THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2017-00260

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, Respondents,

v.

ARCpoint Franchise Group f/k/a Accudiagnostics, LLC and ARCpoint Occupational Solutions, LLC, Appellants.

BRIEF OF APPELLANTS

David W. Overstreet
Michael B. McCall
Earhart Overstreet LLC
P.O. Box 22528
Charleston, SC 29413
(843) 972-9400

Natalma M. McKnew
Smith Moore Leatherwood LLP
2 W. Washington Street, Suite 1100
Greenville, SC 29601
(864) 751-7800

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in narrowly construing the subject arbitration provisions as limited to "disputes . . . between the parties" despite much broader language in the actual provisions that encompasses "all disputes arising out of or relating to this Agreement or to any other agreements between the parties."

2. Whether the trial court erred in finding the claims against ARCpoint Occupational Solutions, LLC for conspiring with ARCpoint Franchise Group, LLC to alter the terms of the franchise agreements and for tortiously interfering with the franchise agreements were not sufficiently related to the franchise agreements or the claims against ARCpoint Franchise Group, LLC to warrant enforcement of the arbitration provisions by AOS as a nonsignatory.

3. Whether the trial court erred in considering the date of incorporation of ARCpoint Occupational Solutions, LLC in denying its motion to compel arbitration.

4. Whether the trial court's factual finding that the parties did not enter into any agreements after the incorporation of ARCpoint Occupational Solutions, LLC was unsupported by the record.

5. Whether the trial court erred in finding that an addendum reserving the right to a jury trial renders a separate arbitration provision unenforceable where the contract can be read as a whole to impart meaning to both the arbitration provision and the right to a jury trial in those claims that are not subject to arbitration.

STATEMENT OF THE CASE

ARCpoint Franchise Group, LLC f/k/a Accudiagnotics, LLC ("AFG") and ARCpoint Occupational Solutions, LLC ("AOS") (collectively, "Appellants") appeal the circuit court's orders denying, in part, Appellants' motion to dismiss and compel arbitration, and denying Appellants' motion to reconsider.

This action was commenced in the Greenville County Court of Common Pleas with the filing of a summons and complaint on June 20, 2017 and service on June 23, 2017. (R. pp. 13-63). The ten Plaintiffs collectively asserted a total of thirteen causes of action in the Complaint, including claims for declaratory relief, civil conspiracy, six claims for breach of contract/breach of contract accompanied by fraud, two claims for violation of the South Carolina Unfair Trade Practices Act, two claims for tortious interference with contract, and a claim for tortious interference with business relationships. (R. pp. 21-61). All but three claims were asserted solely against AFG. Plaintiffs' second cause of action for civil conspiracy was asserted against both Defendants. Plaintiffs' eleventh and twelfth causes of action for tortious interference with contract were asserted against AOS only. (Id.)

On July 20, 2017, Appellants filed a motion to dismiss and compel arbitration. (R. p. 958-1859). Appellants filed a memorandum in support on August 21, 2017. (R. pp. 1860-1938). The motion was heard by the Honorable R. Scott Sprouse on August 24, 2017. (R. pp. 1965-93).

On September 20, 2017, the trial court entered an order granting in part and denying in part Appellants' motion. (R. pp. 1-13). The trial court found that AOS could not enforce the arbitration provisions as a nonsignatory to the Franchise Agreements, and that AFG could not enforce the arbitration provisions as to two Plaintiffs, Florence ODS, Inc. and Myrtle Beach ODS, Inc., based upon the revocations of jury trial waivers in their Franchise Agreements. (Id.)

On September 29, 2017, Appellants filed a motion to reconsider, alter and amend (R. pp. 1954-64), which was denied on October 11, 2017. (R. pp. 11-12). Appellants' notice of appeal was served on October 25, 2017 and filed on October 27, 2017. (R. pp. 1998-2014).

INTRODUCTION

This appeal involves the application of thirteen nearly identical arbitration provisions in Respondents' franchise agreements. The broadly-worded arbitration provisions apply to "all disputes arising out of or relating to this Agreement. . . ." After Respondents filed suit in circuit court asserting various claims arising from and related to their respective franchise agreements, AFG and AOS moved to enforce this provision and compel arbitration. The trial court correctly found that all of the claims asserted against AFG were subject to mandatory arbitration, but then found that AFG's "related/affiliated entity," AOS, could not compel arbitration of the same and similar claims arising from the same facts and circumstances.

To reach this result, the trial court erroneously found that "the AFG arbitration clause is unambiguously and specifically limited to 'disputes. . . between the parties' to the Franchise Agreement[,]" notwithstanding the much broader express language that encompasses "all disputes arising out of or relating to this Agreement or to any other agreements between the parties[.]" By omitting this critical language, the trial court conflated the ARCpoint arbitration provisions with the arbitration provisions at issue in two Eleventh Circuit cases, and erroneously distinguished a South Carolina Court of Appeals decision construing a similarly-worded provision to allow a nonsignatory to compel arbitration under multiple theories.

The trial court alternatively found that nonsignatory enforcement would not be appropriate even with a broader clause. In doing so, the trial court erred in concluding that the claims against AOS – for conspiring with AFG to materially alter the Franchise Agreements, and for tortiously interfering with the Franchise Agreements – were not sufficiently related to AFG

or the franchise agreements. The trial court also injected, without factual or legal support, the date of incorporation of AOS into its analysis of whether a nonsignatory can enforce an arbitration provision, and mistakenly found that the parties did not enter into any agreements after AOS's incorporation despite the record demonstrating otherwise.

Finally, the trial court erred in finding that the revocation of a separate jury trial waiver in two of the franchise agreements rendered the arbitration provision in those two agreements unenforceable by even AFG. Each franchise agreement includes a mutual jury trial wavier that is separate and apart from the arbitration clause. Two of the franchisees revoked their jury trial waivers, thereby preserving their right to a jury trial in disputes that are not subject to mandatory arbitration. In doing so, the parties expressly agreed that "[n]o other terms or conditions of the above-mentioned contract shall be negated or changed as a result of this here stated addendum." The trial court, however, mistakenly applied this addendum to negate the separate arbitration provision despite a literal reading that would give meaning to both.

BACKGROUND

This action arises out of a dispute between a national franchisor and a group of its franchisees. ARCpoint Franchise Group, LLC ("AFG") is the Greenville-based franchisor of ARCpoint Labs, a national third-party provider/administrator providing drug testing, alcohol screening, DNA and clinical lab testing, corporate wellness services, and employment and background screening. ARCpoint Occupational Solutions, LLC ("AOS") is a third-party administrator of national AFG accounts.

In total, ARCpoint franchisees currently operate in over 100 territories in 28 states. Each territory is licensed pursuant to a separate franchise agreement with AFG, which creates and governs the franchisor-franchisee relationship with each respective franchisee. The franchise

agreement sets forth, among other things, the franchisee's protected territory and the respective rights of the franchisor and franchisee within and outside of the territory; rights and obligations with respect to marketing and solicitation; the franchisor's right to select and control the products and services offered by franchisees and the vendors and suppliers used by franchisees; rights and obligations with respect to national, regional and state accounts; provisions to protect the franchisor's service marks and other intellectual property and the franchisor's confidential trade secrets; covenants to protect the franchisor from competition by the franchisee, its owners, executives and managers; and a broad arbitration clause.

The ten Respondents are ARCpoint franchisees who operate franchises in thirteen territories in six states. Each Respondent executed one or more Franchise Agreements with AFG. (Defs.' Mtn. to Compel Arb., Exhibits 1-13; R. pp. 962-1859). Eight of the Franchise Agreements contain the following arbitration provision:

> **This Agreement evidences a transaction involving commerce and, therefore, the Federal Arbitration Act, Title 9 of the United States 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 it 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 Franchisor or any of Franchisor's agents or employees.**

(Defs.' Mtn., Exhibits 1-5, ¶ 23.7 (R. pp. 1002, 1055, 1114, 1174, 1249); Exhibits 6-8, ¶ 22.7 (R. pp. 1318, 1384-85, 1451)).

The arbitration provisions in the remaining five Franchise Agreements include the same language, except that the "interpretation, formation or breach of this or any other agreement" language is replaced by "any of the dealings between the parties" as follows:

> **. . . all disputes arising out of or relating to this Agreement, to any other agreements between the parties, or with regard to any of the dealings between the parties, shall be settled by binding arbitration . . . .**

(Defs.' Mtn., Exhibits 9-13, ¶ 22.7 (R. pp. 1520, 1591, 1681, 1762, 1841)).

Each Franchise Agreement also includes a mutual jury trial waiver as follows:

> **Waiver of Jury Trial**
> Franchisee and Franchisor each irrevocably waive trial by jury in any action, whether at law or in equity, brought by either of them against the other.

(Defs.' Mtn., Exhibits 1-5, ¶ 23.6 (R. pp. 1002, 1055, 1114, 1173, 1249) and Exhibits 6-13, ¶ 22.6 (R. pp. 1318, 1384, 1451, 1519, 1590, 1670, 1761, 1840)).

Two franchisees, Florence ODS, Inc. and Myrtle Beach ODS, Inc., executed addendums with the following language revoking the above jury trial waivers in their Franchise Agreements: "I do not wish to waive our right to a jury trial" and "Do not wish to waive our rights to a jury trial." (R. pp. 1332, 1399). Both addendums further state that "[n]o other terms or conditions of the above-mentioned contract shall be negated or changed as a result of this here stated addendum." (Id.).

Respondents filed suit against AFG and AOS in Greenville County Common Pleas, collectively asserting a total of thirteen causes of action for declaratory relief, civil conspiracy, six claims for breach of contract/breach of contract accompanied by fraud, two claims for violation of the South Carolina Unfair Trade Practices Act, two claims for tortious interference

with contract, and a claim for tortious interference with business relationships. (R. pp. 13-63). All but three claims were asserted solely against AFG. (Id.). Respondents' second cause of action for civil conspiracy was asserted against both AFG and AOS. (R. p. 23). The eleventh and twelfth causes of action for tortious interference with contract were asserted by two groups of Respondents against AOS only. (R. pp. 55-57).

As a result of the trial court's order, the following claims were not ordered to arbitration, and are the subject of this appeal:

Claims asserted against AOS

- The second cause of action for civil conspiracy brought by all Respondents against AFG and AOS (this same cause of action asserted against AFG was ordered to arbitration, except as to Respondents Florence ODS and Myrtle Beach ODS as noted below);

- The eleventh cause of action for tortious interference with contract brought by Respondents AP Tallahassee, AP Nashville, On Trac Holdings, Employer's Choice and Blue Lizard against AOS only; and

- The twelfth cause of action for tortious interference with contract brought by Respondents JumpR2 and Shamey's against AOS only.

Claims asserted by Florence ODS and Myrtle Beach ODS

- The first cause of action for declaratory relief brought by all Respondents against AFG (this same claim asserted by the remaining Respondents was ordered to arbitration);

- The second cause of action for civil conspiracy brought by all Respondents against AFG and AOS (this same cause of action asserted by the remaining Respondents against AFG was ordered to arbitration);

- The fifth cause of action for breach of contract brought by Respondents Florence ODS, Myrtle Beach ODS, and 3 Sons Ventures against AFG (this same cause of action asserted by 3 Sons Ventures was ordered to arbitration);

- The sixth cause of action for breach of contract accompanied by a fraudulent act brought by Respondents Florence ODS, Myrtle Beach ODS, and 3 Sons Ventures against AFG (this same cause of action asserted by 3 Sons Ventures was ordered to arbitration);

- The ninth cause of action for violation of the South Carolina Unfair Trade Practices Act brought by Respondents Florence ODS, Myrtle Beach ODS, and 3 Sons Ventures against

AFG (this same cause of action asserted by 3 Sons Ventures was ordered to arbitration); and

- The thirteenth cause of action for tortious interference with business relationships brought by all Respondents against AFG (this same cause of action asserted by the remaining Respondents was ordered to arbitration).

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings. Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

ARGUMENT

"The policy of the United States and South Carolina is to favor arbitration of disputes." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110, 118 (2001); Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727, 731-32 (2014) ("[A]rbitration agreements enjoy a strong presumption of validity in federal and state courts."). Accordingly, "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Zabinski, 553 S.E.2d at 118.

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." Id. Any doubts about whether Respondents' claims are subject to arbitration "should be resolved in favor of arbitration." Id.

I. The trial court erred in denying Appellants' motion to compel arbitration of the claims against AOS.

A. The trial court narrowly construed the subject arbitration provisions as limited to "disputes . . . between the parties" despite much broader language in the actual provisions that encompass "all disputes arising out of or relating to this Agreement or to any other agreements between the parties."

The trial court found that AOS could not compel arbitration because "the AFG arbitration clause is unambiguously and specifically limited to 'disputes. . . between the parties' to the Franchise Agreement." (R. p. 7). The trial court's quote of the relevant arbitration provision, however, omitted critical language that significantly expands the scope of arbitration to "all disputes ***arising out of or relating to this Agreement or to any other agreements*** between the parties[.]" (R. pp. 1002, 1055, 1114, 1174, 1249, 1318, 1384-85, 1451, 1520, 1591, 1671, 1762, 1841) (emphasis added).

By omitting this critical language, the trial court was able to find support in two Eleventh Circuit cases construing much narrower arbitration provisions, Kroma Makeup Eu, LLC v. Boldface Licensing + Branding, Inc., 845 F.3d 1351, 1353 (11th Cir. 2017) and World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc., 517 F.3d 1240, 1247 (11th Cir. 2008). The language of the arbitration provisions at issue in those cases is distinguishable from both the language at issue here, and the language in the arbitration clause at issue in Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597, 599 (Ct. App. 2012). *Compare* Kroma Makeup Eu, LLC, 845 F.3d at 1353 (". . . the Parties agree that the disputes ***arising between them*** concerning the validity, interpretation, termination or performance of the present Contract, should be considered [in] independent arbitration in the State of Florida, United States."), *and* World Rentals & Sales, LLC, 517 F.3d at 1247 ("[a]ll disputes, claims, controversies or causes of action ***arising between Franchisee and Franchisor***" and expressly excluding its affiliates),

with Pearson, 733 S.E.2d at 599 ("Any controversy or claim ***arising out of or relating to the interpretation, enforcement or breach of this Agreement*** or the relationship between the parties hereto shall be resolved by binding arbitration"), *with* Exhibits 1-8 (R. pp. 1002, 1055, 1114, 1174, 1249, 1318, 1384-85, 1451) ("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"), *and* Exhibits 9-13 (R. pp. 1520, 1591, 1671, 1762, 1841) ("all disputes ***arising out of or relating to this Agreement***, to any other agreements between the parties, or with regard to any of the dealings between the parties") (emphasis added to all).

Each arbitration provision here applies to "all disputes arising out of or relating to this Agreement." Arbitration clauses that contain this "arising out of or relating to" language are considered broadly-worded and have application to all disputes that have a significant relationship to the contract, regardless of whether the claims arise out of the contract. American Bankers Ins. Group, Inc. v. Long, 453 F.3d 623, 630 (4th Cir. 2006); Zabinski, 553 S.E.2d at 119 ("A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained.").

The "heavy presumption" in favor of arbitration is "strengthened when an arbitration clause is broadly written," such as when language provides for arbitration of all disputes "arising out of or relating to" the contract. Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 739 S.E.2d 209, 213 (2013). "[T]he 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.'" Id. at 214 (*quoting* J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988) (second alteration by court).

By failing to appreciate the broad nature of ARCpoint's arbitration provisions and conflating these provisions with those at issue in Kroma Makeup Eu, LLC and World Rentals & Sales, LLC v. Volvo, the trial court erroneously found that AOS was precluded from enforcing the arbitration provisions. The distinction between the arbitration provisions examined in Pearson – which are nearly identical to the ARCpoint arbitration provisions – and the provisions at issue in Kroma Makeup / World Rental & Sales, is critical in the assessment of arbitrability here, and the trial court's failure to appreciate this distinction was in error.

B. AOS can compel enforcement as a nonsignatory under multiple theories set forth in Pearson.

"Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597, 601 (Ct. App. 2012) (*quoting* Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-417 (4th Cir. 2000)).

In Pearson, 733 S.E.2d at 600-03, this Court examined the ability of non-signatories to compel signatories to arbitrate based on estoppel and other equitable theories. *See* id. (collecting cases recognizing various theories based on principles of incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel).

The Pearson court approved of the use of equitable estoppel to allow a non-signatory to compel arbitration in two different circumstances:

> First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims

> against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate.
>
> Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.

Id. at 603 (*quoting* Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 314 n. 9 (D.S.C. 2005) (emphases added by court)); *see also* American Bankers Ins. Group, Inc. v. Long, 453 F.3d 623, 637, 631 n. 3 (4th Cir. 2006) (noting the Fourth Circuit's approval of the estoppel theories cited in Goer and Pearson).

The Pearson court also cited approvingly to cases in which signatories have been compelled to arbitrate with nonsignatories based on "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations." Pearson, 733 S.E.2d at 601-02 (*quoting* Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 n. 6 (4th Cir. 2000)).

All of Respondents' claims against AOS fit squarely within the framework for nonsignatory enforcement set forth in Pearson. Respondents' three causes of action against AOS include the second cause of action for civil conspiracy against AOS and AFG (R. pp. 23), and the eleventh and twelfth causes of action for tortious interference with contract against AOS only. (R. pp. 41-42).

In Respondents' civil conspiracy claim, the Franchise Agreements are the subject of the alleged conspiracy. (Compl. ¶¶ 39, 52, 40, 46. (R. pp. 23-25)). Respondents allege that "AFG

and its affiliate/division, AOS, have combined for the purpose of improperly changing the relationship between AFG and its Franchisees" in a conspiracy "to materially alter the terms of Plaintiffs' franchise agreements." (Compl., ¶¶ 38, 45 (R. pp. 23, 25)). Respondents quote, cite and reference provisions in the Franchise Agreements that AFG and AOS allegedly conspired to alter, and allege as part of this cause of action that AFG breached these provisions. (Compl. ¶ 39. (R. pp. 23-24) (quoting "Area of Primary Responsibility" and "Protected Territory" provisions); ¶ 52[1] (R. p. 24) (citing "National Accounts" provisions); ¶ 40 (R. pp. 24-25) (alleging that "despite the above provisions, [AFG] wrongfully allowed AOS to act as Franchisor's Third-Party Administrator with respect to National Accounts. . . ."); ¶ 45 (R. p. 25) (alleging that ". . . AFG has placed restrictions upon Franchisees that were never contemplated by their Franchise Agreements.")).

Respondents' civil conspiracy claim is premised on the existence of a franchisor-franchisee relationship, and the Franchise Agreements that created those relationships are the subject of the alleged conspiracy. (Compl. ¶¶ 37-65 (R. pp. 23-30)). The claim arises out of the Franchise Agreements. The claim necessarily implicates and requires reference to and interpretation of the provisions of each Franchise Agreement, including not only the Protected Territory and National Accounts provisions that AFG and AOS allegedly conspired to alter and that AFG allegedly breached, but also the provisions that set forth corresponding rights and obligations of the parties. (*E.g.* Exhibit 6, ¶ 2.5 (R. pp. 1271-72) (providing for, among other rights, the right to establish, own, operate and license ARCpoint Businesses and other businesses offering the same or similar products inside and/or outside of the Protected Territory; the right to service National Accounts within the Protected Territory or allow other ARCpoint Businesses or

[1] Paragraphs 52 and 53 of the Complaint are numbered out of sequence.

third parties service National Accounts; the right to provide services and sell products authorized for ARCpoint Businesses, and provide services similar to those offered through the franchised business through alternate channels of distribution, including the internet)).

The eleventh and twelfth causes of action allege that AOS tortiously interfered with ten of the Franchise Agreements.[2] (R. pp. 55-57). Respondents allege that AOS interfered with and has procured a breach of the Franchise Agreements by using the internet to solicit, market, advertise to, and provide ARCpoint's authorized products and services to all persons and entities and not just National Accounts. (Compl. ¶¶ 165-166, 168-169 (R. pp. 55-57)).

These tortious interference claims arise out of the Franchise Agreements that AOS allegedly interfered with. The allegations refer to and incorporate provisions in the Franchise Agreements. (Compl. ¶¶ 165-66, 168-69 (R. pp. 55-57)). The claims implicate the respective rights and obligations created by the Franchise Agreements and require interpretation of the provisions of each Franchise Agreement. (*See e.g.* Exhibit 3, ¶ 2.6 (R. pp. 1075-76) (reserving franchisor's rights to provide the services and sell the products authorized for ARCpoint Businesses through alternate channels of distribution as deemed appropriate); ¶ 11.5 (R. p. 1092) (providing for franchisor's exclusive rights to market on the internet)). In order to prevail on their tortious interference claims, Respondents would have to show that AOS both interfered with and procured a breach of the Franchise Agreements.

(1) Respondents must rely on the terms of the Franchise Agreement to assert their claims against AOS.

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[2] Respondents' eleventh cause of action was brought by "AP Tallahassee" (Exhibit 1, R. p. 962), "AP Nashville" (Exhibit 2, R. p. 1015), "On Trac" (Exhibit 3, R. p. 1072), "Employer's Choice" (Exhibit 4, R. p. 1131), and "Blue Lizard" (Exhibit 5, R. p. 1207); the twelfth was brought by JumpR2 (Exhibit 9, R. p. 1469) and "Seltz and Datlow" (Exhibits 10 (R. p. 1540), 11 (R. p. 1620), 12 (R. p. 1711) and 13 (R. p. 1790)). The allegations in these two causes of action otherwise mirror each other.

As set forth in Pearson, "equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory." Id. (emphasis removed). Respondents must rely on the terms of the Franchise Agreement to assert their claims against AOS for conspiring to materially alter the Franchise Agreements and for tortiously interfering with the Franchise Agreements. (*See e.g.* Compl. ¶ 3 (R. p. 16) ("AFG entered into Franchise Agreements with each of the Plaintiffs"); ¶ 45 (R. p. 25) ("Through AOS, AFG has attempted to materially alter the terms of Plaintiffs' franchise agreements"); ¶¶ 165, 168 (R. pp. 55-56) ("The Franchise Agreements of Plaintiffs . . . are "valid" contracts of which AOS has full knowledge"); ¶¶ 166, 169 (R. p. 56, 57) ("AOS is intentionally procuring a breach of AFG's Franchise Agreement")).

In explaining this first estoppel scenario, the Pearson court observed that

> When each of a signatory's claims against a nonsignatory ***makes reference to or presumes the existence of the written agreement***, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate.

Id. at 603. (emphasis added).

Respondents' claims against AOS for conspiring to materially alter the Franchise Agreements and for tortuously interfering with the Franchise Agreements make reference to **and** presume the existence of the Franchise Agreements. (*See e.g.* Compl. ¶ 3 (R. p. 16) ("AFG entered into Franchise Agreements with each of the Plaintiffs"); ¶ 45 (R. p. 25) ("Through AOS, AFG has attempted to materially alter the terms of Plaintiffs' franchise agreements"; ¶¶ 165, 168, (R. p. 55, 56) ("The Franchise Agreements of Plaintiffs . . . are "valid" contracts of which AOS has full knowledge since it shares many key personnel with AFG and is held out and holds itself out as an affiliate of AFG."); ¶¶ 166, 169 (R. pp. 56, 57) ("AOS is intentionally procuring a breach of AFG's Franchise Agreement"); Pltfs.' Memo in Opposition, p. 13 (R. p. 1951) ("At

best, the claims against AOS only require that Defendants not deny the existence of the Franchise Agreements.")).

(2) Respondents' claims against AOS raise allegations of substantially interdependent and concerted misconduct by AOS and AFG.

The second circumstance that Pearson approved of for the application of estoppel was "when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Pearson, 733 S.E.2d at 603. (emphasis removed).

Respondents' claims against AOS for conspiring with AFG to materially alter the Franchise Agreements and for tortiously interfering with the Franchise Agreements raise allegations of substantially interdependent and concerted misconduct by both AOS and AFG. (*See e.g.* Compl. ¶ 45 (R. p. 25) ("Through AOS, AFG has attempted to materially alter the terms of Plaintiffs' franchise agreements"); ¶ 48 (R. p. 26) ("As part of their combination to expand AOS' role and detrimentally circumscribe and restrict the business activities of the Plaintiffs, AOS, with the active support of AFG, has been bidding on state governmental drug and alcohol testing"); ¶ 55 (R. p. 27) ("AFG used its leverage and market power as the Franchisor of approximately 100 ARCpoint Lab Franchisees nationwide to obtain extremely low wholesale lab service and testing product prices from vendors and suppliers for its AOS affiliate/division"); ¶ 63 (R. p. 29) ("[Plaintiffs] will be and are being substantially damaged by AFG's conduct of arranging for preferential (predatory) pricing for AOS that is not available to these Plaintiffs, who are contractually bound to use AFG's approved vendors and suppliers"); ¶ 68 (R. p. 31) ("Notwithstanding the above provision in each of the foregoing Franchise Agreements, AFG has wrongfully allowed AOS to operate a web page on the world-wide web/internet through which AOS is soliciting, marketing, advertising and providing all of ARCPoint's authorized products

and services to all persons and entities throughout the United States."); ¶¶ 166, 169 (R. pp. 56, 57) ("By operating a web page on the world wide web/internet in each of the Franchisee's Protected Territories though which AOS is soliciting, marketing, advertising, and providing all of ARCpoint's authorized products and services to all persons and entities . . . and not just National Accounts, AOS is intentionally procuring a breach of AFG's Franchise Agreement with these Franchisees without justification and resulting in damages to these Franchisees.")).

(3) Respondents' claims allege a close relationship between AFG and AOS and the alleged wrongs.

Respondents' claims against AOS for conspiring with AFG to materially alter the Franchise Agreements and for tortiously interfering with the Franchise Agreements allege a close relationship between AFG and AOS and the alleged wrongs. (Compl. ¶ 147 (R. p. 51) ("AOS is an AFG/ARCpoint Business[,]"); ¶ 94 (R. p. 37) (AOS is "AFG's affiliate/division[,]"); ¶ 165 (R. p. 55) (AOS "shares many key personnel with AFG[,]"; ¶ 5, (R. p. 16), AOS "has some common ownership with AFG[,]"); ¶ 60 (R. p. 28) ("AOS operates under the 'ARCpoint' name[,]"); ¶ 60 (R. p. 28) (AOS's "employees answer the telephone as 'ARCpoint'" [and] offers the products and services it sells as ARCpoint products and services[,]"); ¶ 147 (R. p. 51) ("AOS and AFG occupy corporate office space across the street from one another, share the same executive team, the same name and trademarks" and that "AOS and AFG are not substantially distinguishable from one another."); ¶ 45 (R. p. 25) ("Through AOS, AFG has attempted to materially alter the terms of Plaintiffs' franchise agreements"); ¶ 48 (R. p. 26) ("As part of their combination to expand AOS' role and detrimentally circumscribe and restrict the business activities of the Plaintiffs, AOS, with the active support of AFG, has been bidding on state governmental drug and alcohol testing"); ¶55 (R. p. 27) ("AFG used its leverage and market power as the Franchisor of approximately 100 ARCpoint Lab Franchisees nationwide to obtain

extremely low wholesale lab service and testing product prices from vendors and suppliers for its AOS affiliate/division"); ¶ 63 (R. p. 29) ("[Plaintiffs] will be and are being substantially damaged by AFG' s conduct of arranging for preferential (predatory) pricing for AOS that is not available to these Plaintiffs, who are contractually bound to use AFG's approved vendors and suppliers"); ¶ 68 (R. p. 31) ("AFG has wrongfully allowed AOS to operate a web page on the world-wide web/internet through which AOS is soliciting, marketing, advertising and providing all of ARCPoint's authorized products and services to all persons and entities throughout the United States."); ¶¶ 165, 168 (R. p. 55, 56) ("The Franchise Agreements of Plaintiffs . . . are 'valid' contracts of which AOS has full knowledge since it shares many key personnel with AFG and is held out and holds itself out as an affiliate of AFG."); ¶¶ 166, 169 (R. p. 56, 57) ("By operating a web page on the world wide web/internet in each of the Franchisee's Protected Territories though which AOS is soliciting, marketing, advertising, and providing all of ARCpoint's authorized products and services to all persons and entities . . . AOS is intentionally procuring a breach of AFG's Franchise Agreement with these Franchisees without justification and resulting in damages to these Franchisees.")).

(4) The claims against AOS are intimately founded in and intertwined with the contractual obligations in the Franchise Agreements.

Respondents' claims against AOS for conspiring with AFG to materially alter the Franchise Agreements and for tortiously interfering with the Franchise Agreements are intimately founded in and intertwined with the contractual obligations in the Franchise Agreements. (*See e.g.* Compl. ¶ 45 (R. p. 25) ("Through AOS, AFG has attempted to materially alter the terms of Plaintiffs' franchise agreements"); ¶ 63 (R. p. 29) ("[Plaintiffs] will be and are being substantially damaged by AFG's conduct of arranging for preferential (predatory) pricing for AOS that is not available to these Plaintiffs, who are contractually bound to use AFG's

approved vendors and suppliers"); ¶ 68 (R. p. 31) ("Notwithstanding the above provision in each of the foregoing Franchise Agreements, AFG has wrongfully allowed AOS to operate a web page on the world-wide web/internet through which AOS is soliciting, marketing, advertising and providing all of ARCPoint's authorized products and services to all persons and entities throughout the United States."); ¶¶ 166, 169 (R. pp. 56, 57) ("By operating a web page on the world wide web/internet in each of the Franchisee's Protected Territories though which AOS is soliciting, marketing, advertising, and providing all of ARCpoint's authorized products and services to all persons and entities . . . and not just National Accounts, AOS is intentionally procuring a breach of AFG's Franchise Agreement with these Franchisees without justification and resulting in damages to these Franchisees.")).

(5) The claims against AOS incorporate the Franchise Agreements.

Respondents' claims against AOS for conspiring to materially alter the Franchise Agreements and for tortiously interfering with the Franchise Agreements incorporate the Franchise Agreements by reference. (*See e.g.* Compl. ¶ 3 (R. p. 16) ("AFG entered into Franchise Agreements with each of the Plaintiffs"; ¶ 45, (R. p. 25) "Through AOS, AFG has attempted to materially alter the terms of Plaintiffs' franchise agreements"); ¶¶ 165, 168 (R. pp. 55, 56) ("The Franchise Agreements of Plaintiffs . . . are 'valid' contracts of which AOS has full knowledge since it shares many key personnel with AFG and is held out and holds itself out as an affiliate of AFG."); ¶¶ 166, 169 (R. pp. 56, 57) ("AOS is intentionally procuring a breach of AFG's Franchise Agreement with these Franchisees without justification and resulting in damages to these Franchisees.")).

Despite all of this, the trial court found that "the claims against AFG and AOS are not substantially interdependent and/or intertwined such that equitable estoppel applies[,]" and that

"the allegations and claims of the Plaintiffs against AOS are independent of AFG." (R. p. 8). The trial court's findings were in error.

C. The arbitrability of Respondents' claims against AOS is unaffected the by date of incorporation of AOS, and the trial court's related factual findings were unsupported by the record.

The trial court erred in considering the date of incorporation of AOS and whether the parties contemplated AOS at the time the franchise agreements were executed, as there are no authorities to suggest that such factors are relevant in analyzing whether a nonsignatory can enforce an arbitration provision. In Pearson, this Court made no reference to either of these factors in its detailed discussion of the various theories under which nonsignatories can compel arbitration. The trial court erred in injecting these factors into its analysis.

Further, the trial court made a related factual finding that was not supported by the record. The trial court found that Respondents and AFG did not enter into any agreements after AOS's incorporation. (R. pp. 7-8). However, Respondents entered into multiple addenda to and modifications of at least four of the franchise agreements after the date AOS was incorporated. (*See* Defs.' Mtn., Exhibits 10, 11, 12 and 13, multiple addenda and modifications signed by Respondents in December 2013, January 2014 and July 2016) (R.pp. 1610-18 (12/30/13 and 1/3/14 Addendums to Shamey Seltz-Datlow Franchise Agreement); 1689, 1693-97 (12/30/13 and 1/3/14 Addendums to Shamey Seltz-Datlow Franchise Agreement); 1780-88 (12/30/13 and 1/3/14 Addendums to Shamey Seltz-Datlow Franchise Agreement)). To the extent the date of incorporation was properly considered in the first place, the trial court's factual finding was not supported by the record.

II. The revocation of a jury trial waiver can be read in harmony with a separate arbitration provision and meaning can be given to both.

The arbitration provision in each franchise agreement is subject to an exception 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. . . ." (Defs.' Mtn. Exhibits 6 and 7, ¶ 22 (R. pp. 1318, 1384-85)). Each franchise agreement also includes a mutual jury trial waiver that is separate and apart from the arbitration provision. The jury trial waiver provides that "Franchisee and Franchisor each irrevocably waive trial by jury in any action, whether at law or equity, brought by either of them." (Id. ¶ 22.6. (R. pp. 1318, 1384)). Reading the arbitration provision and jury trial waiver together with the contract as whole, the jury trial waiver applies to disputes that are not subject to mandatory arbitration.

Respondents Florence ODS, Inc. and Myrtle Beach ODS, Inc. executed addendums revoking their jury trial waivers with the following language: "I do not wish to waive our right to a jury trial" and "Do not wish to waive our rights to a jury trial." (R. p. 1332, p. 1399). Both addendums expressly provided that "[n]o other terms or conditions of the above-mentioned contract shall be negated or changed as a result of this here stated addendum." (Id.). Stated another way, the express language provided that their revocations of the jury trial waivers in Paragraph 22.6 should not be construed to negate their agreements to arbitrate those disputes subject to mandatory arbitration in Paragraph 22.7.

The trial court disregarded this plain, unambiguous language and construed the addendums to negate the separate arbitration provisions in these two franchise agreements. This was in error. Reading the franchise agreement as a whole, Respondents Florence ODS, Inc. and Myrtle Beach ODS, Inc.'s waiver revocations and the arbitration provisions are not mutually

exclusive. Construing the addendum as written and as intended – to preserve these franchisees' right to a jury trial only in those matters that are not subject to mandatory arbitration – imparts meaning to both the revocations and the mandatory arbitration provisions. Accordingly, the trial court erred in denying Appellants' motion as to the claims asserted by Respondents Florence ODS, Inc. and Myrtle Beach ODS, Inc.

CONCLUSION

For the reasons stated, Appellants respectfully submit that the trial court erred in finding the arbitration provisions inapplicable to the claims against AOS and in finding that two franchisees' revocations of jury trial waivers amounted to revocations of the separate agreements to arbitrate. The Court should reverse the trial court's denial of Appellants' motion and find that all of Respondents' claims against both Appellants are subject to mandatory arbitration.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

EARHART OVERSTREET LLC

By: _____

DAVID W. OVERSTREET
State Bar No.: 16965
david@earhartoverstreet.com

MICHAEL B. McCALL
State Bar No.: 73028
mike@earhartoverstreet.com

P.O. Box 22528
Charleston, SC 29413
(843) 972-9400

SMITH MOORE LEATHERWOOD LLP

NATALMA M. McKNEW
State Bar No.: 3864
tami.mcknew@smithmoorelaw.com

2 W. Washington Street, Suite 1100
Greenville, SC 29601
(864) 751-7800

Attorneys for Defendants ARCpoint Franchise Group, LLC and ARCpoint Occupational Solutions, LLC