual pattern in *Pearson*, there is absolutely no evidence whatsoever in these cases that the Plaintiffs have consistently maintained that the provisions of the agency contract between Defendants and Southern Risk should be enforced to benefit them. In fact, as mentioned above, Plaintiffs had never even seen the instant contract prior to

the filing of Defendant' motion. 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. Therefore, Defendants' Motion should be denied.

CONCLUSION

For the reasons stated above the Defendants' motions should be denied.

Respectfully Submitted,

HITE AND STONE



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ATTORNEYS FOR PLAINTIFFS

Abbeville, South Carolina
January 24, 2014

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

Richard W. Wilson,) Civil Action No. 2012-CP-01-00306
)

Plaintiff,)
)

vs.)
)

Laura B. Willis and Jesse A. Dantice,)
individually and as agents and/or brokers)
for Southern Risk Insurance Company,)
Travelers Casualty Insurance Company)
of America, Allied Property & Casualty)
Insurance Company, Peerless Insurance)
Company, Montgomery Mutual)
Insurance Company, Safeco Insurance)
Company of America, and Foremost)
Insurance Company, Southern Risk)
Insurance Company, Travelers Casualty)
Insurance Company of America, Allied)
Property & Casualty Insurance)
Company, Peerless Insurance Company,)
Montgomery Mutual Insurance)
Company, Safeco Insurance Company of)
America, and Foremost Insurance)
Company,)

Defendants.)
)
)

TRUE COPY
BY *Emily McMahon*
ABBEVILLE COUNTY CLERK OF COURT

EMILY MCMAHAN
CLERK OF COURT

2014 FEB 11 AM 9:03

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

**REPLY IN SUPPORT OF THE MOTION TO COMPEL ARBITRATION BY DEFENDANTS
PEERLESS INSURANCE COMPANY, MONTGOMERY MUTUAL INSURANCE COMPANY,
THE NETHERLANDS INSURANCE COMPANY, SAFECO INSURANCE COMPANY OF
AMERICA, AND FIRST NATIONAL INSURANCE COMPANY OF AMERICA**

At the hearing on January 21, 2014, the Court received argument and briefing
on the Motions to Compel filed in fourteen lawsuits filed in Abbeville County and
involving alleged wrongdoing by Laura B. Willis, Jesse A. Dantice, Southern Risk

Insurance Services, LLC ("Southern Risk") and multiple insurers, including the moving insurance defendants. Plaintiffs submitted written arguments and made oral argument attacking, for the first time, the validity of the contracts containing the arbitration clause at issue in addition to contesting the arbitration clause's applicability to Plaintiffs in the various cases. The Court granted the moving parties, Peerless Insurance Company, Montgomery Mutual Insurance Company, The Netherlands Insurance Company, Safeco Insurance Company of America, and First National Insurance Company of America (collectively "the Companies"), defendants in all or some of the pending matters, the opportunity to respond to newly-raised issues.

ARGUMENTS

1. **S.C. Rule of Proc. 8 does not require that arbitration be pled as an affirmative defense.**

Plaintiffs' Argument I incorrectly states that arbitration must be pled as an affirmative defense under S.C. Rule of Proc. 8. Rule 8 states that only "arbitration *and award*" must be affirmatively pled. *Id.* (emphasis added). The rule only applies when there has been a completed arbitration proceeding that has resulted in an award to a party. *See Lee v. Grandcor Med. Syst. Inc.*, 702 F.Supp. 252, 254 (D. Colo. 1988).

Here, there has been no such proceeding or award. Rather, in their answers the Companies have raised the defense that the operative complaints fail to state a claim upon which relief may be granted against the Companies. That is so because all the claims are, for the several reasons argued in the initial motion and at the hearing, subject to arbitration, not adjudication in the Court of Common Pleas. The demand for arbitration is not a "matter constituting an avoidance or affirmative defense" of the

claimed liability as provided for in Rule 8, but rather an issue of the forum in which such claimed liability, if any, will be determined. Rule 8 does not apply by its terms to bar the Companies' motion to compel.

2. The Statute of Frauds does not apply.

Plaintiffs also raise the Statute of Frauds, S.C. Code Ann. §32-3-10, as barring the demand for arbitration because the contract containing the arbitration clause cannot be "performed within the space of one year from the making thereof." *Id.* Under South Carolina law, the statute has no application "when by the happening of a contingency the defendant may be required to perform his contract within a year." *Joseph v. Sears Roebuck & Co.*, 224 S.C. 105, 112, 77 S.E.2d 583, 586 (1953); *see also Weber v. Perry*, 201 S.C. 8, 21 S.E.2d 193, 194 (1942)("contracts of employment for an indefinite term or on a contingency" do not fall within the statute).

Here, all of the agreements governing the ability of Dantice and Southern Risk Insurance Services, LLC ("Southern Risk") to place insurance for the Companies were for indefinite terms and each was terminable at will upon as little as 90 days notice by either party, with or without cause, thus making the agreements fully performable within one year of their making. *See, e.g.*, Contract, Effective Date 4/1/2010 (attached to the original Motion to Compel as Exhibit B), p. 5, § 10(A)(1)(terminable immediately upon suspension of license by a public authority; § 10(A)(3)(terminable upon 90 days notice by either party). Consequently, the "one-year" provision of the statute is inapplicable and does not bar enforcement of the arbitration clause in any of the agreements that govern the relationship between the Companies, Dantice and Southern Risk.

3. **Dantice and Southern Risk were bound to contracts, both signed or unsigned, containing an arbitration clause requiring arbitration of any dispute regarding the "performance or nonperformance" of the agency agreement.**

At the hearing, Plaintiffs' counsel argued that the arbitration clause was unenforceable as to them because Dantice and Southern Risk had not signed the agreement effective April 1, 2010, containing the arbitration clause.¹ Plaintiffs' contention is incorrect.

There is no requirement under the Federal Arbitration Act ("FAA") that the written agreement containing an arbitration clause be signed to be enforceable. *See, e.g., Collie v. Wehr Dissolution Corp.*, 345 F.Supp.2d 555, 558-59 (M.D.N.C. 2004); *Clar Productions, Limited v. Isram Motion Pictures Production Services, Inc.*, 529 F.Supp. 381, 383 (S.D.N.Y. 1982). The arbitration agreement in this case is enforceable where, as in this case, Dantice and Southern Risk continually operated under both signed and unsigned agreements with the Companies containing a written arbitration requirement. The parties received the benefits provided by such agreements and, thus are bound in equity and good faith to all the terms of the agreements, including the arbitration clause.

Because of Plaintiffs' challenge to enforceability of the contract, a more detailed history of the relationship between the Companies, Dantice and Southern Risk is set forth with accompanying exhibits. South Carolina Agents Network, Inc. ("SCAN") was incorporated on January 19, 2001. It was originally known as SIA of South

¹ The Companies' original Motion to Compel and oral argument addressed why the arbitration clause of the contracts governing the relationship between the Companies, Dantice, and Southern Risk applied to Plaintiffs as non-signatories to those agreements. Those arguments are not repeated in this reply.

Carolina, Inc. *See* Exhibit C², S.C. Secretary of State online corporate database, <http://www.scsos.com/>; search terms “South Carolina Agent Network” and “AssureAlliance,” last visited 2/3/14. On July 20, 2007, SCAN changed its name to AssureAlliance, Inc.³ *See Id.*

The Montgomery companies entered into a master agency agreement with SCAN on December 1, 2003, as subsequently amended. A copy of the relevant portions of the agreement is attached as Exhibit D. The 12/1/2003 agreement applied to sub-agents or producers working for or through SCAN as a master agent. *See Id.*, pp. 1 of 6, ¶ 1.F, 5 of 6, ¶ 13.E.

The Safeco Companies entered into an agency agreement with SCAN on December 15, 2006. A copy of the relevant portions of the agreement are attached as Exhibit E. The 12/15/2006 agreement authorized the use of subagents or producers under SCAN to write business under the agreement. *See Id.*, p. 3, ¶ 3.6.

Southern Risk Insurance Services, LLC was formed on May 17, 2004. *See* Exhibit F, S.C. Secretary of State online corporate database, <http://www.scsos.com/>; search term “Southern Risk,” last visited 2/3/2014. Southern Risk’s agency license was effective as of February 7, 2007. *See* Exhibit G, S.C. Dept. of Ins. on-line database,

² Exhibits C through K in support of the Motion to Compel are attached to his reply. Exhibits A and B were previously produced with the motion.

³ Throughout the remainder of this reply SCAN and AssureAlliance are used interchangeably to refer to the company that entered into master agency agreements with defendants Montgomery Mutual Insurance Company, Peerless Insurance Company, and The Netherlands Insurance Company (hereafter “the Montgomery Companies”) and defendants Safeco Insurance Company of America and First National Insurance Company of America (hereafter “the Safeco Companies”). The Montgomery Companies and Safeco Companies are now owned by members of and are part of the Liberty Mutual group of insurance companies.

<https://online.doi.sc.gov/Eng/Public/Queries/AgencyLicSrch.aspx>, search term

“Southern Risk”, last searched 2/3/2014.

Southern Risk and Dantice became agencies or sub-agents/producers under SCAN. See Exhibits J & K. According to the S.C. Department of Insurance online database, Dantice was authorized to write insurance business for Safeco Companies effective March 22, 2007, and with Montgomery Companies effective October 6, 2008.⁴

The Safeco Companies utilized a specific written agreement titled “Safeco Limited Agency Appointment and Agreement” to memorialize Southern Risk’s and Dantice’s status as “Agent for the limited purpose of placing Safeco insurance products in the name of SOUTH CAROLINA AGENT NTWRK [sic] INC.” See Exhibit J. The master agency agreements between the Safeco Companies and Montgomery Companies under which Dantice and Southern Risk operated through SCAN or AssureAlliance were periodically renewed, including after the Liberty Mutual group of insurance companies acquired the Montgomery Companies and the Safeco Companies. See Exhibit I.⁵

Finally, Liberty Mutual sent to Dantice and Southern Risk the Liberty Mutual Agency Corporation Agency Agreement previously produced with the Motion to Compel (Exhibit B) which contained addenda permitting Dantice and Southern Risk to continue placing insurance for the Montgomery Companies and the Safeco Companies. Though Liberty Mutual has to date only located an unsigned version of this document,

⁴ See Exhibit H, S.C. Dept. of Ins. on-line database, <https://online.doi.sc.gov/Eng/Public/Queries/IndvdlLicSrch.aspx>, search term “Dantice”, last visited 2/3/2014.

⁵ One of these renewal agreements was previously attached as Exhibit A to the original Motion to Compel.

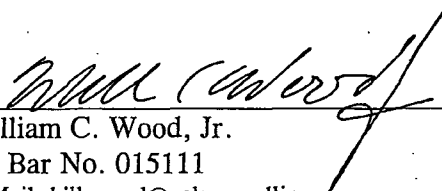
the agreement contained the same arbitration terms that had governed the privilege of Dantice and Southern Risk to place insurance for the Montgomery Companies and Safeco Companies since the inception of their relationship through SCAN/AssureAlliance.

Until the agency relationship was terminated in November 2012 (*See Berry Affidavit (Ex. 3)*), Dantice, Southern Risk, and the Montgomery and Safeco Companies operated under the terms of the written agreements which contained the arbitration clause at issue. Each was bound to the terms of the agreement, both those terms that benefited the respective parties and those, like the arbitration agreement, imposing obligations upon the parties resulting from the relationship. Given the long-standing, multi-year relationship between the Montgomery and Safeco Companies, Dantice, and Southern Risk, the lack of signature on the agreement effective 4/1/2010 is not an impediment under the Federal Arbitration Act to the enforcement of the arbitration provision contained in the agreement against Dantice and Southern Risk and, as argued in the initial motion and orally at the hearing, against Plaintiffs.

Conclusion

For the reasons set forth above and in the previously file motion and oral argument, the motion to compel arbitration should be granted.

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2/7, 2014

rec'd 2/20/2014
00350/679



Thomas E. Hite, Jr.* | Heather Hite Stone | Thomas E. Hite, III

February 17, 2014

VIA U.S. MAIL

The Honorable Judge Eugene C. Griffith, Jr.
Eighth Judicial Circuit
Post Office Box 375
Newberry, SC 29108

RE: C/A Nos.: 2012-CP-01-306,-340,-341,-342,-343
2013-CP-01-044,-045,-066,-073,-094,-123,-124,-220,-221

Dear Judge Griffith:

Enclosed, please find the original and one copy of the Proposed Order on Defendants' Motions to Compel Arbitration and Dismiss Claims in the above-referenced cases.

By copy of this letter, we are notifying opposing counsel of our correspondence with you.

Should you have any questions about the enclosed, or should the Court require any additional information, please do not hesitate to call.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas E. Hite, Jr.", written over a horizontal line.

Thomas E. Hite, Jr.
Attorney at Law

TEHjr./amh

Enclosure

cc: William C. ("Billy") Nicholson, III, Esquire
Lena Meredith, Esquire
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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

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 considering the oral arguments and briefs presented by the parties, 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

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 were customers of Defendants Laura Willis and the Southern Risk agency and insureds of the Defendants Peerless, Montgomery and Safeco. Plaintiffs each purchased insurance coverage from Defendant Willis and Southern Risk and allege that although they were assured by Willis that the policies her agency offered were the least expensive and with the most coverage in the insurance market, Plaintiffs in fact were issued bogus insurance policies and left without coverage. 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 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, injured consumers and business men 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). "The determination whether a claim is subject to arbitration is subject to *de novo* review." *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* (citing *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007)); *see also Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010).

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 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. The Defendants have submitted no other evidence to support the validity of the 2010 Agency Agreement. 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. 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)). Defendants rely heavily upon the *Pearson* case in support of their Motions to Compel. 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. See *R.J. Griffin*, 384 F.3d at 163-64 (holding where the plaintiff did not seek a direct benefit from a contract it did not sign but instead sought to recover under South Carolina common law, the doctrine of equitable estoppel is inapplicable to enforce an arbitration provision of such contract). In this case, as described above, Plaintiffs seek *no direct benefit* from the Agency Agreement; therefore equitable estoppel should not apply to enforce the agreement's arbitration provision and Defendants' Motions are denied.

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 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.

Relying on *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007), the *Partain* court quoted the S.C. Supreme Court in *Aiken*, noting "[b]ecause even the most broadly-worded arbitration agreements still have limits founded in

general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.” *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709. The *Aiken* court provided that it did not seek to exclude all intentional torts from the scope of arbitration, but only “those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties.” *Id.* at 152, 644 S.E.2d at 709. After all, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Aiken*, 373 S.C. at 149, 644 S.E.2d at 708 (citations omitted). The Court found in *Partain* that the plaintiff cannot be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct, and further held South Carolina courts should not enforce an otherwise proper arbitration agreement where the claim presented was clearly not within the contemplation of the parties. *Partain*, 386 SC at 494, 689 S.E.2d at 605.

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. S.C. Code Ann. § 15-48-10 Exempts Insureds from Arbitration Provisions

South Carolina’s Uniform Arbitration Act specifically exempts any insured under any insurance policy from being bound by arbitration provisions. S.C. Code Ann. § 15-48-10(b)(4). This section further exempts from arbitration “any claim arising out of personal

injury, based on contract or tort....” *Id.* The South Carolina Court of Appeals has held the purpose of § 15-48-10(b)(4) is to regulate the business of insurance. *Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 401 (Ct. App. 2001). Thus, this statutory section “reverse preempts” the Federal Arbitration Act through the application of the McCarran-Ferguson Act and specifically exempts insurance arbitration clauses. *Id.* In this case, the Insured Plaintiffs filed these actions as insureds under policies of insurance issued by Defendants. Therefore, this Court finds the exception outlined in § 15-48-10(b)(4) applies to this action and demands Defendants’ Motions to Compel Arbitration be denied as to the Insured Plaintiffs.

VI. 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

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. Plaintiffs argue that eleven months, almost one year, is an unreasonable length of time for Defendants to seek arbitration, particularly given the nature of the instant case, the amount of discovery served, and the time devoted by counsel in establishing (or defending) the instant claims. This Court agrees.

In *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999), the Court of Appeals affirmed the trial court’s denial of plaintiff’s motion to compel arbitration, finding plaintiff waived its right to arbitration given the two and half years in which the case was pending. The Court found by availing itself of the system for two and a half years before

seeking to compel arbitration, the plaintiff waived its right. *Liberty*, 336 S.C. at 668, 521 S.E.2d at 754 (citing *Gateway Drywall & Decorating, Inc. v. Village Constr. Co.*, 395 N.E.2d 613, 616 (Ill. 1979) (finding “an arbitrable issue may in some circumstances be found to have been submitted to the court so as to waive a right to arbitration where a defendant has presented a factual issue to the court by filing an answer without asserting therein his right to arbitration)). Other South Carolina Courts have held nineteen months, see *Evans v. Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct. App. 2003), a sufficient length of time to support waiver where the parties had exchanged discovery and conducted at least two depositions.

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.

The Honorable Eugene C. Griffith, Jr.
Eighth Judicial Circuit

Newberry, South Carolina
February ____, 2014

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February 21, 2014

Via Regular and Electronic Mail

The Honorable Eugene C. Griffith, Jr.
Eighth Judicial Circuit
P.O. Box 375
Newberry, SC 29108

Re: Proposed Order Denying the Motions to Compel Arbitration in Civil Action Nos., 2012-CP-01-306, -340, -341, -342, -343 and 2013-CP-01-044, -045, -066, -073, -094, -123, -124, -220, -221.

Dear Judge Griffith:

Peerless Insurance Company, Montgomery Mutual Insurance Company, The Netherlands Insurance Company, Safeco Insurance Company of America, and First National Insurance Company of America (collectively "the Companies"), submit the following comments and objections regarding the proposed order sent to the Court denying the Companies motion to compel arbitration in the several cases. The comments and objections are set forth as to each section of the proposed order.

1. Introductory Paragraph

The introductory paragraph states that the Companies seek to apply the arbitration provision to the Plaintiffs "as alleged third party beneficiaries of the contract." This is an incomplete characterization of the Companies' argument. It would be more accurate to state that the Companies sought to apply the arbitration provision on grounds set forth in the case of *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), which includes not only the ground of equitable estoppel, but other theories, such as "direct beneficiary," argued in the submissions of the Companies to the Court.

The introductory paragraph also incorrectly states that the court considered "the oral argument and briefs" presented by the parties. Your email indicated that you had considered all the "submissions" of the parties, not just the oral arguments and briefs.

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2. The Fact Statement

On page 2 in the carry-over paragraph, the proposed fact statement contains two sentences that are incorrect or incomplete in that the "facts" stated are disputed and the resolution of such facts is not necessary to the decision as to arbitration.

The proposed order states that all of the individual plaintiffs (except Wilson and Shirley) are insureds of the Companies. This statement is disputed in at least one matter (Gary), as, in that case, there is a question as to whether a policy was in effect at the time of the incident at issue.

Similarly, the next sentence states that all the individual plaintiffs allege or were issued "bogus insurance policies." This, again, is disputed and in some cases is simply not true. In some of the suits, it is not disputed that a policy or policies existed. The dispute is over coverage for a particular incident. In others, the allegation is that no policy was issued at all as opposed to a "bogus" policy.

We suggest that these two sentences be deleted from the proposed order as they are unnecessary to the resolution of the arbitration matter and improperly touch upon the merits of the various cases.

On page 2, in the last paragraph that carries over to page 3, the statement regarding the Companies' argument is incomplete. The Companies rely not only on the 2010 agreement mentioned, but on the series of agreements governing the relationship with Southern Risk and the course of dealing between the Companies and Southern Risk as set forth in the Companies' briefing and arguments.

Finally, on page 3, in the final paragraph, the proposed order refers to the plaintiffs as "injured" consumers and business men. This point is disputed. Characterization of the plaintiffs as injured is unnecessary to the resolution of the arbitration motion.

3. Standard of Review

The Companies agree with the first statement in this section. The remaining two sentences pertain to review upon appeal and are not, therefore, relevant to this initial decision as to arbitration.

4. Argument 1 – Validity of the Contract

On page 4, the opinion states that the Companies submitted "no other evidence to support the validity of the 2010 Agency Agreement." This statement is incorrect. The Companies submitted an affidavit and several exhibits to support applying the 2010 agreement. You specifically indicated that you reviewed all such submissions before ruling. In your ruling, you

The Honorable Eugene C. Griffith, Jr.
February 21, 2014
Page 3

disagreed that arbitration should be compelled on the basis of the 2010 agreement, but it was not based on the view that nothing but the agreement was submitted as evidence.

In the last paragraph, the order invokes the statute of frauds. The order fails to address the specific case law cited in the Companies' reply showing that where, as here, the agreement is terminable essentially at will upon notice, the statute of frauds has no application and the lack of signature is, therefore, irrelevant.

5. Argument 2 – Scope of the Arbitration Clause

The Companies disagree with the conclusion reached in this section and reincorporate their oral and written arguments as to the scope of the arbitration clause and its application to Plaintiffs.

6. Argument 3 – Estoppel Inapplicable

Again, the Companies disagree with the conclusion reached in this section and reincorporate their oral and written arguments as to the scope of the arbitration clause and its application to Plaintiffs.

7. Argument 4 – Outrageous Acts

The South Carolina Supreme Court has recently held that even "intentional infliction of emotional distress" claims are subject to arbitration. *See Landers v. Federal Deposit Ins. Co.*, 402 S.C. 100, 739 S.E.2d 209 (2013). This is in accord with recent United States Supreme Court jurisprudence, and thus the Companies submit it would be an error to deny the motion to compel arbitration on this basis.

8. Argument 5 – Reverse Preemption

This preemption ground was not raised in Plaintiffs opposition memorandum submitted to the Court. Counsel for the Companies have no recollection of its being raised orally at the hearing (a transcript of the hearing has not yet been obtained). Assuming, however, that the argument was raised to the Court, the proposed order is erroneous. This is true for several reasons.

First, by its terms, S.C. Code Ann. § 15-48-10(b) states that "[t]his chapter [i.e., Chapter 48, the Uniform Arbitration Act, which embraces §§ 15-48-10 through 200], however, shall not apply to ..." and then lists four groups of items excepted from the provisions of the Act. The particular provision put at issue in the proposed order, section 15-48-10(b)(4), does not exempt "any claim arising out of personal injury" or "any insured or beneficiary under any insurance policy ..." from arbitration itself, but only from application of the Act and its requirements, such as the "All caps/first page" requirement of section 15-48-10(a). *But see*

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American Health and Life Ins. Co. v. Heyward, 272 F.Supp.2d 578, 582-83 (D.S.C. 2003).¹ If Plaintiffs' proposed interpretation were true, the Arbitration Act would be in direct and irreconcilable conflict with specific provisions of the insurance code which specifically authorize arbitration of claims covered by insurance policies. See S.C. Code § 38-77-710 through 770.

Second, even if S.C. Code Ann. § 15-48-10(b)(4) applied to prohibit arbitration clauses in insurance contracts, the arbitration clause in this case is not contained in "any insurance policy or annuity contract" as stated in the statute. See *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 731 S.E.2d 324 (Ct. App. 2012) (rejecting argument that "the statute precludes arbitration of any claim related to a contract for insurance" and enforcing arbitration of claim for credit life insurance benefits arising from and related to an automobile lease agreement). The arbitration clause in this case is contained in an agency agreement between the Companies and an independent insurance agency, Southern Risk, and is the source and ground of the alleged duties, to the extent they exist, that Plaintiffs claim the Companies breached in failing to supervise, train, monitor, or otherwise govern the work of Southern Risk or the independent agents or sub-agents, such as Willis, that it employed. As in *Walden*, the arbitration clause, at best, relates to claims about insurance contracts, but is not contained in the contracts. Thus, the statute has no application.

Finally, none of the individual Plaintiffs has made a claim for "personal injury" within the meaning of the statute. None of the claims asserted by the Plaintiffs allege physical, bodily injury to themselves, but all involve economic losses such as payment of reinstatement fees, loss of money ostensibly paid for premiums, or similar type losses.

¹ In *Heyward*, the district court noted that this argument was made, that the South Carolina Court of Appeal's decision in *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001) "did not specifically address" the argument (272 F.Supp.2d at 582), and that *Cox*'s discussion of reverse preemption was dicta (*Id.* at 582 n.2), but that it implicitly assumed that the provision preempted all arbitration clauses in insurance contracts. *Id.* at 582. This decision misapplied *Cox* because, as stated by former Chief Judge Sanders of the Court of Appeals, "simply put, appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984). *Cox* simply did not answer the question because it was not necessary to its decision and no other state appellate court has specifically addressed the question. Similarly, in *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 731 S.E.2d 324 (Ct. App. 2012), the court of appeals, again in dicta, suggested that the provision applied to bar arbitration clauses in insurance contracts, but actually held that the statute had no application because the contract at issue was not an insurance contract.

9. Argument 6 - Waiver

In addition to arguments made at the hearing on the motion, the Companies note the following. South Carolina courts generally favor arbitration. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). While the right to compel arbitration can be waived, *Id.*, a party seeking to establish waiver must show prejudice through an undue burden caused by delay in demanding arbitration. *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985). Waiver depends on the facts of each case. *Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). Actual prejudice must be shown. *Rich v. Walsh*, 357 S.C. 64, 71, 590 S.E.2d 506, 509 (Ct. App. 2003). "Mere inconvenience" is insufficient to establish prejudice. *Id.* Generally, acting inconsistently to an assertion of a right to arbitrate may constitute waiver. *MailSource, LLC v. M.A. Bailey & Associates, Inc.*, 356 S.C. 370, 375-76, 588 S.E.2d 639, 642 (Ct. App. 2003). Courts generally consider three factors to determine if a party waived its right to compel: (1) whether a substantial length of time has passed since the commencement of the action and the motion to compel arbitration; (2) whether the party requesting arbitration has taken advantage of 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).

None of these factors supports a waiver finding in this case. In cases that have found waiver, the time frame was longer than in the present case, whereas the oldest of Plaintiffs' cases was only about 11 months post-commencement when the motion to compel arbitration was filed. Further, the Companies, as defendants in these cases, have engaged in only limited written discovery. No depositions have been scheduled or taken. Even a limited motion to dismiss as to only two of the several claims was withdrawn upon the filing of the motion to compel arbitration.

By contrast, cases finding waiver generally involved time ranges beginning at 18 months and ranging up to over five years and involved extensive or even complete discovery and offense-oriented actions invoking the power of the courts by the parties seeking arbitration. *See Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (litigated for two and a half years, sought assistance from the court approximately forty times, including motions to amend, compel, dismiss, add parties, and restore under SCRCP 40(j)); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) (19 months and the moving party made motions, deposed the opponent, and generally had extensive discovery resulting in increased costs for the other side); *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 594 S.E.2d 523 (Ct. App. 2004) (over five and a half years and thousands of documents were produced and one claim actually tried to the court); *Davis v. KB Home of S. Carolina, Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), *reh'g denied* (Aug. 23, 2011) (18 months and the parties had extensive discovery, including one deposition that was rescheduled five times).

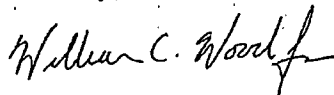
The Honorable Eugene C. Griffith, Jr.
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Page 6

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007), had the shortest time period of any case that found waiver. Only 10 months had passed, but the parties had conducted virtually all discovery, including written interrogatories, requests to produce, and five depositions. The case was to the point where it had been set on the docket when the moving party attempted to compel arbitration, so the court found prejudice. None of these cases contain closely analogous facts to this case.

Rich v. Walsh, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003) most closely parallels this matter and does not support waiver. In *Rich*, 13 months had passed between the commencement of the action and the demand, but with limited discovery. There had been one set of interrogatories, one set of requests to admit, only responses to standard interrogatories, one motion to compel (which was resolved without the court's assistance) and one short deposition unrelated to the merits. As between Plaintiffs and the Companies, the length of time, extent of discovery, and lack of prejudice are similar.

Thank you for allowing us to submit these responses to the proposed order.

Sincerely,



William C. Wood, Jr.
Nelson Mullins Riley & Scarborough LLP

Attorneys for Peerless Insurance Company,
Montgomery Mutual Insurance Company, The
Netherlands Insurance Company, Safeco Insurance
Company of America, and First National Insurance
Company of America

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

RICHARD WILSON,) Civil Action No. 2012-CP-01-306

Plaintiff,)

vs.)

LAURA B. WILLIS and JESSE A.)
DANTICE, individually, and as agents)
and/or brokers for Southern Risk)
Insurance Services LLC, Travelers)
Casualty Insurance Company of America,)
Allied Property and Casualty Insurance)
Company, Peerless Insurance Company,)
Montgomery Mutual Insurance Company,)
Safeco Insurance Company of America,)
and Foremost Insurance Company,)
SOUTHERN RISK INSURANCE)
SERVICES, LLC, TRAVELERS)
CASUALTY INSURANCE COMPANY)
OF AMERICA, ALLIED PROPERTY)
AND CASUALTY INSURANCE)
COMPANY, PEERLESS INSURANCE)
COMPANY, MONTGOMERY)
MUTUAL INSURANCE COMPANY,)
SAFECO INSURANCE COMPANY OF)
AMERICA, AND FOREMOST)
INSURANCE COMPANY,)

Defendants.)

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2014 APR -8 AM 9:42
EMILY Y MCMAHAN
CLERK OF COURT

Motion to Alter or Amend the Order,
filed March 25, 2014, Denying the
Motion to Compel Arbitration

TRUE COPY
BY *Emily Y McMahon*
ABBEVILLE COUNTY CLERK OF COURT

Pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure, Defendants Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Peerless Insurance Company hereby respectfully request that this Court alter or amend the Order filed March 25, 2014, denying the Motion to Compel Arbitration ("the Order"). As the Order addressed similar motions in multiple

unconsolidated cases, the moving Defendants as to all motions addressed in the Order are collectively referred to herein as "the Companies." The Companies received written notice of the entry of the Order on March 25, 2014, and this motion is timely filed within ten days of that receipt. The grounds for this motion are stated below.

1. The Companies hereby incorporate herein all prior arguments, authorities and exhibits submitted to this Court, whether orally or in writing, in this matter, including but not limited to the arguments made at the January 21, 2014 hearing, and the following filings and submissions:

- a. the Motion to Compel Arbitration and to Dismiss Claims filed October 31, 2013;
- b. the Reply in Support of Motion to Compel Arbitration filed February 11, 2014; and
- c. the Companies' letter to The Honorable Eugene C. Griffith, Jr. dated February 21, 2014, objecting to the Proposed Order Denying the Motion to Compel Arbitration (attached as Exhibit A hereto).

To the extent that the findings of fact and conclusions of law contained in the Order conflict with the facts, legal arguments, and authorities as set forth in these prior filings and submissions, the Companies respectfully request that this Court reconsider such findings and rulings and grant the motion to compel arbitration.

2. The Order's introductory paragraph incorrectly states that the Companies seek to apply the arbitration provision to the Plaintiffs "as alleged third party beneficiaries of the contract." (Order filed 3/25/14 at p. 1). This is an incomplete characterization of the Companies' argument. As opposed to the Order's inaccurate limitation of the Companies' argument, the Companies have sought to apply the arbitration provision on grounds set forth in the case of *Pearson v. Hilton Head*

Hospital, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), which includes not only the ground of equitable estoppel, but other theories, such as “direct beneficiary,” argued in the submissions of the Companies to this Court. To the extent that the Order incorrectly limited the arguments asserted by the Companies and failed to consider all of the grounds actually asserted by the Companies in support of compelling arbitration, the Companies respectfully request that this Court reconsider such findings and rulings and grant the motion to compel arbitration.

3. The Order incorrectly states that “[t]he Insurer Defendants rely upon a 2010 Agency Agreement ... presented to Southern Risk Agency in support of their motion.” (Order filed 3/25/14 at p. 2). This is an inaccurate statement that incorrectly suggests that the Companies rely solely upon the 2010 Agency Agreement in support of their motion to compel arbitration. To the contrary, the Companies’ argument relies not only upon the 2010 Agency Agreement, but also upon an entire series of agreements, as set forth in the Companies’ briefing and arguments, that governed the Companies’ relationship with Southern Risk Insurance Services, LLC or Jesse Dantice (collectively referred to as “Southern Risk”). To the extent that the Court failed to consider the other agreements or the totality of these multiple agreements, and instead based its conclusions on the incorrect assumption that only the 2010 agreement supported the Companies’ motion, the Companies respectfully request that this Court reconsider such findings and rulings and grant the motion to compel arbitration.

4. The Court erred in concluding that, because the 2010 Agency Agreement is not signed by Southern Risk, the Companies failed to establish the existence of a binding contract supporting arbitration (Order filed 3/25/14 at p. 3). There is no

requirement under the Federal Arbitration Act (“FAA”)¹ that the written agreement containing an arbitration clause be signed to be enforceable. *See, e.g., Collie v. Wehr Dissolution Corp.*, 345 F.Supp.2d 555, 558-59 (M.D.N.C. 2004); *Clar Productions, Limited v. Isram Motion Pictures Production Services, Inc.*, 529 F. Supp. 381, 383 (S.D.N.Y. 1982). The arbitration agreement in this case is enforceable where, as in this case, Southern Risk continually operated under both signed and unsigned agreements with the Companies containing a written arbitration requirement. As set forth in the Companies’ reply in support of their arbitration motion, the Companies and Southern Risk (and Southern Risk’s predecessors) had a longstanding relationship which included various agreements that included arbitration agreements. *See* Reply in Support of Motion to Compel Arbitration filed 2/11/14 at pp. 4-7. The parties received the benefits provided by such agreements and, thus are bound in equity and good faith to all the terms of the agreements, including the arbitration clause. Therefore, the Companies respectfully request that this Court reconsider this conclusion and grant the motion to compel arbitration.

5. The Court erred in holding that 2010 Agency Agreement is invalid based on the application of South Carolina’s Statute of Frauds. (Order filed 3/25/14 at p. 4). Under South Carolina law, the Statute of Frauds (S.C. Code Ann. § 32-3-10) has no application “when by the happening of a contingency the defendant may be required to perform his contract within a year.” *Joseph v. Sears Roebuck & Co.*, 224 S.C. 105, 112, 77 S.E.2d 583, 586 (1953); *see also Weber v. Perry*, 201 S.C. 8, 21 S.E.2d 193, 194 (1942)(“contracts of employment for an indefinite term or on a contingency” do

¹ Section III of the Motion to Compel Arbitration sets forth the Companies’ argument that the FAA applies to the arbitration agreement at issue in this matter.

not fall within the statute). In this matter, all of the agreements governing the ability of Southern Risk to place insurance for the Companies were for indefinite terms and each was terminable at will upon as little as 90 days notice by either party, with or without cause. Therefore, all of the agreements were fully performable within one year of their making. Consequently, the "one-year" provision of the statute is inapplicable and does not bar enforcement of the arbitration clause in any of the agreements that govern the relationship between the Companies and Southern Risk. The Order fails to address this authority or the fact that, because the Agreements were terminable at will with as little as 90-days notice, they were clearly capable of being performed within one year, rendering the Statute of Frauds inapplicable. Therefore, the Companies respectfully request that this Court reconsider its finding regarding the Statute of Frauds and grant the motion to compel arbitration.

6. The Court erred in holding that the arbitration clause "is too narrowly worded for the Court to enforce in the instant litigation." (Order filed 3/25/14 at p. 4). The Agency Agreement between Southern Risk and the Companies required arbitration of "any dispute or disagreement [that] arises in connection with the interpretation of this Agreement, its performance or nonperformance...." (Exhibit B to Motion to Compel Arbitration). The Court erred in concluding that the claims in this case "have no relation to and are not 'in connection with the performance of the Agency Agreement.'" (Order filed 3/15/14 at p. 5). To the contrary, the claims asserted in the Complaint in this matter are entirely premised on the Companies' alleged rights and duties that would not exist but for the Agency Agreement between Southern Risk and the Companies. Specifically:

- The Complaint alleges Southern Risk and its employees operated under the direct supervision of the Companies, and any such supervisory authority could be grounded only in the Agency Agreement between Southern Risk and the Companies;
- Southern Risk's ability to solicit and submit applications for insurance from the Companies is the underlying basis for all of the Complaint's claims and does not exist but for the Agency Agreement;
- the Complaint asserts that the Companies had a duty to investigate and conduct background checks on Southern Risk and its employees, and such an alleged duty is necessarily derived from the Agency Agreement;
- the Complaint asserts that the Companies had a duty to properly train and supervise Southern Risk and its employees, and any such duty is necessarily grounded in the Agency Agreement;
- the Complaint alleges that the alleged wrongful acts of Southern Risk and its employees were preformed with the express or implied permission of the Companies, and such permission could only be derived from the Agency Agreement; and
- the Complaint alleges that the Companies should have discovered (through supervision and audits) and stopped the alleged wrongful acts of Southern Risk and its employees, but the Companies ability to impose such measures would exist only pursuant to the Agency Agreement.

Additionally, this dispute falls squarely within the scope of the arbitration provision, because the claims asserted in the Complaint lead to the Companies' right to make a demand against Southern Risk for indemnification pursuant to the Agency Agreement. Thus, because all of the claims asserted in the Complaint are directly connected to the interpretation of the Companies' obligations, rights and duties under the Agency Agreement, and are therefore within the scope of the arbitration provision, the Companies respectfully request that this Court reconsider this finding and rulings and grant the motion to compel arbitration.

7. The Court erred in concluding that the arbitration provision is not enforceable against non-signatories in this matter, because "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.” (Order filed 3/25/14 at p. 6). The Court based this conclusion on the assertions that Plaintiffs never saw the contract prior to the filing of the motion to compel arbitration, and 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. (*Id.* at pp. 6-7). However, as illustrated in paragraph 6 above, the claims asserted against the Companies are all, necessarily, based on alleged rights and duties that the Companies would not have but for the Agency Agreement. Plaintiffs cannot assert claims against the Companies based entirely upon the Companies’ alleged failure to exercise rights and duties created solely by the Agency Agreement while simultaneously asserting that they are not seeking to invoke the provisions of the Agency Agreement creating those rights and duties to their benefit. Simply put, they cannot have one without the other. Plaintiffs expanded their dispute beyond Southern Risk to specifically include claims against the Companies. This expansion is necessarily dependent on the alleged rights and duties the Companies would not have without the existence of the Agency Agreement. Thus, the Plaintiffs are seeking the enforcement of Agency Agreement for their benefit, and are subject to the arbitration provision despite their status as non-signatories. *See Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d at 213-14 (2013) (“A clause which provides for arbitration of all disputes ‘arising out of or relating to’ the contract is construed broadly” and is “capable of an expansive reach.”) (citations omitted); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603-04 (2010) (noting that

because “[t]he policy of the United States and of South Carolina is to favor arbitration of disputes,” arbitration should generally be ordered, “[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute.”); *see also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 95, 749 S.E.2d 139, 154 (Ct. App. 2013) (“[A] claim is within the scope of an arbitration clause that purports to cover all related disputes, so long as a significant relationship exists between the claim and the contract containing the arbitration agreement.”) (citing *Partain*, 386 S.C. at 493, 689 S.E.2d at 604). Therefore, the Companies respectfully request that this Court reconsider this finding and rulings and grant the motion to compel arbitration.

8. The Court erred in concluding that the arbitration provision is inapplicable, because “the alleged actions of the Defendants constitute ‘illegal and outrageous acts’ unforeseeable to a reasonable consumer in the context of normal business dealings.” (Order filed 3/25/14 at pp. 7-8). First, the Court failed to distinguish the claims asserted against the Companies from those asserted against the Southern Risk Defendants. With respect to the Companies, their alleged conduct does not arise to the level of “illegal or outrageous acts.” Second, the Court failed to consider the recent holding in the case of *Landers v. Federal Deposit Ins. Co.*, 402 S.C. 100, 739 S.E.2d 209 (2013), wherein the South Carolina Supreme Court held that even a claim for “intentional infliction of emotional distress,” which is the quintessential “outrage” situation, can be subject to arbitration. Therefore, the Companies respectfully request that this Court reconsider this finding and rulings and grant the motion to compel arbitration.

9. The Court erred in concluding, as a final alternative ground for denying the motion, that the Companies waived their right to compel arbitration by delaying invocation of the arbitration provision. (Order filed 3/25/14 at p. 8). The Court correctly noted that the right to compel arbitration can be waived and correctly stated that, in determining if a party waived this right, the court should consider the factors of (1) the length of time that passed; (2) whether the moving party engaged in extensive discovery; and (3) prejudice to the non-moving party. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). However, the Court incorrectly concludes that all three factors are met in this instance. (Order filed 3/25/14 at p. 9). To the contrary, the record shows that none of these factors weigh in favor of a finding of waiver. With regard to the delay in compelling discovery and engaging in discovery, the oldest of the involved cases was filed eleven months prior to the motion to compel arbitration and the Companies have engaged in only very limited discovery and have taken no depositions. In contrast, the South Carolina cases finding waiver generally involved time ranges beginning at 18 months and ranging up to over five years and involved extensive or even complete discovery and offense-oriented actions invoking the power of the courts by the parties seeking arbitration. See *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (litigated for two and a half years, sought assistance from the court approximately forty times, including motions to amend, compel, dismiss, add parties, and restore under SCRCP 40(j)); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct.App.2003)(19 months and the moving party made motions, deposed the opponent, and generally had extensive discovery resulting in increased

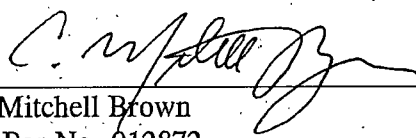
costs for the other side); *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 594 S.E.2d 523 (Ct. App. 2004)(over five and a half years and thousands of documents were produced and one claim actually tried to the court); *Davis v. KB Home of S. Carolina, Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), *reh'g denied* (Aug. 23, 2011)(18 months and the parties had extensive discovery, including one deposition that was rescheduled five times).² The case of *Rich v. Walsh*, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003), where the court refused to find waiver despite a delay of thirteen months and the party engaging in limited discovery, more closely parallels this matter and illustrates that a finding of waiver is inappropriate. Additionally, the Court's conclusion that compelling arbitration "would substantially prejudice Plaintiffs" is without support. (Order filed 3/25/14 at p. 9). Plaintiffs have not shown, and the Court fails to identify how Plaintiffs would be prejudiced. In order to establish waiver, actual prejudice must be shown. *Rich*, 357 S.C. at 71, 590 S.E.2d at 509. Additionally, "mere inconvenience" is insufficient to establish prejudice. *Id.* Therefore, the Companies respectfully request that this Court reconsider this finding and rulings and grant the motion to compel arbitration.

For the reasons stated herein, the Companies respectfully request, pursuant to Rules 52(b) and 59(e), SCRCP, that this Court amend its March 25, 2014 Order and instead issue an order granting the Companies' motion to compel arbitration.

[SIGNATURE PAGE ATTACHED]

² While the case of *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007), found waiver after a delay of ten months, in *Rhodes* the parties had conducted virtually all discovery, including written interrogatories, requests to produce, and five depositions, and the case was to the point where it had been set on the docket when the moving party attempted to compel arbitration, so the court found prejudice. Thus, *Rhodes* is clearly distinguishable from this case.

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Columbia, South Carolina

April 4, 2014

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STATE OF SOUTH CAROLINA
COUNTY OF Aiken

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Exhibit A

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February 21, 2014

Via Regular and Electronic Mail

The Honorable Eugene C. Griffith, Jr.
Eighth Judicial Circuit
P.O. Box 375
Newberry, SC 29108

Re: Proposed Order Denying the Motions to Compel Arbitration in Civil Action Nos., 2012-CP-01-306, -340, -341, -342, -343 and 2013-CP-01-044, -045, -066, -073, -094, -123, -124, -220, -221.

Dear Judge Griffith:

Peerless Insurance Company, Montgomery Mutual Insurance Company, The Netherlands Insurance Company, Safeco Insurance Company of America, and First National Insurance Company of America (collectively "the Companies"), submit the following comments and objections regarding the proposed order sent to the Court denying the Companies motion to compel arbitration in the several cases. The comments and objections are set forth as to each section of the proposed order.

1. Introductory Paragraph

The introductory paragraph states that the Companies seek to apply the arbitration provision to the Plaintiffs "as alleged third party beneficiaries of the contract." This is an incomplete characterization of the Companies' argument. It would be more accurate to state that the Companies sought to apply the arbitration provision on grounds set forth in the case of *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), which includes not only the ground of equitable estoppel, but other theories, such as "direct beneficiary," argued in the submissions of the Companies to the Court.

The introductory paragraph also incorrectly states that the court considered "the oral argument and briefs" presented by the parties. Your email indicated that you had considered all the "submissions" of the parties, not just the oral arguments and briefs.

With offices in the District of Columbia, Florida, Georgia, Massachusetts, North Carolina, South Carolina, Tennessee and West Virginia

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BY *[Signature]*
ABBEVILLE COUNTY CLERK OF COURT

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CLERK OF COURT
ABBEVILLE COUNTY
SOUTH CAROLINA
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The Honorable Eugene C. Griffith, Jr.
February 21, 2014
Page 2

2. The Fact Statement

On page 2 in the carry-over paragraph, the proposed fact statement contains two sentences that are incorrect or incomplete in that the "facts" stated are disputed and the resolution of such facts is not necessary to the decision as to arbitration.

The proposed order states that all of the individual plaintiffs (except Wilson and Shirley) are insureds of the Companies. This statement is disputed in at least one matter (Gary), as, in that case, there is a question as to whether a policy was in effect at the time of the incident at issue.

Similarly, the next sentence states that all the individual plaintiffs allege or were issued "bogus insurance policies." This, again, is disputed and in some cases is simply not true. In some of the suits, it is not disputed that a policy or policies existed. The dispute is over coverage for a particular incident. In others, the allegation is that no policy was issued at all as opposed to a "bogus" policy.

We suggest that these two sentences be deleted from the proposed order as they are unnecessary to the resolution of the arbitration matter and improperly touch upon the merits of the various cases.

On page 2, in the last paragraph that carries over to page 3, the statement regarding the Companies' argument is incomplete. The Companies rely not only on the 2010 agreement mentioned, but on the series of agreements governing the relationship with Southern Risk and the course of dealing between the Companies and Southern Risk as set forth in the Companies' briefing and arguments.

Finally, on page 3, in the final paragraph, the proposed order refers to the plaintiffs as "injured" consumers and business men. This point is disputed. Characterization of the plaintiffs as injured is unnecessary to the resolution of the arbitration motion.

3. Standard of Review

The Companies agree with the first statement in this section. The remaining two sentences pertain to review upon appeal and are not, therefore, relevant to this initial decision as to arbitration.

4. Argument 1 - Validity of the Contract

On page 4, the opinion states that the Companies submitted "no other evidence to support the validity of the 2010 Agency Agreement." This statement is incorrect. The Companies submitted an affidavit and several exhibits to support applying the 2010 agreement. You specifically indicated that you reviewed all such submissions before ruling. In your ruling, you

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disagreed that arbitration should be compelled on the basis of the 2010 agreement, but it was not based on the view that nothing but the agreement was submitted as evidence.

In the last paragraph, the order invokes the statute of frauds. The order fails to address the specific case law cited in the Companies' reply showing that where, as here, the agreement is terminable essentially at will upon notice, the statute of frauds has no application and the lack of signature is, therefore, irrelevant.

5. Argument 2 – Scope of the Arbitration Clause

The Companies disagree with the conclusion reached in this section and reincorporate their oral and written arguments as to the scope of the arbitration clause and its application to Plaintiffs.

6. Argument 3 – Estoppel Inapplicable

Again, the Companies disagree with the conclusion reached in this section and reincorporate their oral and written arguments as to the scope of the arbitration clause and its application to Plaintiffs.

7. Argument 4 – Outrageous Acts

The South Carolina Supreme Court has recently held that even "intentional infliction of emotional distress" claims are subject to arbitration. See *Landers v. Federal Deposit Ins. Co.*, 402 S.C. 100, 739 S.E.2d 209 (2013). This is in accord with recent United States Supreme Court jurisprudence, and thus the Companies submit it would be an error to deny the motion to compel arbitration on this basis.

8. Argument 5 – Reverse Preemption

This preemption ground was not raised in Plaintiffs opposition memorandum submitted to the Court. Counsel for the Companies have no recollection of its being raised orally at the hearing (a transcript of the hearing has not yet been obtained). Assuming, however, that the argument was raised to the Court, the proposed order is erroneous. This is true for several reasons.

First, by its terms, S.C. Code Ann. § 15-48-10(b) states that "[t]his chapter [i.e., Chapter 48, the Uniform Arbitration Act, which embraces §§ 15-48-10 through 200], however, shall not apply to ..." and then lists four groups of items excepted from the provisions of the Act. The particular provision put at issue in the proposed order, section 15-48-10(b)(4), does not exempt "any claim arising out of personal injury" or "any insured or beneficiary under any insurance policy ..." from arbitration itself, but only from application of the Act and its requirements, such as the "All caps/first page" requirement of section 15-48-10(a). *But see*

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February 21, 2014
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American Health and Life Ins. Co. v. Heyward, 272 F.Supp.2d 578, 582-83 (D.S.C. 2003).¹ If Plaintiffs' proposed interpretation were true, the Arbitration Act would be in direct and irreconcilable conflict with specific provisions of the insurance code which specifically authorize arbitration of claims covered by insurance policies. See S.C. Code § 38-77-710 through 770.

Second, even if S.C. Code Ann. § 15-48-10(b)(4) applied to prohibit arbitration clauses in insurance contracts, the arbitration clause in this case is not contained in "any insurance policy or annuity contract" as stated in the statute. See *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 731 S.E.2d 324 (Ct. App. 2012) (rejecting argument that "the statute precludes arbitration of any claim related to a contract for insurance" and enforcing arbitration of claim for credit life insurance benefits arising from and related to an automobile lease agreement). The arbitration clause in this case is contained in an agency agreement between the Companies and an independent insurance agency, Southern Risk, and is the source and ground of the alleged duties, to the extent they exist, that Plaintiffs claim the Companies breached in failing to supervise, train, monitor, or otherwise govern the work of Southern Risk or the independent agents or sub-agents, such as Willis, that it employed. As in *Walden*, the arbitration clause, at best, relates to claims about insurance contracts, but is not contained in the contracts. Thus, the statute has no application.

Finally, none of the individual Plaintiffs has made a claim for "personal injury" within the meaning of the statute. None of the claims asserted by the Plaintiffs allege physical, bodily injury to themselves, but all involve economic losses such as payment of reinstatement fees, loss of money ostensibly paid for premiums, or similar type losses.

¹ In *Heyward*, the district court noted that this argument was made, that the South Carolina Court of Appeal's decision in *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001) "did not specifically address" the argument (272 F.Supp.2d at 582), and that *Cox's* discussion of reverse preemption was dicta (*Id.* at 582 n.2), but that it implicitly assumed that the provision preempted all arbitration clauses in insurance contracts. *Id.* at 582. This decision misapplied *Cox* because, as stated by former Chief Judge Sanders of the Court of Appeals, "simply put, appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984). *Cox* simply did not answer the question because it was not necessary to its decision and no other state appellate court has specifically addressed the question. Similarly, in *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 731 S.E.2d 324 (Ct. App. 2012), the court of appeals, again in dicta, suggested that the provision applied to bar arbitration clauses in insurance contracts, but actually held that the statute had no application because the contract at issue was not an insurance contract.

9. Argument 6 - Waiver

In addition to arguments made at the hearing on the motion, the Companies note the following. South Carolina courts generally favor arbitration. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). While the right to compel arbitration can be waived, *Id.*, a party seeking to establish waiver must show prejudice through an undue burden caused by delay in demanding arbitration. *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985). Waiver depends on the facts of each case. *Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). Actual prejudice must be shown. *Rich v. Walsh*, 357 S.C. 64, 71, 590 S.E.2d 506, 509 (Ct. App. 2003). "Mere inconvenience" is insufficient to establish prejudice. *Id.* Generally, acting inconsistently to an assertion of a right to arbitrate may constitute waiver. *MailSource, LLC v. M.A. Bailey & Associates, Inc.*, 356 S.C. 370, 375-76, 588 S.E.2d 639, 642 (Ct. App. 2003). Courts generally consider three factors to determine if a party waived its right to compel: (1) whether a substantial length of time has passed since the commencement of the action and the motion to compel arbitration; (2) whether the party requesting arbitration has taken advantage of 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).

None of these factors supports a waiver finding in this case. In cases that have found waiver, the time frame was longer than in the present case, whereas the oldest of Plaintiffs' cases was only about 11 months post-commencement when the motion to compel arbitration was filed. Further, the Companies, as defendants in these cases, have engaged in only limited written discovery. No depositions have been scheduled or taken. Even a limited motion to dismiss as to only two of the several claims was withdrawn upon the filing of the motion to compel arbitration.

By contrast, cases finding waiver generally involved time ranges beginning at 18 months and ranging up to over five years and involved extensive or even complete discovery and offense-oriented actions invoking the power of the courts by the parties seeking arbitration. *See Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (litigated for two and a half years, sought assistance from the court approximately forty times, including motions to amend, compel, dismiss, add parties, and restore under SCRCP 40(j)); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) (19 months and the moving party made motions, deposed the opponent, and generally had extensive discovery resulting in increased costs for the other side); *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 594 S.E.2d 523 (Ct. App. 2004) (over five and a half years and thousands of documents were produced and one claim actually tried to the court); *Davis v. KB Home of S. Carolina, Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), *reh'g denied* (Aug. 23, 2011) (18 months and the parties had extensive discovery, including one deposition that was rescheduled five times).

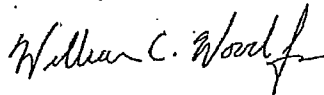
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Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007), had the shortest time period of any case that found waiver. Only 10 months had passed, but the parties had conducted virtually all discovery, including written interrogatories, requests to produce, and five depositions. The case was to the point where it had been set on the docket when the moving party attempted to compel arbitration, so the court found prejudice. None of these cases contain closely analogous facts to this case.

Rich v. Walsh, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003) most closely parallels this matter and does not support waiver. In *Rich*, 13 months had passed between the commencement of the action and the demand, but with limited discovery. There had been one set of interrogatories, one set of requests to admit, only responses to standard interrogatories, one motion to compel (which was resolved without the court's assistance) and one short deposition unrelated to the merits. As between Plaintiffs and the Companies, the length of time, extent of discovery, and lack of prejudice are similar.

Thank you for allowing us to submit these responses to the proposed order.

Sincerely,



William C. Wood, Jr.
Nelson Mullins Riley & Scarborough LLP

Attorneys for Peerless Insurance Company,
Montgomery Mutual Insurance Company, The
Netherlands Insurance Company, Safeco Insurance
Company of America, and First National Insurance
Company of America

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-01-00306
Appellate Case No. 2014-00946

Richard Wilson, Michael J. Antoniak, Jr., Marsha L.
Antoniak, Anita L. Belton, Prescott Darren Bosler,
Johnny Calhoun, Sallie Calhoun, Cynthia Gary,
Robert Wayne Gary, Eugene P. Lawton, Jr., Jeanette
Norman, James Robert Shirley, Robert W. Spires,
Crystal Spires Wiley, Lewis S. Williams, Janie
Wiltshire, Benjamin Franklin Wofford, Jr., and
Rebecca Hammond Wofford..... Respondents,

v.

LAURA B. WILLIS and JESSE A. DANTICE,
individually, and as agents and/or brokers for
Southern Risk Insurance Services LLC, Travelers
Casualty Insurance Company of America, Allied
Property and Casualty Insurance Company, Peerless
Insurance Company, Montgomery Mutual Insurance
Company, Safeco Insurance Company of America,
and Foremost Insurance Company, SOUTHERN
RISK INSURANCE SERVICES, LLC, TRAVELERS
CASUALTY INSURANCE COMPANY OF
AMERICA, ALLIED PROPERTY AND
CASUALTY INSURANCE COMPANY, PEERLESS
INSURANCE COMPANY, MONTGOMERY
MUTUAL INSURANCE COMPANY, SAFECO
INSURANCE COMPANY OF AMERICA, AND
FOREMOST INSURANCE COMPANY, and Laurie
Williams Defendants,

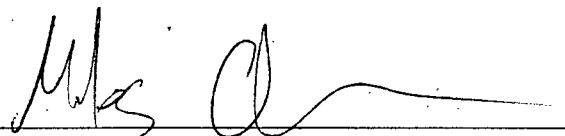
Of Whom Peerless Insurance Company, Montgomery
Mutual Insurance Company, and Safeco Insurance
Company of America are..... Appellants,

Of Whom Laurie Williams is a..... Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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Montgomery Mutual Insurance Company, and Safeco
Insurance Company of America.

January 7, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-01-00306
Appellate Case No. 2014-00946

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SC Court of Appeals

Richard Wilson, Michael J. Antoniak, Jr., Marsha L.
Antoniak, Anita L. Belton, Prescott Darren Bosler,
Johnny Calhoun, Sallie Calhoun, Cynthia Gary, Robert
Wayne Gary, Eugene P. Lawton, Jr., Jeanette Norman,
James Robert Shirley, Robert W. Spires, Crystal Spires
Wiley, Lewis S. Williams, Janie Wiltshire, Benjamin
Franklin Wofford, Jr., and Rebecca Hammond Wofford..

Respondents,

v.

LAURA B. WILLIS and JESSE A. DANTICE,
individually, and as agents and/or brokers for Southern
Risk Insurance Services LLC, Travelers Casualty
Insurance Company of America, Allied Property and
Casualty Insurance Company, Peerless Insurance
Company, Montgomery Mutual Insurance Company,
Safeco Insurance Company of America, and Foremost
Insurance Company, SOUTHERN RISK
INSURANCE SERVICES, LLC, TRAVELERS
CASUALTY INSURANCE COMPANY OF
AMERICA, ALLIED PROPERTY AND CASUALTY
INSURANCE COMPANY, PEERLESS INSURANCE
COMPANY, MONTGOMERY MUTUAL
INSURANCE COMPANY, SAFECO INSURANCE
COMPANY OF AMERICA, AND FOREMOST
INSURANCE COMPANY, and Laurie Williams

Defendants,

Of Whom Peerless Insurance Company, Montgomery
Mutual Insurance Company, and Safeco Insurance
Company of America are.....

Appellants,

Of Whom Laurie Williams is a.....

Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Montgomery Mutual Insurance Company, Peerless Insurance Company, and Safeco Insurance Company of America, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Record on Appeal

Counsel Served:

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Administrative Assistant

January 7, 2015

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Company, Safeco Insurance Company of America,
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RISK INSURANCE SERVICES, LLC, TRAVELERS
CASUALTY INSURANCE COMPANY OF
AMERICA, ALLIED PROPERTY AND
CASUALTY INSURANCE COMPANY, PEERLESS
INSURANCE COMPANY, MONTGOMERY
MUTUAL INSURANCE COMPANY, SAFECO
INSURANCE COMPANY OF AMERICA, AND
FOREMOST INSURANCE COMPANY, and Laurie
Williams Defendants,

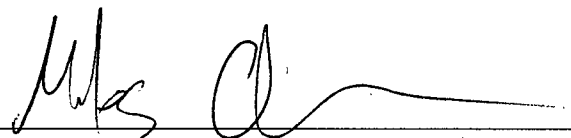
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Insurance Company of America.

January 7, 2015
Columbia, South Carolina