STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	C.A. No. 2017-CP-23-03986
ARCPOINT OF TALLAHASSEE, INC., GREG BOWMAN d/b/a Bowman Lab Solutions, Inc. d/b/a ARCpoint Labs of Nashville; GARY PATRONE d/b/a On Trac Holdings, Inc. d/b/a Arcpoint Labs of Tempe, ARCpoint Labs of Mesa, ARCpoint Labs of Phoenix- Black Canyon, EMPLOYER'S CHOICE TESTING, LLC MICHAEL GAMMEL d/b/a Blue Lizard, Inc., FLORENCE ODS, INC. MYRTLE BEACH ODS, INC. 3 SONS VENTURES, INC; JUMPR2, INCORPORATED, NEIL SELTZ AND LESLY DATLOW d/b/a Shamey, LLC	)	
Plaintiffs,	)	
v.	)	
ARCPOINT FRANCHISE GROUP, LLC. f/k/a Accudiagnositcs, LLC and ARCPOINT OCCUPATIONAL SOLUTIONS, LLC	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION

This matter is before the court on Defendants ARCPoint Franchise Group, LLC ("AFG") and ARCPoint Occupational Solutions, LLC's ("AOS") (collectively "Defendants") Motion to Dismiss and Compel Arbitration as to all claims and parties in the matter. A hearing on Defendants motion was held on August 24, 2017 at the Greenville County Courthouse. Prior to the hearing, both Defendants and Plaintiffs submitted memorandum to the court.

AFG's motion is premised upon the arbitration clause contained in the ARCPoint Franchise Group, LLC Franchise Agreements ("Franchise Agreement") attached as exhibits 1 - 13 to Defendants' motion. Defendant AOS, a non-signatory to the Franchise Agreements, seeks

to compel arbitration with regard to all claims and parties in the case on a theory of equitable estoppel.

Plaintiffs oppose Defendants motion for the following reasons:

1. Plaintiffs assert Defendants' motion should be denied as a matter of law as the Franchise Agreements signed by the Plaintiffs are not in compliance with South Carolina law.
2. In the alternative, Plaintiffs assert that Defendant AOS' motion to dismiss and compel arbitration should be denied as a matter of law because as between AOS and the Plaintiffs there is no agreement to arbitrate. In addition, Plaintiffs assert that AOS is not entitled to an order of equitable estoppel because (a) the AFG arbitration agreement is contractually limited to "the parties" therefore AOS is not entitled to an order expanding the scope of the arbitration agreement on a theory of equitable estoppel and (b) the claims against AFG and AOS are sufficiently distinct such that AOS cannot meet its burden to establish equitable estoppel.
3. In the alternative, Plaintiffs Florence ODS, Inc. and Myrtle Beach ODS, Inc. assert they are not subject to arbitration as a matter of law because they specifically reserved their right to a jury trial in the mutually agreed addendum to their Franchise Agreements.

BACKGROUND

Plaintiffs are the owner/operators of several franchises of AFG. Plaintiffs each signed the ARCPoint Franchise Group, LLC Franchise Agreements ("Franchise Agreement") on or before October 17, 2013. The arbitration clause provides as follows:

> This Agreement evidences a transaction involving commerce and, therefore, the Federal Arbitration Act, Title 9 of the United State Code is applicable to the subject matter contained herein. Except for controversies or claims relating to the ownership of any of Franchisor's Marks, the unauthorized use or disclosure of Franchisor's Confidential Information or covenants against competition, all disputes arising out of or relating to this Agreement or to any other agreements between the parties, or with regard to interpretation, formation or breach of this or any other agreement between the parties, shall be settled by binding arbitration conducted in Greenville County, South Carolina, in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. A single Arbitrator agreed upon by the parties or otherwise appointed by the Circuit Court located in or serving Greenville County, South Carolina, shall conduct the proceedings. The decision of the arbitrator will be final and binding upon the parties. Judgment upon the award rendered by the arbitrator may be entered in any court having personal and subject matter jurisdiction.
>
> Franchisee acknowledges that is has read the terms of this binding arbitration provision and affirms that this provision is entered into willingly and voluntarily and without any fraud duress or undue influence on the part of the Franchisor or any of Franchisor's agents or employees.

Defendant AOS is a related/affiliated entity to AFG. According the records of the South Carolina Secretary of State, AOS was incorporated on November 12, 2013, which is after all of the franchise agreements between AFG and the Plaintiffs were executed. As specifically set forth in the Complaint, the matter involves allegations by the Plaintiff that AFG engaged in acts in breach of the AFG Franchise Agreement, as well as other activities in violation of South Carolina statutory and common law. AOS is further alleged to have engaged in activities separate and apart from AFG in violation South Carolina statutory and common law.

ANALYSIS

After careful consideration of the memorandum, exhibits, relevant case law and the arguments of counsel, the court finds as follows:

First, in their addendums to their February 6, 2013 Franchise Agreements, Plaintiffs Florence ODS, Inc. and Myrtle Beach ODS, Inc. unambiguously reserved their right to a jury trial. Specifically, Florence ODS, Inc. included the following handwritten term: "I do not wish

to waive our right to a jury trial". The addendum was signed by company President Felix Mirando on behalf of AFG. Likewise, Myrtle Beach ODS, Inc. included the following handwritten term: "Do not wish to waive our rights to a jury trial". The addendum was as well signed by company President Felix Mirando on behalf of AFG. Defendants assert that Florence ODS, Inc.'s and Myrtle Beach ODS, Inc.'s reservations are factually limited to those disputes that are not subject to arbitration. The court finds Defendants' assertion without merit.

By including this term, Florence ODS and Myrtle Beach ODS did definitively reserve the right to a jury trial as their means of dispute resolution. By signing the addendum, AFG agreed to the term. The court therefore finds as a matter of law Florence ODS and Myrtle Beach ODS' jury trial reservations valid and enforceable.

Article I, section 14 of the South Carolina Constitution declares that "[t]he right of trial by jury shall be preserved inviolate." The Florence ODS and Myrtle Beach ODS hand written jury trial reservations were specifically included and mutually agreed to in an addendum to the Franchise Agreement modifying the default terms of the Franchise Agreements. Because the right to a jury trial cannot be preserved in arbitration, the court finds the two provisions of the Franchise Agreement in direct conflict. In this matter, the jury trial reservation is included within a later, negotiated addendum modifying the default terms of the Franchise Agreement. The court finds as a matter of law that the reservation modifies the default terms of the Franchise Agreement and specifically voids the conflicting arbitration clause. As such, the court finds that the Defendants have no basis in law to compel Plaintiffs Myrtle Beach ODS and Florence ODS to arbitrate. Therefore, Defendants motion as to dismiss and compel Myrtle Beach ODS and Florence ODS to arbitrate is denied.

Next, with respect to Plaintiffs ARCpoint of Tallahassee, Inc. ("AP Tallahassee"), Greg Bowman d/b/a Bowman Lab Solutions, Inc. d/b/a Bowman Lab Solutions, Inc. d/b/a ARCpoint of Nashville ("AP Nashville"), Gary Patrone d/b/a On Trac Holdings, Inc. d/b/a ARCpoint Labs of Tempe, ARCpoint Labs of Mesa, ARCpoint Labs of Phoenix-Black Canyon ("On Trac Holdings"), Employer's Choice Testing, LLC ("Employer's Choice"), Michael Gammel d/b/a Blue Lizard, Inc. ("Blue Lizard"), 3 Sons Ventures, Inc. ("3 Sons"), JumpR2, Incorporated ("JumpR2"), and Neil Seltz and Lesly Datlow d/b/a Shamey, LLC ("Shamey"), Defendant AFG asserts that the arbitration clause is valid and enforceable. The court agrees.

In opposition, Plaintiffs argue that the Franchise Agreement's Choice of Law provision requires the court apply South Carolina law to determine the construction of the Franchise Agreement, enforceability and arbitrability. Plaintiffs assert that in drafting the Choice of Law provision, AFG contractually bound itself to apply South Carolina law to determine arbitrability of the Franchise Agreements. Plaintiffs argue that the agreement to apply South Carolina law to questions of arbitrability requires that the contract adhere specifically to South Carolina's statutory provisions requiring that notice of arbitration be affixed to the first page of the agreement in underlined capital letters. See S.C. Code Ann. § 15-48-10. Plaintiffs argue that the failure to supply the statutorily required notice renders the arbitration clause unenforceable as a matter of law. The court disagrees with the Plaintiffs and finds their assertions without merit.

The court finds the arbitration clause in the Franchise Agreements of ARCpoint of Tallahassee, Inc. ("AP Tallahassee"), Greg Bowman d/b/a Bowman Lab Solutions, Inc. d/b/a Bowman Lab Solutions, Inc. d/b/a ARCpoint of Nashville ("AP Nashville"), Gary Patrone d/b/a On Trac Holdings, Inc. d/b/a ARCpoint Labs of Tempe, ARCpoint Labs of Mesa, ARCpoint Labs of Phoenix-Black Canyon ("On Trac Holdings"), Employer's Choice Testing, LLC

("Employer's Choice"), Michael Gammel d/b/a Blue Lizard, Inc. ("Blue Lizard"), 3 Sons Ventures, Inc. ("3 Sons"), JumpR2, Incorporated ("JumpR2"), and Neil Seltz and Lesly Datlow d/b/a Shamey, LLC ("Shamey") valid and enforceable. As such, Defendants motion to dismiss AFG and compel the arbitration of all claims against AFG is hereby granted.

Finally, Defendant AOS is a non-signatory to the AFG Franchise Agreement. As such, AOS cannot compel arbitration as a matter of law. AOS asserts that because AFG's arbitration clause is valid and enforceable, AOS is entitled to compel arbitration as a non-signatory on the basis of equitable estoppel. AOS principally relies upon Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) in support of its assertion. AOS asserts that the claims against AOS and AFG are "substantially interdependent" and/or "intertwined" such that the court should apply principals of equitable estoppel to compel Plaintiffs to arbitrate with AOS as a non-signatory.

In opposition, Plaintiffs assert that equitable estoppel is not available to AOS because (1) the arbitration clause cannot extend to AOS in equity because the agreement specifically limits arbitration to "disputes ... between the parties" to the Franchise Agreement, *i.e.* AFG and the Plaintiffs. (2) Alternatively, Plaintiffs assert that AOS is not entitled to equitable estoppel because AOS did not exist at the time of signing the Franchise Agreement, could not have been within the contemplation of the parties at the time of the Agreements, and Plaintiffs' claims against AOS are independent and, at best, tangentially related to the claims against AFG.

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit. Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is restricted by the terms of the agreement." Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App.

2010). In this matter, the court finds as a matter of law that the AFG arbitration clause is unambiguously and specifically limited to "disputes ... between the parties" to the Franchise Agreement. As a result, to expand the contractually agreed scope of the arbitration clause to AOS, a nonsignatory, on principals of equitable estoppel would be improper and inequitable. See Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc., 845 F.3d 1351 (11th Cir. 2017) (holding that principals of equitable estoppel could not be applied to extend an arbitration clause that was limited to "the parties". The court concluded that it would be "effectively ... rewriting the agreement between the signatories about which disputes they would arbitrate to require one of them to arbitrate disputes that they had not agreed to."); World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc., 517 F.3d 1240, 1247, (11th Cir. 2008) (holding "the arbitration provisions in the Franchise Agreements are expressly limited to the immediate parties (Volvo Rents and World Rentals), and they expressly exclude any affiliates such as Volvo Finance. In other words, the language of the arbitration provisions expressly and unambiguously exclude from their scope any dispute between the World Parties and Volvo Finance. Thus, we are constrained to conclude that the district court correctly refused to compel Volvo Finance to arbitrate on an incorporation-by-reference theory. Any other result would not only "unduly stretch," but completely rewrite the arbitration clause, and compel a non-party to arbitrate in the absence of ever having agreed to do so in the first place."). Because the arbitration clause in the Franchise Agreement is restricted to disputes between the parties, of which AOS is not, the court must deny AOS' motion to dismiss and compel arbitration.

Additionally, even if the arbitration clause was not restricted as set forth above, the court otherwise denies AOS' motion because the court finds AOS's claim of equitable estoppel without merit. First, without dispute, AOS did not exist until after each of the Plaintiffs'

Franchise Agreements' was executed. For this reason, AOS could not have been within the contemplation of the parties at the time of execution. As such, absent some agreement between AFG and Plaintiffs after AOS' incorporation, which does not exist, no principal of law or equity permits the court to extend the arbitration clause to AOS as a beneficiary or otherwise. Next, the law instructs that in order for the court to exercise its discretion to apply equitable estoppel to compel the Plaintiffs to arbitrate with a non-signatory, the record must establish that the claims against AFG and AOS are substantially interdependent and/or intertwined. After reviewing the record before the court, the court disagrees with AOS' assertion that it is entitled to equitable estoppel. The court finds that the claims against AFG and AOS are not substantially interdependent and/or intertwined such that equitable estoppel applies. The allegations and claims of the Plaintiffs against AOS are independent of AFG.[1] For this reason, the court would also deny AOS' motion to dismiss and compel arbitration.

[1] The court is aware that AFG and AOS are parties to a claim of civil conspiracy. However, co-conspirators are not necessary or indispensable parties. See State of Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945); Atl. Textiles v. Avondale Inc., 505 F.3d 274, 284 (4th Cir. 2007) (... coconspirators are not necessary parties.... The presence of only one defendant in a given arbitration proceeding thus in no sense would prevent the plaintiffs from proving the existence of a conspiracy.").

It is therefore,

ORDERED that Defendants combined motion to dismiss and compel the arbitration of all claims by Plaintiffs Florence ODS, Inc. and Myrtle Beach ODS, Inc. is denied. It is further

ORDERED that Defendant AOS' motion to dismiss and compel the arbitration of all claims by the Plaintiffs is denied. It is further

ORDERED that Defendant AFG's motion to dismiss and compel the arbitration of all claims by Plaintiffs ARCpoint of Tallahassee, Inc. ("AP Tallahassee"), Greg Bowman d/b/a Bowman Lab Solutions, Inc. d/b/a Bowman Lab Solutions, Inc. d/b/a ARCpoint of Nashville ("AP Nashville"), Gary Patrone d/b/a On Trac Holdings, Inc. d/b/a ARCpoint Labs of Tempe, ARCpoint Labs of Mesa, ARCpoint Labs of Phoenix-Black Canyon ("On Trac Holdings"), Employer's Choice Testing, LLC ("Employer's Choice"), Michael Gammel d/b/a Blue Lizard, Inc. ("Blue Lizard"), 3 Sons Ventures, Inc. ("3 Sons"), JumpR2, Incorporated ("JumpR2"), and Neil Seltz and Lesly Datlow d/b/a Shamey, LLC ("Shamey") is granted. These Plaintiffs are directed to file their Demand for Commercial Arbitration with the American Arbitration Association

IT IS SO ORDERED.

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The Honorable R. Scott Sprouse
Thirteenth Judicial Circuit

September _____, 2017

Greenville Common Pleas

Case Caption: ARCpoint Of Tallahassee Inc , plaintiff, et al vs. Arcpoint Franchisee Group Llc , defendant, et al

Case Number: 2017CP2303986

Type: Order/Dismissal

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit