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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

No. 2016-001512

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5387 (S.C. Ct. App. Filed March 2, 2016)
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,.....*Plaintiffs/Petitioners,*

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 Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co.; Southern Risk Insurance Services, LLC; Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co; and Laurie Williams,.....*Defendants,*

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are.....*Respondents,*

Of whom Laurie Williams is.....*Petitioner.*

JOINT APPENDIX VOLUME II

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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.

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Certificate of Compliance January 23, 2015

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.safeconow.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.

Safeco and the Safeco logo are registered trademarks of Safeco Corporation
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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.safeconow.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.safeconow.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.safeconow.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.safeconow.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 INC
Agency Name

100 HENRY PL
Street Address

SPARTANBURG | SC | 29608-3230
City | State | Zip

03-42-0744 | 39-36715
SPI Stat # | SBI Stat #

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

Agency Principal Signature 1/2/08

AM-1001 9/07

Safeco Insurance

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 NTWRK 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.

- [X] Safeco Insurance Company of America
- [X] General Insurance Company of America
- [X] 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
- [X] American States Insurance Company
- [X] 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 SRVICES 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: [signature]
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.

AM-1035 7/06 DOC

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

(L.S.)

Notary Public for South Carolina

My Commission Expires: 8/12/2021

FILED
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
2005 FEB 11 PM 3:05
EMILY Y MORGAN
CLERK OF COURT

Exhibit 1

Safeco Insurance

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 NTWRK 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.

- [X] Safeco Insurance Company of America
- [X] General Insurance Company of America
- [X] 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
- [X] American States Insurance Company
- [X] 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: [signature]
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.

AM-1035 7/06

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FILED
STATE OF SOUTH CAROLINA
COUNTY OF [illegible]
2019 FEB 11 [illegible] 05
EMILY Y. ROMANAN
CLERK OF COURT

Exhibit 2

Liberty Mutual
Agency Corporation

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:

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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.

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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

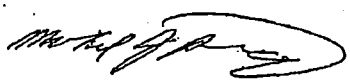
A892701 (02-11)

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
Title	Authorized Representative Title
Date	May 31, 2012 Date

A892701 (02-11)

Safeco Insurance™

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.safeconow.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."

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.safeconow.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."

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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Member of Liberty Mutual Group

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:

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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

Safeco Insurance™

Member of Liberty Mutual Group

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 PM 2:05
EMILY V. MOULTHAN
CLERK OF COURT

Exhibit 3

Safeco Insurance™

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,

Cecil Booher

Cecil Booher
Regional General Manager
Personal Lines Distribution

Safeco Insurance™

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)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE) 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
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
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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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)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE) 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
BY
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
SC Bar No. 012872
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William C. Wood, Jr.
SC Bar No. 015111
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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
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9025
www.nelsonmullins.com

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

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

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

EMILY Y. [illegible]
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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E-Mail: brian.crotty@nelsonmullins.com
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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)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE) 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
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

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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
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

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=1237825802125 (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 party 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*]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Defendant Peerless Insurance Company and Montgomery Mutual Insurance Company.

STATE OF SOUTH CAROLINA) COUNTY OF ABBEVILLE	)	IN THE COURT OF COMMON PLEAS
RICHARD WILSON, 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.	)	Civil Action No. 2012-CP-01-306 MOTION OF DEFENDANTS MONTGOMERY INSURANCE COMPANY, SAFECO INSURANCE COMPANY, AND PEERLESS INSURANCE COMPANY TO COMPEL ARBITRATION AND TO DISMISS CLAIMS

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2012 OCT 18 P 12:56
EMILY S. MCCANLIES
CLERK OF COURT

TRUE COPY
BY
ABBEVILLE COUNTY 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. Schwabedissen 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.)

Finally, Wilson 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 ¶ 13.) 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. 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 party 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.)

Because Wilson'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. B. at ¶ 12.A (emphasis added).) All of Wilson'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, Wilson 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, 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, Wilson'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 Wilson alleged he 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, Safeco, 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 Defendant 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.

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

BENJAMIN FRANKLIN WOFFORD, JR. and REBECCA HAMMOND WOFFORD,

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.

Civil Action No. 2013-CP-01-045

TRUE COPY
ABBEVILLE COUNTY CLERK OF COURT

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

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2013 OCT 31 AM 11:16
EMILY [illegible]
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 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 party 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)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE) EIGHTH JUDICIAL CIRCUIT

Robert W. Spires,) Civil Action No: 2012-CP-01-342
)
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.)

TRUE COPY
BY
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
EMILY P. JONATHAN
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 party 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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Attorneys for Defendant Montgomery Mutual Insurance Company.

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

Eugene P. Lawton, Jr.,) Civil Action No. 2013-CP-01-124
)
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.)

TRUE COPY
BY
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 AM 10:54
BILLY Y. MCCRACKEN
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

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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

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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 party 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.")

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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.

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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.

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CONCLUSION

For the foregoing reasons, Peerless 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 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 12/8/14

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

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EMILY Y MCMAHAN
CLERK OF COURT

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

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

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BY
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 AGREEEMENT

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.

FILED
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COUNTY OF ABBEVILLE
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EMILY MCCRAHAN
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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.

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

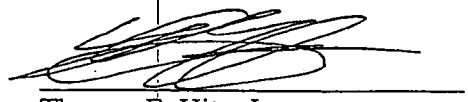
the filing of Defendant' motion. Further, a close reading of the contract evidences that the allegations for which Plaintiffs seek to recover – stealing, misappropriation of funds, artificial premium calculations, fraud, and forgery – are not contemplated by the agency agreement at hand. Therefore, Defendants' 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 21, 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
ABBEVILLE COUNTY CLERK OF COURT

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2014 FEB 11 AM 9:03
EMILY Y. MCMAHAN
CLERK OF COURT

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 C[2], 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,

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[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/AgncyLicSrch.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. 1)), 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.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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2/7, 2014

rec'd 2/20/2014
00350/1679

Hite & Stone
ATTORNEYS AT LAW

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,

Thomas E. Hite, Jr.
Attorney at Law

TEHjr./amh

Enclosure

cc: William C. ("Billy") Nicholson, III, Esquire
Lena Meredith, Esquire
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire

Robert C. Calamari, Esquire
Elizabeth McMillan, Esquire
Jane Hawthorne Merrill, Esquire
James C. ("Trey") Cox, III, Esquire
D. Larry Kristinik, Esquire
Mason Goldsmith, Esquire

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.

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

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*

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.

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[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).

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) COUNTY OF ABBEVILLE)	)	IN THE COURT OF COMMON PLEAS
RICHARD WILSON, 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.	)	Civil Action No. 2012-CP-01-306 **Motion to Alter or Amend the Order, filed March 25, 2014, Denying the Motion to Compel Arbitration**

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2014 APR -8 PM 2:42
EMILY Y MONAHAN
CLERK OF COURT

TRUE COPY
BY
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.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: _____

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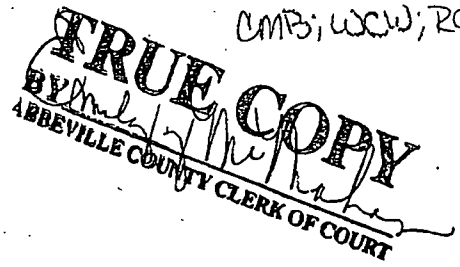
Attorneys for Defendants Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America

Columbia, South Carolina
April 4, 2014

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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.

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

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*

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.

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[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).

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,

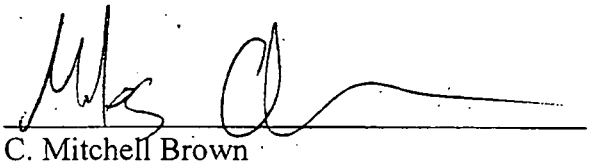
Of Whom Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America are..... Appellants,

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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January 7, 2015
Columbia, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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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):

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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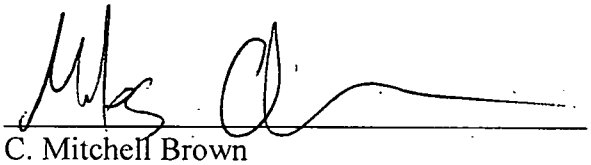
Of Whom Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America are..... Appellants,

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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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 III

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Certificate of Compliance January 7, 2015

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Certificate of Compliance January 23, 2015

State of South Carolina, County of Abbeville
In the Common Pleas Court, Eighth Judicial Circuit

Laurie Wilson Williams

Plaintiff,

vs.

Cynthia Gary

Defendant.

Case No. 2013-CP-01-00165

Consent Order

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2014 JUL 22 AM 8:40
EMILY Y MCMAHAN
CLERK OF COURT

The parties, through counsel, have reached an agreement and requests the Court approve it and make it an Order of the Court.

1. This case has a companion case that is currently being appealed to the South Carolina Court of Appeals (Appellate Case No. 2014-000974). The appellate court's decision will directly affect the posture of this case.
2. This case will not be called to trial until the matter on appeal is resolved, including any appeals either party may make to the South Carolina Supreme Court after the South Carolina Court of Appeals makes its decision.

Wherefore, it is ordered the above captioned case be continued until the companion case on appeal is resolved.

s/ Frank R. Addy, Jr.

Frank R. Addy, Jr.
Chief Administrative Judge, Common Pleas
Eighth Judicial Circuit

TRUE COPY
BY
ABBEVILLE COUNTY CLERK OF COURT

July 18, 2014

Greenwood, South Carolina

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

First National Insurance Company of America

Plaintiff(s)

v.

Robert Wayne Gary and Cynthia Gary, and Laurie Wilson-Williams

Defendant(s)

Civil Action No. 8:12-3124-GRA

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Robert Wayne Gary
2507 Long Cane Road
Troy, SC 29848-3636

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Shannon F. Bobertz, Esquire
Turner Padget Graham & Laney, PA
P. O. Box 1473
Columbia, SC 29202
803-254-2200

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 10/30/12
~~10/29/2012~~

s/Angela Lewis, Deputy Clerk

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

First National Insurance Company of America

Plaintiff(s)

v.

Robert Wayne Gary and Cynthia Gary, and Laurie Wilson-Williams

Defendant(s)

Civil Action No. 8:12-3124-GRA

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Cynthia Gary
2507 Long Cane Road
Troy, SC 29848-3636

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Shannon F. Bobertz, Esquire
Turner Padget Graham & Laney, PA
P. O. Box 1473
Columbia, SC 29202
803-254-2200

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: 10/30/12
~~10/29/2012~~

CLERK OF COURT

s/Angela Lewis, Deputy Clerk

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

First National Insurance Company of America

Plaintiff(s)

v.

Robert Wayne Gary and Cynthia Gary, and Laurie Wilson-Williams

Defendant(s)

Civil Action No. 8:12-3124-GRA

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Laurie Wilson-Williams

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Shannon F. Bobertz, Esquire
Turner Padget Graham & Laney, PA
P. O. Box 1473
Columbia, SC 29202
803-254-2200

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: 10/30/12
10/29/2012

CLERK OF COURT

s/Angela Lewis, Deputy Clerk

Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 441 (Rev. 07/10) Summons on Third-Party Complaint

UNITED STATES DISTRICT COURT

for the

District of South Carolina

First National Insurance Company of America
Plaintiff

v.

Laurie Wilson-Williams, Robert Wayne Gary et al.
Defendant, Third-party plaintiff

v.

Laura Willis, et al.
Third-party defendant

Civil Action No. 8:12-3124-GRA

SUMMONS ON A THIRD-PARTY COMPLAINT

To: *(Third-party defendant's name and address)* Laura B. Willis
c/o Billy Nicholson, Attorney
Nicholson Meredith & Anderson
109 West Court Avenue
Greenwood, South Carolina 29646
PLEASE SEE ATTACHED FOR ADDITIONAL THIRD PARTY DEFENDAN

A lawsuit has been filed against defendant Robert / Cynthia Gary, who as third-party plaintiff is making this claim against you to pay part or all of what the defendant may owe to the plaintiff First National Insurance Co..

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff and on the defendant an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant or defendant's attorney, whose name and address are:

Thomas E. Hite, Jr.
PO BOX 805
Abbeville, SC 29620

It must also be served on the plaintiff or plaintiff's attorney, whose name and address are:

Shannon Furr Bobertz
1901 Main St # 1700
Columbia, SC 29201

If you fail to respond, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may – but are not required to – respond to it.

Date: December 19, 2012

CLERK OF COURT

Signature of Clerk or Deputy Clerk

Civil Action No. 8:12-3124-GRA

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*: _____

_____

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

THIRD PARTY DEFENDANTS CONTINUED:

First National Insurance Company of America,
SC Department of Insurance
Legal Division (Service of Process)
PO Box 100105 Columbia, SC 29202-3105

Montgomery Insurance Company
SC Department of Insurance
Legal Division (Service of Process)
PO Box 100105 Columbia, SC 29202-3105

Safeco Insurance Company
SC Department of Insurance
Legal Division (Service of Process)
PO Box 100105 Columbia, SC 29202-3105

Jesse A. Dantice,
1007 Crestview Rd.
Anderson, SC 29621

Southern Risk Insurance Services LLC,
1007 Crestview Rd.
Anderson, SC 29621
Or
SC Department of Insurance Legal Division (Service of Process)
PO Box 100105 Columbia, SC 29202-3105

AO 441 (Rev. 07/10) Summons on Third-Party Complaint

UNITED STATES DISTRICT COURT

for the

District of South Carolina

First National Insurance Company of America
Plaintiff

v.

Laurie Wilson-Williams, Robert Wayne Gary et al.
Defendant, Third-party plaintiff

v.

Laura Willis, et al.
Third-party defendant

Civil Action No. 8:12-3124-GRA

SUMMONS ON A THIRD-PARTY COMPLAINT

To: *(Third-party defendant's name and address)* Laura B. Willis
c/o Billy Nicholson, Attorney
Nicholson Meredith & Anderson
109 West Court Avenue
Greenwood, South Carolina 29646
PLEASE SEE ATTACHED FOR ADDITIONAL THIRD PARTY DEFENDAN

A lawsuit has been filed against defendant Laurie Wilson-Williams, who as third-party plaintiff is making this claim against you to pay part or all of what the defendant may owe to the plaintiff First National Insurance Co..

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff and on the defendant an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant or defendant's attorney, whose name and address are:

Jane H. Merrill, Federal ID No. 10777
Post Office Box 1547
Greenwood, SC 29648

It must also be served on the plaintiff or plaintiff's attorney, whose name and address are:

Shannon Furr Bobertz
1901 Main St # 1700
Columbia, SC 29201

If you fail to respond, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may – but are not required to – respond to it.

Date: December 19, 2012

CLERK OF COURT

Signature of Clerk or Deputy Clerk

Civil Action No. 8:12-3124-GRA

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify):* _____

_____

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

THIRD PARTY DEFENDANTS CONTINUED:

First National Insurance Company of America,
SC Department of Insurance
Legal Division (Service of Process)
PO Box 100105 Columbia, SC 29202-3105

Montgomery Insurance Company
SC Department of Insurance
Legal Division (Service of Process)
PO Box 100105 Columbia, SC 29202-3105

Safeco Insurance Company
SC Department of Insurance
Legal Division (Service of Process)
PO Box 100105 Columbia, SC 29202-3105

Jesse A. Dantice,
1007 Crestview Rd.
Anderson, SC 29621

Southern Risk Insurance Services LLC,
1007 Crestview Rd.
Anderson, SC 29621
Or
SC Department of Insurance Legal Division (Service of Process)
PO Box 100105 Columbia, SC 29202-3105

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

First National Insurance Company of America, PLAINTIFF, VS. Robert Wayne Gary and Cynthia Gary and Laurie Wilson-Williams, DEFENDANTS, and Robert Wayne Gary and Cynthia Gary, THIRD PARTY PLAINTIFFS, VS. Laura B. Willis, individually, and as agent for Southern Risk Insurance Services LLC and First National Insurance Company of America, Montgomery Insurance Company, and Safeco Insurance Company, and Jesse A. Dantice, individually and as broker/agent for Southern Risk Insurance Services LLC, Montgomery Insurance Company and Safeco Insurance Company, and Montgomery Insurance Company, and Safeco Insurance Company, Southern Risk Insurance Services,	**ANSWER, COUNTERCLAIM AND THIRD PARTY COMPLAINT** **8:12-3124-GRA** **JURY TRIAL DEMANDED**

LLC)
)
THIRD PARTY)
DEFENDANTS.)
)

Defendants Robert Wayne Gary and Cynthia Gary (hereinafter Garys), reserving their right to contest subject matter jurisdiction pursuant to lack of diversity, hereby Answer the Complaint, Counterclaim thereto, assert a Third Party Complaint against the Third Party Defendants and would respectfully show unto the Court.

FOR A FIRST DEFENSE

1. That each and every allegation of the complaint not hereinafter admitted, modified or explained is denied.

2. That the Garys do not have sufficient information to admit or deny Paragraph One and therefore deny the same.

3. That the Garys admit Paragraphs Two, Three, Four, Five, Six, Seven, Eight, Nine Ten, Eleven, Thirteen, and Sixteen.

4. That the Garys presently do not have sufficient information to admit or deny Paragraphs Twelve, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, and Twenty and therefore deny the same and demand strict proof thereof.

FOR A SECOND DEFENSE AND COUNTERCLAIM
(PLAINTIFF ESTOPPED TO DENY LIABILITY INSURANCE COVERAGE)

5. That the allegations of the First Defense are incorporated herein by reference.

6. That the Garys had a right to rely on written letters which they received from Montgomery Insurance Company and Safeco Insurance Company, prior to the expiration of their Peerless Insurance automobile policy, indicating that their automobiles would continue to be covered

under the Liberty Mutual Group and that "they were not required to take any action." That the Plaintiff is also under auspices of the Liberty Mutual Group and are a successor in interest to Montgomery Insurance Company and Safeco Insurance Company.

7. That the Garys are informed and believe that the Plaintiff should be estopped from denying liability coverage based upon the written representation of coverage made to the Garys.

FOR A THIRD DEFENSE AND COUNTERCLAIM
(PLAINTIFF ESTOPPED BECAUSE AGENT BOUND LIABILITY COVERAGE)

8. That the First Defense, and the Second Defense and Counterclaim are incorporated herein by reference.

9. That in addition to the written representations referred to above in the Second Defense and Counterclaim, the Plaintiff's insurance agent, Laura Willis, personally assured the Garys that they continued to be covered with liability insurance and would receive a bill for that coverage at a later date. That the Garys are informed and believe that Laura Willis, as the Plaintiff's duly authorized and acting agent can legally bind the Plaintiff to provide coverage to the Garys in this case.

10. That when requested by the Plaintiff's authorized and acting agent, Laura Willis, the Garys paid for their insurance coverage with a check made payable to Safeco in the amount of One Thousand and Ninety Four Dollars and 00/100 ($1,094.00) dated August 10, 2012. This check was not backdated by the Garys, because there was no attempt to mislead anyone and absolutely no fraud or misrepresentation of any type on their part. Garys had no reason to mislead anyone because they had always been assured that their liability coverage was in force and effect.

FOR A FOURTH DEFENSE, COUNTERCLAIM, AND THIRD PARTY CLAIM
(VIOLATIONS OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT
S.C. CODE ANN § 39-5-10, *et seq.)*

11. That the allegations of the First Defense and Second and Third Defenses and

Counterclaims are incorporated herein by reference.

12. That the Third Party Defendant Laura B. Willis is a citizen and resident of the County of Abbeville, State of South Carolina and at the times mentioned herein was a licensed insurance agent and operated an insurance business under the direct supervision of her partner/broker Third Party Defendant Jesse A. Dantice, Third Party Defendant, Southern Risk Insurance Services LLC, Plaintiff, First National Insurance Company of America, Third Party Defendants Montgomery Insurance Company and Safeco Insurance Company.

13. That the Third Party Defendant Jesse A. Dantice, is on information and belief, a resident of the County of Anderson, State of South Carolina and at the times mentioned herein operated a insurance business in Abbeville County South Carolina wherein his agent/employee Laura B. Willis sold insurance policies under his direct supervision as well as the direct supervision of Third Party Defendant, Southern Risk Insurance Services LLC, Plaintiff, First National Insurance Company of America, Third Party Defendants Montgomery Insurance Company and Safeco Insurance Company.

14. That Third Party Defendant Southern Risk Insurance Services LLC is a corporation organized and existing under the laws of a state of the United States and at the time mentioned herein maintained a retail insurance office in Abbeville County, South Carolina wherein its authorized agents and servants sold insurance policies to the general public.

15. That the Plaintiff, First National Insurance Company of America, is a corporation organized and existing under the laws of a state of the United States and at the time mentioned herein maintained a retail insurance office in Abbeville County, South Carolina wherein its authorized agents and servants sold insurance policies to the general public.

16. That the Third Party Defendant, Montgomery Insurance Company, is a corporation

organized and existing under the laws of a state of the United States and at the time mentioned herein maintained a retail insurance office in Abbeville County, South Carolina wherein its authorized agents and servants sold insurance policies to the general public.

17. That Third Party Defendant, Safeco, is a corporation organized and existing under the laws of a state of the United States and at the time mentioned herein maintained a retail insurance office in Abbeville County, South Carolina wherein its' authorized agents and servants sold insurance policies to the general public.

18. That the Plaintiff, First National Insurance Company of America, and the Third Party Defendants Jesse A. Dantice, Southern Risk Insurance Services LLC, Montgomery Insurance Company and Safeco Insurance Company at all times have a legal duty to fully investigate any prospective insurance agent and/or employee as well as to the properly train and supervise Third Party Defendant Laura B. Willis both before and especially after she was fined, publicly reprimanded and placed on probation for dishonesty by the South Carolina Insurance Commission in October 2011.

19. That before the expiration of the Garys' Peerless Insurance automobile liability policy the Garys were contacted in writing by Third Party Defendants Montgomery Insurance Company and Safeco Insurance Company assuring them that their policy would be replaced and there was nothing that the Garys needed to do. That Third Party Defendant Laura B. Willis assured the Garys at all times that their liability insurance automobile policy was in full force and effect and all they needed to do was pay the premium when asked to do so. That the Garys paid their premium as requested, but now their automobile liability coverage has been denied by the Plaintiff and they are being accused of illegal and/or fraudulent acts by the Plaintiff.

20. South Carolina's Unfair Trade Practices Act (UTPA) creates a cause of action for those harmed by deceptive acts including "unfair or deceptive" acts or promises.

21. That the Plaintiff and Third Party Defendants by and through their acting agent and/or servant have made numerous misrepresentations to the Garys and the general public. These misrepresentations have an impact on the general public and this conduct is capable of repetition and in fact has been repeated numerous times.

22. That the Garys are informed and believe that among the many illegal and improper tactics used by the Plaintiff and Third Party Defendants to corner the retail insurance market in Abbeville County, South Carolina and destroy all competition, the Plaintiff and Third Party Defendants' authorized and acting agent and/or servant Third Party Defendant Laura B. Willis, with the express or implied permission of the Plaintiff and other Third Party Defendants committed the following acts:

a. repeatedly changed insurance applications filled out by customers, without the knowledge or permission of customers, to omit facts which would have resulted in higher rates to gain an unfair advantage against her competition;

b. repeatedly used her own personal driver's license number and social security number for new policy submissions;

c. quoted severely reduced premiums in violation of state insurance regulations to capture more insurance business and destroy competition;

d. took cash payments from the general public and gave no receipts making it difficult for customers to prove that they had in fact paid their insurance premiums;

e. forged documents to confirm non-existent insurance coverage;

f. issued bogus, and non-existent insurance policies to the general public;

g. pretended insurance policies were in force when a loss to a customer occurred;

h. unfairly adjusted claims made against the bogus insurance policies;

i. when insurance customers of Third party Defendant, Laura B. Willis questioned whether or not they had insurance coverage and/or needed to go elsewhere to other insurance agents to obtain coverage they were emphatically discouraged from seeking other coverage and through misrepresentation, blatant lies and deceit were assured that everything was fine even though the customer's lienholder and/or state government agencies were telling the customers that they had no coverage;

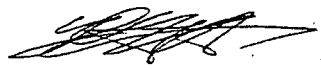
All of which could have been discovered and should have been discovered and stopped by the Plaintiff and the Third Party Defendants through reasonable direct supervision of Third Party Defendant Laura B. Willis' activities as well and through auditing computer programs which reveal fraud and/or misconduct of agents and/or customers. That the sheer volume of new insurance business generated by Third Party Defendant Laura B. Willis, in such a short amount of time, should have put the Plaintiff and Third Party Defendants on notice that something was being done improperly.

23. That as a direct and proximate result of Plaintiff and Third Party Defendants' unlawful business practices, fraudulent acts, and false statements, Garys have suffered significant damages, including, but not limited to, exposure to a potential liability suit and/or possible potentially damaged credit, damaged standing in the insurance industry for the purpose of obtaining future insurance policies, actual lost money paid for insurance premiums, severe emotional distress and aggravation and will continue to suffer such damages in the future.

24. That the Garys are informed and believe that they are entitled to actual damages including, restitution, disgorgement, treble damages, injunctive relief, attorneys' fees and costs, and all other relief allowed under South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*

WHEREFORE, the Garys pray that the Complaint be dismissed with costs, and for judgment against the Plaintiff and Third Party Defendants for actual damages, trebled damages, punitive damages and attorneys fees to be determined by a jury and for such other and further relief as the Court deems just and proper.

HITE & STONE

BY: 

THOMAS E. HITE, JR.
FED. ID. NO. 1888
THOMAS E. HITE, III
FED. ID. NO. 10657
100 EAST PICKENS STREET
P. O. BOX 805
ABBEVILLE, SC 29620
(864) 366-5400 TELEPHONE
(864) 366-2638 FACSIMILE
Email: tommyhite@hotmail.com
ATTORNEY FOR THE DEFENDANT
and THIRD PARTY PLAINTIFFS
ROBERT WAYNE GARY AND
CYNTHIA GARY

ABBEVILLE, SOUTH CAROLINA
DECEMBER 18, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF SOUTH CAROLINA

First National Insurance Company of America, Plaintiff, vs. Robert Wayne Gary and Cynthia Gary, and Laurie Wilson Williams, Defendants. and Laurie Wilson Williams Third Party Plaintiff, vs. Laura B. Willis, individually and as agent and/or broker for Southern Risk Insurance Services, LLC, First National Insurance Company of America, Safeco Insurance Company, and Montgomery Insurance Company, and Jesse A. Dantice, individually and as agent and/or broker for Southern Risk Insurance Services, LLC, First National Insurance Company of	Civil Action No. 8-12-3124-GRA ANSWER, COUNTERCLAIM, AND THIRD PARTY COMPLAINT JURY TRIAL DEMANDED

America, Safeco Insurance Company, and Montgomery Insurance Company,

and

Southern Risk Insurance Services, LLC, Safeco Insurance Company, and Montgomery Insurance Company,

Third Party Defendants.

Now comes Defendant, Laurie Wilson Williams, in the above styled and numbered cause of action, by and through her counsel, answers the Complaint, counterclaims, and brings third party claims as follows:

FIRST DEFENSE

Without waiving any defenses and specifically reserving the right to move for this action to be remanded to state court, Defendant Williams specifically answers the allegations of the Complaint and says:

1. Defendant Williams denies each and every allegation not herein specifically admitted, and answering further, says that Plaintiff has no cause of action and thus demands strict proof of same.
2. Upon information and belief, Defendant Williams admits paragraph 1.
3. Defendant Williams denies paragraphs 2 and 3.

4. Defendant Williams is without sufficient information to answer paragraphs 4, 5, 6, and 7; therefore, same are denied.

5. Defendant Williams admits the allegations of paragraphs 8 and 9.

6. Defendant Williams is without sufficient information to answer paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20; therefore, same are denied.

SECOND DEFENSE BY WAY OF COUNTERCLAIM AND THIRD PARTY COMPLAINT

7. The foregoing paragraphs are incorporated by reference.

8. Laurie Wilson Williams (Williams) is a citizen and resident of McCormick County, South Carolina.

9. Robert Wayne Gary and Cynthia Gary (Garys) are citizens and residents of the McCormick County, South Carolina.

10. First National Insurance Company of America (First National) is a company organized under the laws of the State of New Hampshire, with its principal place of business in Boston, Massachusetts. At the time mentioned herein, First National maintained a retail insurance office in Abbeville County, South Carolina where its authorized agent(s) and servant(s) sold insurance policies to the general public, including Williams and the Garys.

11. Laura B. Willis (Willis) is a citizen and resident of the Abbeville County, South Carolina. At all times mentioned herein Willis was a licensed insurance agent and operated an insurance business under the direct supervision of her

partner/broker, Jesse A. Dantice, Southern Risk Insurance, First National, Safeco, and Montgomery.

12. Jesse A. Dantice (Dantice) is a citizen and resident of the County of Anderson, State of South Carolina and at the times mentioned herein operated an insurance business in Abbeville County, South Carolina wherein his agent/employee Willis sold insurance policies under his direct supervision as well as the direct supervision of all other Third Party Defendants.

13. Southern Risk Insurance Services, LLC (Southern Risk) is a limited liability company organized and existing under the laws of the state of South Carolina with its principal location in Anderson County, South Carolina. At the times mentioned herein Southern Risk maintained a retail insurance office in Abbeville County, South Carolina wherein its authorized agents and servants sold insurance policies to the general public.

14. Montgomery Insurance Company (Montgomery) is a corporation organized and existing under the laws of a state of the United States and at the time mentioned herein maintained a retail insurance office in Abbeville County, South Carolina wherein its authorized agents and servants sold insurance policies to the general public.

15. Safeco Insurance Company (Safeco) is a corporation organized and existing under the laws of a state of the United States and at the time mentioned herein

maintained a retail insurance office in Abbeville County, South Carolina wherein its authorized agents and servants sold insurance policies to the general public.

FIRST CAUSE OF ACTION
(Breach of Contract)

16. The foregoing paragraphs are incorporated by reference.

17. At all times mentioned, First National, through its agents, servants, and/or employees sold Gary an auto insurance policy, number F2555459, with effective dates from July 10, 2012 through July 10, 2013, with total liability limits of $250,000/$500,000.

18. In the alternative, at all times mentioned, First National, through its agents, servants, and/or employees insured the Garys through Peerless Insurance Company policy number PLPW634837 that First National obtained from Peerless.

19. The Garys have paid their premiums when due.

20. Willis, Dantice, and Southern Risk were acting as agents for First National.

21. On July 26, 2012, Ms. Gary was operating her vehicle, which struck Williams, who suffered injuries and damages.

22. On August 5, 2012, Mr. Gary notified First National, through its agent Willis, of the July 26, 2012 collision.

23. Williams is a third party beneficiary of any and all of the Garys' insurance

policies effective on July 26, 2012.

24. First National owes a duty to indemnify the Garys either policy PLPW634837 or F2555459.

25. First National's assertion that it has no duty to indemnify the Garys breaches their contract to which Williams is a third party beneficiary.

26. Williams has actual damages in an amount to be determined, consequential damages as a result of First National's refusal to indemnify the Garys and the filing of its declaratory judgment action.

27. Williams is entitled to judgment against First National for an undetermined sum and certain consequential damages and reasonable attorney fees together with costs for this cause of action.

SECOND CAUSE OF ACTION
(Violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et. seq.*)

28. The foregoing paragraphs are incorporated by reference.

29. South Carolina's Unfair Trade Practices Act (UTPA) creates a cause of action for those harmed by deceptive acts including "unfair or deceptive" acts or promises.

30. First National and all Third Party Defendants, at all times, have a legal duty to fully investigate and research any prospective insurance agent and/or employee, particularly Willis.

31. First National and all Third Party Defendants, at all times, have a legal duty to properly train and supervise Willis' work and computer submissions, both before and especially after the South Carolina Insurance Commission, in October 2011, fined, publicly reprimanded, and placed Willis on probation for public dishonesty.

32. At all times, Willis was acting on behalf of First National and all Third Party Defendants.

33. As agent and/or servant, Willis, with the express or implied permission of First National and all Third Party Defendants, committed the following acts:

    a. Repeatedly changed and altered insurance applications filled out by customers, without the knowledge or permission of customers;

    b. Repeatedly used her own personal driver's license number and social security number for new policy submissions;

    c. Took customers' cash payments and gave no receipts making it difficult for customers to prove payments of their insurance premiums;

    d. Quoted severely reduced premiums in violation of state insurance regulations;

    e. Forged documents to confirm non-existent insurance coverage;

    f. Issued bogus, non-existent insurance policies to customers and the general public;

g. Pretended insurance policies were in force when a loss to a customer occurred;

h. Unfairly adjusted claims made against the bogus insurance policies;

i. Repeatedly assured customers through misrepresentation, blatant lies, and deceit that their insurance policies were in effect when she had knowledge they were not in effect and even when a customer's lienholder and/or state government agencies informed customers they had no coverage;

34. All of the activities listed in paragraphs a. through i. adversely affected customers, particularly third party beneficiary Williams and the Garys.

35. All of the activities listed in paragraphs a. through i. could have and should have been discovered and stopped by First National and all Third Party Defendants through reasonable supervision of Willis' activities. Further, First National and all Third Party Defendants could have, should have, and/or failed to use proper auditing computer software that reveals fraud and/or misconduct of agents and/or customers.

36. Were First National and all Third Party Defendants acting properly, the sheer volume of Third Party Defendant Willis' business would have put them on notice that Willis' actions were improper.

37. As a direct and proximate result of First National and all Third Party

Defendants' unlawful business practices, fraudulent acts, and false statements, Williams is a third party beneficiary and has suffered significant damages, including, but not limited to, severe emotional distress and aggravation causing Williams further health problems. She will continue to suffer such damages in the future.

38. Williams is informed and believe that she is entitled to actual damages, personal injury damages, treble damages, injunctive relief, attorneys' fees and costs, and all other relief allowed under South Carolina Unfair Trade Practices Act, S.C. Code Ann. section 39-5-10, *et seq.* (1976, as amended).

THIRD CAUSE OF ACTION
(Negligent Supervision)

39. The foregoing paragraphs are incorporated by reference.

40. Willis' actions, detailed in paragraph 33, intentionally harmed others, particularly third party beneficiary Ms. Williams and the Garys.

41. First National and all Third Party Defendants knew or should have known that Willis was using its computer software, programs, and/or applications to commit the misdeeds listed in paragraph 34.

42. First National and all Third Party Defendants knew or should have known it had the means to control Willis' conduct by limiting, restricting, or forbidding her access to its computer software, programs, and/or applications to continue her misdeeds.

43. First National and all Third Party Defendants knew or should have known of its need to control Willis' conduct. South Carolina Insurance Commission, in October 2011, fined, publicly reprimanded, and placed Willis on probation for public dishonesty. The Insurance Commission's actions are published and available to the public. This public reprimand placed, or should have placed, First National and all Third Party Defendants on notice of Willis' misconduct such that First National and all Third Party Defendants knew the need to control Willis' conduct.

44. Williams is entitled to actual and punitive damages for First National and all Third Party Defendants' negligent supervision of Willis, individually and as an agent and/or servant of First National and all Third Party Defendants.

FOURTH CAUSE OF ACTION
(Civil Conspiracy)

45. The foregoing paragraphs are incorporated by reference.

46. Williams is informed and believes she is entitled to proceeds of any and all insurance policies effective on July 26, 2012 held by Mr. or Ms. Gary.

47. Willis and Dantice, individually and as agents and/or servants of First National and all Third Party Defendants, First National, and all Third Party Defendants worked together to coordinate their efforts with a common design and plan to misrepresent and defraud Williams and the Garys, among other customers, of their money and the benefits of their insurance policies which Willis, Dantice,

First National, and/or all Third Party Defendants knew to be lapsed or fraudulent while falsely representing they were effective and in force.

48. Williams is entitled to actual and punitive damages for the civil conspiracy of Willis and Dantice, individually and as agents and/or servants of First National and all Third Party Defendants, First National, and all Third Party Defendants.

THIRD DEFENSE BY WAY THIRD PARTY COMPLAINT
(UNIFORM DECLARATORY JUDGMENT ACT, S.C. CODE ANN. § 15-53-10, *ET SEQ.*)

49. The foregoing paragraphs are incorporated by reference.

50. This claim is brought pursuant to South Carolina's Uniform Declaratory Judgment Act, S.C. Code Ann. section 15-53-10, *et seq.* (1976, as amended).

51. On or about July 16, 2012, for a premium paid, Montgomery Insurance issued to Williams an automobile policy number PLP W841911 covering at least one automobile owned by Williams insuring the automobile for liability coverage in the amount of $25,000 for each person and $50,000 for each accident. The policy of insurance was in full force and effect at the time of the below described collision.

52. Montgomery Insurance failed to make a meaningful offer of optional underinsured coverage up to the liability limits of the policies and further failed to offer other option coverage as required by S.C. Code Ann. section 38-77-160 (1976, as amended). Further, Montgomery Insurance did not use a form as provided for in S.C. Code Ann. section 38-77-350, *et seq.* (1976, as amended).

53. On July 26, 2012, Williams was struck by a vehicle and sustained a loss which likely far exceeds the liability limits of the at fault driver's liability coverage limits.

54. Southern Risk notified Williams, through the undersigned attorney, no waiver form exists.

55. Williams is entitled to a declaratory judgment that no reasonable or meaningful offer of optional underinsured coverage up to the policy's liability limit was made to Williams when the policy was issued.

56. Williams prays for a declaratory judgment stating that no meaningful offer, nor any offer as required by law, was made by Montgomery Insurance, or its agents, upon issuance of the automobile insurance policy; for reformation of the insurance contract granting Williams underinsured coverage up to the liability limits of her policy; for judgment declaring Williams is entitled to stack underinsured coverage on each of the automobiles which may have been insured under the aforesaid policy; for attorney's fees and costs in this action; and for such other and further relief that may be deemed just and proper.

Now having fully answered, Williams prays to be dismissed from Plaintiff First National's Complaint with costs and attorney fees. Williams further prays for a declaratory judgment against First National that it has a duty to indemnify the Garys. Williams further prays for judgment against First National and all Third Party

Defendants for actual and punitive damages to be determined by a jury. Williams further prays for a judgment stating that no meaningful offer, or any offer as required by law, was made by Montgomery Insurance, or its agents, upon issuance of the automobile insurance policy; for reformation of the insurance contract granting Williams underinsured coverage up to the liability limits of her policy; for judgment declaring Williams is entitled to stack underinsured coverage on each of the automobiles which may have been insured under the aforesaid policy; for attorney's fees and costs in this action; and for such other and further relief the Court deems proper and just.

McDONALD PATRICK POSTON
HEMPHILL & ROPER, LLC

By: Jane H. Merrill

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Attorneys for Defendant and Third Party Plaintiff Williams

December 19, 2012
Greenwood, South Carolina

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

Robert Wayne Gary and Cynthia Gary

Plaintiffs,

vs.

Laura B. Willis, individually, and as agent for Southern Risk Insurance Services, LLC, and First National Insurance Company of America, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Peerless Insurance Company,

and

Jesse A. Dantice, individually, and as agent for Southern Risk Insurance Services, LLC, and First National Insurance Company of America, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Peerless Insurance Company,

and

First National Insurance Company of America, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, Peerless Insurance Company, Southern Risk Insurance Company, LLC, and Laurie Wilson Williams,

Defendants.

Case No. 2013-CP-01-66

SUMMONS

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2013 MAY 29 PM 4:54
EMILY Y. MCMAHAN
CLERK OF COURT

TRUE COPY
BY
ABBEVILLE COUNTY CLERK OF COURT

To the above named Defendants and their attorneys, C. Mitchell Brown, William C. Wood, Jr., and Shannon F. Bobertz:

You are hereby summoned and required to answer Defendant Williams' Answer and Cross Claim to Defendants First National Insurance Company, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Peerless Insurance Company's Cross Claim in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Defendant Williams' Cross Claim on the subscriber at her office at 410 Main Street, Greenwood, South Carolina, within **thirty (30) days**, exclusive of the day of such service; and if you fail to answer the Cross Claim within the time aforesaid, judgment by default will be rendered against you and Defendant Williams will apply to the Court for the relief demanded in her Cross Claim.

HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill

Jane H. Merrill
410 Main St. | Greenwood, SC 29646
864-229-1010 | jane@hawthornemerrilllaw.com
Attorney for Defendant Williams

May 28, 2013
Greenwood, SC

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

Robert Wayne Gary and Cynthia Gary

Plaintiffs,

vs.

Laura B. Willis, individually, and as agent for Southern Risk Insurance Services, LLC, and First National Insurance Company of America, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Peerless Insurance Company,

and

Jesse A. Dantice, individually, and as agent for Southern Risk Insurance Services, LLC, and First National Insurance Company of America, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Peerless Insurance Company,

and

First National Insurance Company of America, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, Peerless Insurance Company, Southern Risk Insurance Company, LLC, and Laurie Wilson Williams,

Defendants.

Case No. 2013-CP-01-66

DEFENDANT WILLIAMS' ANSWER AND CROSS CLAIM TO DEFENDANTS FIRST NATIONAL INSURANCE COMPANY, MONTGOMERY MUTUAL INSURANCE COMPANY, SAFECO INSURANCE COMPANY OF AMERICA, AND PEERLESS INSURANCE COMPANY'S CROSS CLAIM

Jury Trial Demanded

TRUE COPY
BY
ABBEVILLE COUNTY CLERK OF COURT

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2013 MAY 20 PM 4:55
EMILY Y MCMAHAN
CLERK OF COURT

Defendant Laurie Wilson Williams (Williams), answers Defendants First National Insurance Company, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Peerless Insurance Company (Insurance Companies) Cross Claim as follows:

FOR A FIRST DEFENSE

1. Each and every allegation not specifically admitted is hereby denied.

2. Defendant Williams admits, upon information and belief, the allegations of Paragraphs 45, 46, 47, 48, 49, 50, 51, 52, and 53.

3. Defendant Williams admits, upon information and belief, that Laura Willis (Willis) is a resident and citizen of Abbeville County, South Carolina. Defendant Williams lacks sufficient information to respond to the remaining allegations in paragraph 54 and therefore same is denied.

4. Defendant Williams admits, upon information and belief, that Jesse A. Dantice (Dantice) is a resident and citizen of Anderson County, South Carolina. Defendant Williams lacks sufficient information to respond to the remaining allegations in paragraph 55 and therefore denies same.

5. Defendant Williams admits, upon information and belief, the allegations of Paragraphs 56 and 57.

6. Defendant Williams lacks sufficient information to admit or deny the allegations in paragraphs 58, 59, 60, 61, 62, 63, 64, 65, 66, and 67 and therefore denies same.

7. Defendant Williams admits the allegations in Paragraph 68.

8. Defendant Williams lacks sufficient information to admit or deny the allegations in Paragraphs 69, 70, 71, 72, 73, 74, 75, 76, 77 and 78 and therefore denies same.

9. Defendant Williams admits the allegations of Paragraph 79.

10. Defendant Williams denies the allegations of Paragraph 80.

11. Defendant Williams admits the allegations of Paragraphs 81 and 82.

As to the First Cause of Action

12. Defendant Williams incorporates every answer set forth above.

13. Paragraph 83 is a procedural paragraph to which no response is required. To the extent any response may be necessary, Defendant Williams denies the allegations in Paragraph 83.

14. Defendant Williams lacks sufficient information to admit or deny the allegations in Paragraph 84 and therefore denies same.

As to the Second Cause of Action

15. Defendant Williams incorporates every answer set forth above.

16. Paragraph 85 is a procedural paragraph to which no response is required. To the extent any response may be necessary, Defendant Williams denies the allegations in Paragraph 85.

17. Defendant Williams lacks sufficient information to admit or deny the allegations in Paragraphs 86 and 87 and therefore denies same.

As to the Third Cause of Action

18. Defendant Williams incorporates every answer set forth above.

19. Paragraph 88 is a procedural paragraph to which no response is required. To the extent any response may be necessary, Defendant Williams denies the allegations in Paragraph 88.

20. Defendant Williams lacks sufficient information to admit or deny the allegations in Paragraphs 89, 90, and 91 and therefore denies same.

As to the Fourth Cause of Action

21. Defendant Williams incorporates every answer set forth above.

22. Paragraph 92 is a procedural paragraph to which no response is required. To the extent any response may be necessary, Defendant Williams denies the allegations in Paragraph 92.

23. Defendant Williams lacks sufficient information to admit or deny the allegations in Paragraphs 93, 94, 95, 96, 97, 98, 99, 100 and 101 and therefore denies same.

As to the Fifth Cause of Action

24. Defendant Williams incorporates every answer set forth above.

25. Paragraph 102 is a procedural paragraph to which no response is required. To the extent any response may be necessary, Defendant Williams denies the allegations in Paragraph 102.

26. Defendant Williams lacks sufficient information to admit or deny the allegations in Paragraphs 103 and 104 and therefore denies same.

As to the Sixth Cause of Action

27. Defendant Williams incorporates every answer set forth above.

28. Paragraph 105 is a procedural paragraph to which no response is required. To the extent any response may be necessary, Defendant Williams denies the allegations in Paragraph 105.

29. Defendant Williams lacks sufficient information to admit or deny the allegations in Paragraph 106 and therefore denies same.

30. Paragraphs 107 and 108 contain conclusions of law to which no response is required. To the extent any response may be necessary, Defendant Williams denies the allegations in Paragraphs 107 and 108.

As to the Defendants Insurance Companies Cross Claim Against Defendant Williams

31. Defendant Williams incorporates every answer set forth above.

32. Paragraph 109 is a procedural paragraph to which no response is required. To the extent any response may be necessary, Defendant Williams denies the allegations in Paragraph 109.

33. In response to Paragraph 110, Defendant Williams admits her Peerless automobile policy in effect on July 26, 2012 does not show that it includes underinsured motorist coverage; however, Defendant Williams denies rejecting such coverage and demands strict proof of same.

34. Defendant Williams denies the allegations in Paragraphs 111 and 112 and demands strict proof of same.

35. Responding to the "Wherefore" clause, Defendant Williams denies Defendants Insurance Companies are entitled to the relief sought in their Cross Claim and demands strict proof thereof.

FOR A SECOND DEFENSE

36. The Counterclaims of Defendants should be barred by the doctrines of waiver, estoppel and/or laches.

FOR A THIRD DEFENSE

37. Defendant Williams reserves her right to any additional and/or affirmative defenses as may be available or revealed to them during the course of the investigation and/or discovery in this case.

FOR A FOURTH DEFENSE BY WAY OF CROSS CLAIM

38. The foregoing paragraphs are incorporated by reference.

39. Laurie Wilson Williams (Williams) is a citizen and resident of McCormick County, South Carolina.

40. Robert Wayne Gary and Cynthia Gary (Garys) are citizens and residents of the McCormick County, South Carolina.

41. First National Insurance Company of America (First National) is an insurance company organized and existing under the laws of one of the states of the United State of America and licensed to sell insurance policies in South Carolina. At the time mentioned herein, First National maintained a retail insurance office in Abbeville County, South Carolina where its authorized agent(s) and servant(s) sold insurance policies to the general public, including Williams and the Garys.

42. Montgomery Mutual Insurance Company (Montgomery) is an insurance company organized and existing under the laws of one of the states of the United State of America and licensed to sell insurance policies in South Carolina. At the time mentioned herein Montgomery maintained a retail insurance office in Abbeville County, South Carolina wherein its authorized agents and servants sold insurance policies to the general public.

43. Safeco Insurance Company of America (Safeco) is an insurance company organized and existing under the laws of one of the states of the United State of America and licensed to sell insurance policies in South Carolina. At the time mentioned herein Safeco maintained a retail insurance office in Abbeville County, South Carolina wherein its authorized agents and servants sold insurance policies to the general public.

44. Peerless Insurance Company (Peerless) is an insurance company organized and existing under the laws of one of the states of the United State of America and licensed to sell insurance policies in South Carolina. At the time mentioned herein Peerless maintained a retail insurance office in Abbeville County, South Carolina wherein its authorized agents and servants sold insurance policies to the general public, including Williams and the Garys.

45. Laura B. Willis (Willis) is a citizen and resident of the Abbeville County, South Carolina. At all times mentioned herein Willis was a licensed insurance agent and operated an insurance business under the direct supervision of her partner/broker, Jesse A. Dantice, Southern Risk Insurance, First National, Safeco, and Montgomery.

46. Jesse A. Dantice (Dantice) is a citizen and resident of the County of Anderson, State of South Carolina and at the times

mentioned herein operated an insurance business in Abbeville County, South Carolina wherein his agent/employee Willis sold insurance policies under his direct supervision as well as the direct supervision of all other Third Party Defendants.

47. Southern Risk Insurance Services, LLC (Southern Risk) is a limited liability company organized and existing under the laws of the state of South Carolina with its principal location in Anderson County, South Carolina. At the times mentioned herein Southern Risk maintained a retail insurance office in Abbeville County, South Carolina wherein its authorized agents and servants sold insurance policies to the general public.

First Cause of Action
(Breach of Contract)

48. The foregoing paragraphs are incorporated by reference.

49. At all times mentioned, First National, through its agents, servants, and/or employees sold the Garys an auto insurance policy, number F2555459, with effective dates from July 10, 2012 through July 10, 2013, with total liability limits of $250,000/$500,000.

50. In the alternative, at all times mentioned, First National, through its agents, servants, and/or employees insured the Garys through Peerless Insurance Company policy number PLPW634837 that First National obtained from Peerless.

51. The Garys have paid their premiums when due.

52. Willis, Dantice, and Southern Risk were acting as agents for First National.

53. On July 26, 2012, Ms. Gary was operating her vehicle, which struck Williams, who suffered injuries and damages.

54. On August 5, 2012, Mr. Gary notified First National, through its agent Willis, of the July 26, 2012 collision.

55. Williams is a third party beneficiary of any and all of the Garys' insurance policies effective on July 26, 2012.

56. First National owes a duty to indemnify the Garys either policy PLPW634837 or F2555459.

57. First National's assertion that it has no duty to indemnify the Garys breaches their contract to which Williams is a third party beneficiary.

58. Williams has actual damages in an amount to be determined, consequential damages as a result of First National's

refusal to indemnify the Garys and the filing of its declaratory judgment action.

59. Williams is entitled to judgment against First National for an undetermined sum and certain consequential damages and reasonable attorney fees together with costs for this cause of action.

Second Cause of Action

(Violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et. seq.*)

60. The foregoing paragraphs are incorporated by reference.

61. South Carolina's Unfair Trade Practices Act (UTPA) creates a cause of action for those harmed by deceptive acts including "unfair or deceptive" acts or promises.

62. First National, Montgomery, Safeco, Peerless, Dantice, and Southern Risk (collectively, Insurance Companies and Agents), and Willis, at all times, have a legal duty to fully investigate and research any prospective insurance agent and/or employee, particularly Willis.

63. Insurance Companies and Agents, at all times, have a legal duty to properly train and supervise Willis' work and computer submissions, both before and especially after the South Carolina Insurance Commission, in October 2011, fined, publicly reprimanded, and placed Willis on probation for public dishonesty.

64. At all times, Willis was acting on behalf of Insurance Companies and Agents.

65. As agent and/or servant, Willis, with the express or implied permission of Insurance Companies and Agents, committed the following acts:

a. Repeatedly changed and altered insurance applications filled out by customers, without the knowledge or permission of customers;
b. Repeatedly used her own personal driver's license number and social security number for new policy submissions;
c. Took customers' cash payments and gave no receipts making it difficult for customers to prove payments of their insurance premiums;
d. Quoted severely reduced premiums in violation of state insurance regulations;
e. Forged documents to confirm non-existent insurance coverage;

f. Issued bogus, non-existent insurance policies to customers and the general public;
g. Pretended insurance policies were in force when a loss to a customer occurred;
h. Unfairly adjusted claims made against the bogus insurance policies;
i. Repeatedly assured customers through misrepresentation, blatant lies, and deceit that their insurance policies were in effect when she had knowledge they were not in effect and even when a customer's lienholder and/or state government agencies informed customers they had no coverage;

66. All of the activities listed in paragraphs a. through i. adversely affected customers, particularly third party beneficiary Williams and the Garys.

67. All of the activities listed in paragraphs a. through i. could have and should have been discovered and stopped by Insurance Companies and Agents through reasonable supervision of Willis' activities. Further, Insurance Companies and Agents could have, should have, and/or failed to use proper auditing computer software that reveals fraud and/or misconduct of agents and/or customers.

68. Were Insurance Companies and Agents acting properly, the sheer volume of Third Party Defendant Willis' business would have put them on notice that Willis' actions were improper.

69. As a direct and proximate result of Insurance Companies and Agents' unlawful business practices, fraudulent acts, and false statements, Williams is a third party beneficiary and has suffered significant damages, including, but not limited to, severe emotional distress and aggravation causing Williams further health problems. She will continue to suffer such damages in the future.

70. Williams is informed and believe that she is entitled to actual damages, personal injury damages, treble damages, injunctive relief, attorneys' fees and costs, and all other relief allowed under South Carolina Unfair Trade Practices Act, S.C. Code Ann. section 39-5-10, *et seq.* (1976, as amended).

Third Cause of Action
(Negligent Supervision)

71. The foregoing paragraphs are incorporated by reference.

72. Willis' actions, detailed in paragraph 33, intentionally harmed others, particularly third party beneficiary Williams and the Garys.

73. Insurance Companies and Agents knew or should have known that Willis was using its computer software, programs, and/or applications to commit the misdeeds listed in paragraph 34.

74. Insurance Companies and Agents knew or should have known it had the means to control Willis' conduct by limiting, restricting, or forbidding her access to its computer software, programs, and/or applications to continue her misdeeds.

75. Insurance Companies and Agents knew or should have known of its need to control Willis' conduct. South Carolina Insurance Commission, in October 2011, fined, publicly reprimanded, and placed Willis on probation for public dishonesty. The Insurance Commission's actions are published and available to the public. This public reprimand placed, or should have placed, First National and all Third Party Defendants on notice of Willis' misconduct such that First National and all Third Party Defendants knew the need to control Willis' conduct.

76. Williams is entitled to actual and punitive damages for Insurance Companies and Agents' negligent supervision of Willis, individually and as an agent and/or servant of Insurance Companies and Agents.

Fourth Cause of Action
(Civil Conspiracy)

77. The foregoing paragraphs are incorporated by reference.

78. Williams is informed and believes she is entitled to proceeds of any and all insurance policies effective on July 26, 2012 held by Mr. or Ms. Gary.

79. Willis and Dantice, individually and as agents and/or servants of Insurance Companies and Agents, Insurance Companies and Agents worked together to coordinate their efforts with a common design and plan to misrepresent and defraud Williams and the Garys, among other customers, of their money and the benefits of their insurance policies which Willis, Dantice, First National, Montgomery, Safeco, Peerless, and/or all Southern Risk knew to be lapsed or fraudulent while falsely representing they were effective and in force.

80. Williams is entitled to actual and punitive damages for the civil conspiracy of Willis and Dantice, individually and as agents

and/or servants of First National, Montgomery, Safeco, Peerless, and/or all Southern Risk, First National, Montgomery, Safeco, Peerless, and/or all Southern Risk.

Fifth Cause of Action

(Uniform Declaratory Judgment Act, S.C. Code Ann. § 15-53-10, *et seq.*)

81. The foregoing paragraphs are incorporated by reference.

82. This claim is brought pursuant to South Carolina's Uniform Declaratory Judgment Act, S.C. Code Ann. section 15-53-10, *et seq.* (1976, as amended).

83. On or about July 16, 2012, for a premium paid, Montgomery Insurance issued to Williams an automobile policy number PLP W841911 covering at least one automobile owned by Williams insuring the automobile for liability coverage in the amount of $25,000 for each person and $50,000 for each accident. The policy of insurance was in full force and effect at the time of the below described collision.

84. Montgomery Insurance failed to make a meaningful offer of optional underinsured coverage up to the liability limits of the policies and further failed to offer other option coverage as required by S.C. Code Ann. section 38-77-160 (1976, as amended). Further, Montgomery Insurance did not use a form as provided for in S.C. Code Ann. section 38-77-350, *et seq.* (1976, as amended).

85. On July 26, 2012, Williams was struck by a vehicle and sustained a loss which likely far exceeds the liability limits of the at fault driver's liability coverage limits.

86. Southern Risk notified Williams, through her undersigned attorney, no waiver form exists.

87. Williams is entitled to a declaratory judgment that no reasonable or meaningful offer of optional underinsured coverage up to the policy's liability limit was made to Williams when the policy was issued.

88. Williams prays for a declaratory judgment stating that no meaningful offer, nor any offer as required by law, was made by Montgomery Insurance, or its agents, upon issuance of the automobile insurance policy; for reformation of the insurance contract granting Williams underinsured coverage up to the liability limits of her policy; for judgment declaring Williams is entitled to stack underinsured coverage on each of the automobiles which may have been insured under the aforesaid policy; for attorney's fees and costs in this action;

and for such other and further relief that may be deemed just and proper.

Wherefore, Williams prays to be dismissed from Defendants Insurance Companies' Cross Claim with costs and attorney fees. Williams further prays for a judgment to be issued for Defendant Williams in the underlying action for actual damages, trebled damages, punitive damages and attorneys' fees to determined by a jury. Williams further prays for a declaratory judgment against First National that it has a duty to indemnify the Garys. Williams further prays for judgment against Willis and Dantice, individually and as agents and/or servants of First National, Montgomery, Safeco, Peerless, and/or Southern Risk, First National, Montgomery, Safeco, Peerless, and/or Southern Risk for actual and punitive damages to be determined by a jury. Williams further prays for a judgment stating that no meaningful offer, or any offer as required by law, was made by Montgomery Insurance, or its agents, upon issuance of the automobile insurance policy; for reformation of the insurance contract granting Williams underinsured coverage up to the liability limits of her policy; for judgment declaring Williams is entitled to stack underinsured coverage on each of the automobiles which may have been insured under the aforesaid policy; for attorney's fees and costs in this action; and for such other and further relief the Court deems proper and just.

HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill

Jane H. Merrill
410 Main St. | Greenwood, SC 29646
864-229-1010 | jane@hawthornemerrilllaw.com
Attorney for Defendant Williams

May 28, 2013
Greenwood, SC

State of South Carolina, County of Abbeville
In the Court of Common Pleas, Eighth Judicial Circuit

Laurie Wilson Williams

Plaintiff,

vs.

Cynthia Gary

Defendant.

Case No. 2013-CP-01-165

Summons

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2013 MAY 29 AM 8:32
EMILY Y MCMAHAN
CLERK OF COURT

To the above named Defendant:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers at their offices at 410 Main Street, Greenwood, South Carolina, **within thirty (30) days**, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you and the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill

Jane H. Merrill
410 Main St. | Greenwood, SC 29646
864-229-1010 | jane@hawthornemerrilllaw.com
Attorney for Defendant Williams

May 28, 2013
Greenwood, SC

State of South Carolina, Abbeville County
In the Court of Common Pleas, Eighth Judicial Circuit

Laurie Wilson Williams
Plaintiff,

vs.

Cynthia Gary
Defendant.

Case No. 2013-CP-01-165

Complaint

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2013 MAY 29 AM 8:32
EMILY Y MCMAHAN
CLERK OF COURT

Plaintiff, complaining of Defendant Cynthia Gary, alleges as follows:

1. Laurie Wilson Williams, Plaintiff, resides in McCormick County, South Carolina. At the time of the collision detailed below, Plaintiff resided in McCormick County, South Carolina.

2. Upon information and belief, Defendant resides in McCormick County, South Carolina.

3. Upon information and belief, all acts and/or omissions complained of occurred in McCormick County, South Carolina.

4. Civil Action 2013-CP-01-66 is currently pending in Abbeville County. This present action involves facts about the collision in which insurance coverage involved in 2013-CP-01-66 applies. For judicial economy and parties' convenience, Plaintiff files this action in Abbeville County.

5. This Court has jurisdiction over all subject matter alleged herein, has jurisdiction over all parties named herein, and venue is proper in Abbeville County, South Carolina.

6. In the evening on July 26, 2012, Plaintiff was walking on the shoulder of Long Cane Road, near her home. Defendant Cynthia Gary negligently, gross negligently, recklessly and carelessly operated her vehicle while traveling down Long Cane Road and struck the Plaintiff Laurie Wilson Williams. Plaintiff was not at fault in any way.

7. As a result of the collision, Plaintiff suffered severe bodily injuries, permanent injuries, experienced severe pain, experienced a lengthy recovery and incurred significant medical expenses. Additionally, Plaintiff missed worked because of the severity of her injuries which caused her to incur lost wages.

8. As an operator of a vehicle on the roads of South Carolina,

Defendant owed a duty to the Plaintiff to operate her vehicle in a safe and proper manner and to obey all applicable traffic laws.

9. Notwithstanding this duty, Defendant Cynthia Gary negligently, carelessly, willfully, wantonly and recklessly breached her duty of care to the Plaintiff in each of the following particulars:

a. By failing to exercise a proper lookout and attentiveness for others upon the road and Defendant knew or should have known that such failure would result in damage to others upon the road, and particularly to Plaintiff;
b. By failing to exercise a proper lookout and attentiveness for others upon the road and Defendant knew or should have known that such failure would result in damage to others upon the road, and particularly to Plaintiff;
c. By failing to exercise adequate control of their vehicles at all times in view of the circumstances then and there existing;
d. By failing to devote Defendant's full attention to the street the Defendant was traveling and to the operation of the Defendant's vehicle, when Defendant knew, or should have known, that to failing to do so would result in damage to others traveling upon said road, and particularly to Plaintiff;
e. By failing to properly observe the road, other vehicles, pedestrians and all surrounding conditions; by otherwise failing to exercise due and adequate care under the circumstances; and by not being mentally and physically alert to the impending dangers.

10. As a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of Defendant Cynthia Gary, Plaintiff sustained numerous painful bodily injuries, permanent injuries, incurred significant medical expenses, and lost wages.

Wherefore, Plaintiff respectfully requests an award of actual, consequential, special damages that adequately compensates the Plaintiff for all property damages, past, present, and future medical expenses; personal injury; pain and suffering; mental anguish; emotional distress; lost wages and loss of enjoyment of life, punitive damages, and for such other and further relief as this Court may deem appropriate.

HAWTHORNE MERRILL LAW, LLC

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Attorney for Defendant Williams

May 28, 2013
Greenwood, SC

STATE OF SOUTH CAROLINA COUNTY OF ABBEVILLE	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Robert Wayne Gary and **Cynthia Gary,** Plaintiffs, vs. **Laura B. Willis**, individually, and as agent for Southern Risk Insurance Services LLC, and First National Insurance Company of America, Montgomery Insurance Company, and Safeco Insurance Company, and **Jesse A. Dantice**, individually and as broker/agent for Southern Risk Insurance Services LLC, First National Insurance Company of America, Montgomery Insurance Company, and Safeco Insurance Company, and **First National Insurance Company of America, Montgomery Insurance Company, Safeco Insurance Company, Peerless Insurance Company**, and **Laurie Wilson-Williams.** Defendants.	)	Civil Action No. 2013-CP-01-66 ANSWER OF FIRST NATIONAL INSURANCE COMPANY, MONTGOMERY MUTUAL INSURANCE COMPANY, SAFECO INSURANCE COMPANY OF AMERICA, AND PEERLESS INSURANCE COMPANY TO THE CROSSCLAIMS OF LAURIE WILSON-WILLIAMS Jury Trial Requested

First National Insurance Company of America ("First National"), Montgomery Mutual Insurance Company ("Montgomery"), incorrectly identified in the complaint as Montgomery Insurance Company, Safeco Insurance Company of America ("Safeco"),

incorrectly identified as Safeco Insurance Company, and Peerless Insurance Company ("Peerless") (collectively "the Insurers") answer the crossclaim of Laurie Wilson-Williams as follows. First National, Montgomery, Safeco, and Peerless deny every allegation of the crossclaim unless it is specifically and expressly admitted below.

FOR A FIRST DEFENSE

1. Paragraphs 1 through 38 of William's pleading are responses to the allegations of the crossclaims asserted by the Insurers and require no response. To the extent some further response is required, the Insurers reassert the allegations of their Answer, Counterclaim and Crossclaim.

2. The Insurers admit the allegations of paragraphs 39 and 40 on information and belief.

3. The Insurers admit the allegations of the first sentence of paragraphs 41, 42, 43, and 44. The Insurers deny the remaining allegations of paragraphs 41, 42, 43, and 44.

4. The Insurers admit the allegations of the first sentence of paragraph 45 on information and belief and further admit that Willis was, at one time, a licensed insurance agent and operated in affiliation with Dantice and Southern Risk. The Insurers deny all remaining allegations of paragraph 45.

5. The Insurers admit the allegations of the first sentence of paragraph 46 on information and belief and further admit that Dantice operated his business in affiliation Willis. The Insurers deny all remaining allegations of paragraph 46.

6. The Insurers admit the allegations of the first sentence of paragraph 47 on information and belief the Insurers are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations and deny them on that basis

As to the First Cause of Action for Alleged Breach of Contract

7. The Insurers incorporate by reference their responses to paragraphs 1-47 into this paragraph as their response to paragraph 48.

8. The Insurers deny the allegations of paragraphs 49, 50, 51, and 52.

9. The Insurers admit the allegations of paragraph 53 on information and belief.

10. The Insurers deny the allegations of paragraphs 54, 55, 56, 57, 58, and 59.

As to the Second Cause of Action for Alleged Violations of the SCUPTA

11. The Insurers incorporate by reference their responses to paragraphs 1-59 into this paragraph as their response to paragraph 60.

12. The Insurers respond that the text of the South Carolina Unfair Trade Practices Act ("SCUPTA") sets forth the elements and requirements necessary to maintain a cause of action pursuant to that act and the limitations on such actions. The Insurers deny all allegations of paragraph 61 that are inconsistent with or an incomplete statement of the elements, requirements, and limitations under the Act.

13. The Insurers deny the allegations of paragraphs 62, 63, and 64.

14. The Insurers deny the allegations of paragraph 65, including each subpart.

15. The Insurers deny the allegations of paragraph 66, 67, 68, 69, and 70.

As to the Third Cause of Action for Alleged Negligent Supervision

16. The Insurers incorporate by reference their responses to paragraphs 1-70, as their response to paragraph 71.

17. The Insurers are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations of paragraph 72 and deny them on that basis.

18. The Insurers deny the allegations of paragraph 73, 74, 75, and 76.

As to the Fourth Cause of Action for Alleged Civil Conspiracy

19. The Insurers incorporate by reference their responses to paragraphs 1-76, above, into this paragraph as their response to paragraph 77.

20. The Insurers deny the allegations of paragraph 78, 79, and 80.

As to the Fifth Cause of Action for Declaratory Relief

21. The Insurers incorporate by reference their responses to paragraphs 1-80, above, into this paragraph as their response to paragraph 81.

22. The Insurers admit the allegations of paragraphs 82 and 83.

23. The Insurers deny the allegations of paragraph 84.

24. The Insurers admit that on or about July 26, 2012, Williams was struck by a vehicle while in the roadway, but is without information or knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph 85 and denies them on that basis.

25. The Insurers are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 86 and denies them on that basis.

26. The Insurers deny the allegations of paragraphs 87 and 88.

27. The Insurers deny that Williams is entitled to any of the relief requested in the prayer for relief against them.

FOR A SECOND DEFENSE
(Failure to State a Claim)

28. Williams' crossclaims fail to state a claim for relief against the Insurers.

FOR A THIRD DEFENSE
(Statutory Bar)

29. Williams' second crossclaim is barred by S.C. Code Ann. § 39-5-40(c).

FOR A FOURTH DEFENSE
(Comparative Fault)

30. Williams' claims are barred by the comparative negligence/recklessness of Williams which was the proximate cause of any claimed injuries on her part, and was greater in proportion than any alleged wrongdoing of the Insurers, all of which is denied.

FOR A FIFTH DEFENSE
(Intervening Actions of Third Party)

31. The Insurers would show that any injury or damage suffered by Williams, if any, was due to or caused by or occasioned by the intervening actions or omissions of a third party or parties for whom the Insurers are not responsible and therefore, Williams' claims should be barred or reduced accordingly.

FOR A SIXTH DEFENSE
(Scope of Agency)

32. The Insurers would show that any actions taken by any alleged agent of the Insurers which caused any injury to Williams, which is expressly denied, were

taken while said alleged agent or agents were acting outside the scope of any alleged agency relationship, and, therefore, the Insurers are not responsible.

FOR A SEVENTH DEFENSE
(Set-Off)

33. The Insurers assert that they are entitled to a set-off based on any recovery by Williams from any of the other Defendants.

FOR A EIGHTH DEFENSE
(Failure to Properly Allege Special Damages)

34. The Insurers would show that Williams has failed to allege special damages with the specificity required by Rule 9(g), SCRCP

FOR A NINTH DEFENSE
(Unconstitutionality of Punitive Damages)

35. The Insurers would show that an award of punitive damages would violate the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that:

a. the judiciary's ability to correct a punitive damages award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;

b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

c. any award of punitive damages based upon the wealth of the Defendants violates due process guarantees;

d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;

e. an excessive award of punitive damages violates the due process guarantees of the Defendants;

f. an award of punitive damages that is neither reasonable nor proportionate to the alleged wrong committed is irrational, arbitrary, furthers no legitimate purpose, and is an unconstitutional deprivation of the property of the Defendants;

g. an award of punitive damages that is grossly disproportionate to any compensatory damages awarded violates the Defendants' due process guarantees;

h. an award of punitive damages based solely on vicarious liability or the doctrine of respondeat superior is violative of due process guarantees;

i. due to the lack of standards for determining punitive damages, the Defendants lack fair notice of the punishment to which they could be subjected;

j. even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;

k. an award of punitive damages that does not comport with the three guideposts articulated in *State Farm Mutual Automobile Insurance Company v. Campbell* fails to satisfy constitutional due process guarantees; and

l. the Plaintiff's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Defendants.

36. To the extent Williams asserts or has a claim for punitive damages, and the same is expressly denied, Williams' claim is subject to any and all standards and limitations regarding the determination and/or enforceability of punitive damage awards contained in the decisions of BMW of No. America v. Gore, 517 U.S. 559 (1996), Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003), Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007) and Philip Morris USA v. Williams, 549 U.S. 346 (2007) and South Carolina case law and statutory provisions.

FOR A TENTH DEFENSE
(Limitation on Punitive Damages)

37. a) To the extent Williams is entitled to and is awarded punitive damages, and the Insurers deny that she is entitled to or should be awarded any such damages, such damages are limited as provided by S.C. Code Ann. § 15-32-530.

b) Williams' claim for punitive damages is barred as to the Insurers for failure to meet the requirements for imposition of such damages based on the actions of a purported agent as set forth in Restatement (Second) Torts § 909.

Reservation

38. The Insurers reserve the right to assert any and all other defenses to Williams' claims, both factual and legal, as may be justified by information subsequently obtained.

WHEREFORE, having fully answered all allegations of Williams' crossclaims and requested declarations, the Insurers pray as follows:

(a) For a declaration setting forth the rights and obligations of the parties to this action;

(b) For a declaration that the Peerless policy was cancelled on May 4, 2012 and no rights and/or obligations exist for any event taking place after May 4, 2012, under that policy;

(c) For a declaration that no Safeco or Montgomery policy was ever issued and no party to this action has any rights against Safeco or Montgomery;

(d) For a declaration that the First National Policy was not issued until August 10, 2012; that the policy period of the First National Policy is August 10, 2012 through the earlier of August 10, 2013 or cancellation due to non-payment; and that no rights or obligations exist under the First National policy for events, occurrences, accidents, claims or other taking place outside of the policy period of August 10, 2012 through the earlier of August 10, 2013 or cancellation date;

(e) For a declaration that First National, Montgomery, Safeco, and Peerless have no duty to defend or indemnity the Garys for any claim arising out of the automobile accident between Cynthia Gary and Laurie Wilson-Williams taking place on July 26, 2012.

(f) For a declaration that Wilson-Williams has no underinsured motorist coverage for the accident of July 26, 2012, or alternatively, that if Wilson-Williams is entitled to underinsured motorist coverage under her policy with Peerless, the coverage limited is a maximum of $25,000.00 subject to the terms, conditions, limitations, and exclusions of the policy and South Carolina law.

(g) For the costs of this action; and

(h) For any other and further relief the Court deems just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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

June 28, 2013

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

First National Insurance Company of America, **PLAINTIFF,** **VS.** **Robert Wayne Gary and Cynthia Gary and Laurie Wilson-Williams,** **DEFENDANTS,** **and** **Robert Wayne Gary and Cynthia Gary,** **THIRD PARTY PLAINTIFFS,** **VS.** **Laura B. Willis, individually, and as agent for Southern Risk Insurance Services LLC and First National Insurance Company of America, Montgomery Insurance Company, and Safeco Insurance Company,** **and** **Jesse A. Dantice, individually and as broker/agent for Southern Risk Insurance Services LLC, Montgomery Insurance Company and Safeco Insurance Company,** **and** **Montgomery Insurance Company, and Safeco Insurance Company, Southern Risk Insurance Services, LLC** **THIRD PARTY DEFENDANTS.**	**MOTION TO REMAND TO STATE COURT FOR LACK OF DIVERSITY / SUBJECT MATTER JURISDICTION** **8:12-3124-GRA**

_____)

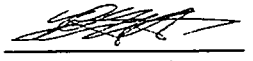
To: The Plaintiff and Third Party Defendants:

The Defendants and Third Party Plaintiffs, Robert Wayne Gary and Cynthia Gary by and through their undersigned counsel, hereby move the Court for an Order pursuant to 28 U.S.C. Sections 1332 and 1441 remanding this action to the South Carolina Court of Common Pleas for Abbeville County, because the United States District Court lacks subject matter jurisdiction.

The United States District Court has subject matter jurisdiction when the amount in controversy is more than $75,000.00, exclusive of interest and costs, and all parties have diverse citizenship. 28 U.S.C. §1332. The complete diversity rule requires that citizenship of each plaintiff be different from the citizenship of each defendant. *Athena Automotive, Inc. v. DiGregorio*, 166 F.3d 288, 290 (4th Cir. 1999). Defendants and Third Party Plaintiffs, Robert Wayne Gary and Cynthia Gary, citizens and residents of the State of South Carolina, have named necessary parties to this action who are citizens of the County of Abbeville and County of Anderson, State of South Carolina. Therefore, complete diversity does not exist and this court does not have subject mater jurisdiction.

For the foregoing reasons, Defendants and Third Party Plaintiffs, Robert Wayne Gary and Cynthia Gary respectfully requests this Court issue an Order remanding this action to the South Carolina Court of Common Pleas in Abbeville County.

Respectfully submitted:



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Attorneys for Defendants and Third Party Plaintiffs

December 19, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF SOUTH CAROLINA

First National Insurance Company of America,

Plaintiff,

vs.

Robert Wayne Gary and Cynthia Gary, and Laurie Wilson Williams,

Defendants.

and

Laurie Wilson Williams

Third Party Plaintiff,

vs.

Laura B. Willis, individually and as agent and/or broker for Southern Risk Insurance Services, LLC, First National Insurance Company of America, Safeco Insurance Company, and Montgomery Insurance Company,

and

Jesse A. Dantice, individually and as agent and/or broker for Southern Risk Insurance Services, LLC, First National Insurance Company of

Civil Action No. 8-12-3124-GRA

MOTION TO REMAND TO SOUTH CAROLINA COURT OF COMMON PLEAS

America, Safeco Insurance Company, and Montgomery Insurance Company,

and

Southern Risk Insurance Services, LLC, Safeco Insurance Company, and Montgomery Insurance Company,

Third Party Defendants.

To: The above named Plaintiff and Third Party Defendants:

The Defendant and Third Party Plaintiff, Laurie Wilson Williams (Williams), by and through her undersigned counsel, hereby moves the Court for an Order pursuant to 28 U.S.C. sections 1332 and 1441 remanding this action to the South Carolina Court of Common Pleas for Abbeville County because the United State District Court lacks subject matter jurisdiction.

The United States District Court has subject matter jurisdiction when the amount in controversy is more than $75,000.00, exclusive of interest and costs, and all parties have diverse citizenship. 28 U.S.C. §1332. The complete diversity rule requires that citizenship of each plaintiff be different from the citizenship of each defendant. *Athena Automotive, Inc. v. DiGregorio*, 166 F.3d 288, 290 (4th Cir. 1999). Williams, a South Carolina citizen, has named necessary parties to this action who are South Carolina

citizens. Complete diversity does not exist; therefore, this court lacks subject mater jurisdiction.

For the foregoing reasons, Williams respectfully requests this Court issue an Order remanding this action to the South Carolina Court of Common Pleas in Abbeville County.

McDONALD PATRICK POSTON
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By: Jane H. Merrill

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December 19, 2012
Greenwood, 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

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.

RECEIVED
JAN 27 2015
SC Court of Appeals

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

January 23 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
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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.

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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.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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

January 23 2015
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
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v.

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JAN 26 2015
SC Court of Appeals

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) and via electronic mail:

Pleadings:

Record on Appeal – Volume III

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Lisa P. Whitehurst
Administrative Assistant

January 23, 2015

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

Case No. 2012-CP-01-00306
Appellate Case No. 2014-000946

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v.

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

FINAL BRIEF OF APPELLANTS

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Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
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APPEAL FROM ABBEVILLE COUNTY
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Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-01-00306
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v.

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

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by ruling there was no valid contract containing an arbitration provision despite the fact that the Federal Arbitration Agreement does not require a signed agreement for an arbitration provision to be enforceable and despite the fact that Appellants and co-defendants Southern Risk Insurance Services and Laura Willis have continuously operated under signed and unsigned agreements containing written arbitration provisions?
2. Did the trial court err by ruling that the arbitration provision at issue was too "narrow" to encompass the plaintiffs' claims, despite the expansive wording of the provision?
3. Did the trial court err by refusing to compel arbitration of the Respondents' claims against the Appellant insurers when each of those claims was based and grounded on provisions of a contract that contained a binding arbitration agreement?
4. Did the trial court err by conflating the allegations made against the Appellants with those made against the co-defendants and thus ruling that Appellants' alleged wrongdoing was so "outrageous" as to render it unforeseeable?
5. Did the trial court err by ruling that Appellants waived their right to compel arbitration despite the de minimis lapse of time between the filing of the lawsuits and the motion to compel and despite the absence of any significant proceedings in the lawsuits?

STATEMENT OF THE CASE

This appeal arises from the trial court's denial of Peerless Insurance Company's, Montgomery Mutual Insurance Company's, and Safeco Insurance Company of America's (collectively "the Insurers") motions to compel arbitration of the claims made against them and to dismiss them from 14 related suits.[1] The suits, which were filed between November 1, 2012 and August 28, 2013, all allege wrongdoing by Laura Willis, an insurance agent operating under the supervision of Jesse Dantice and Southern Risk

[1] The suits are Case Numbers 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, and 2013-CP-01-221.

Insurance Services, LLC ("Southern Risk"). Twelve of the suits were brought by residents of Abbeville County who were Willis' customers, and two suits—those brought by Richard Wilson and Robert Shirley—were brought by local insurance agents who were competitors with Willis and Southern Risk.

The plaintiffs in the lawsuits name several defendants including Willis, Dantice, Southern Risk and various insurance companies, including the Insurers. The plaintiffs allege in the complaints that Willis engaged in a variety of tortious acts and assert a number of claims including that the Insurers had a duty to properly investigate, train, and supervise Willis, that they failed to detect and stop her wrongdoing, and that they engaged in unfair trade practices, civil conspiracy, conversion, fraud, and negligent misrepresentation.

On October 31, 2013, the Insurers filed motions to compel arbitration and to be dismissed from the suits.[2] The motions were based on the ground that each of the plaintiffs' claims against the Insurers was premised on the Insurers' alleged duties that would not exist but for the Insurers' contractual relationship with Southern Risk. The Insurers argued that the contract contains a broad, binding arbitration provision, and the plaintiffs cannot rely on and seek to recover monies against the Insurers based on some provisions of the agreement while ignoring others such as the arbitration clause.

The trial court heard arguments on the motions on January 21, 2014, and the plaintiffs filed memoranda in opposition to the Motion to Compel Arbitration that same day. The Insurers filed reply memoranda in support of their motion on February 11, 2014. On March 25, 2014, the trial court issued an order denying the Insurers motions. The

[2] The Insurers filed their motion several days later in the suits brought by Eugene Lawton and the Antoniaks.

Insurers filed motions to alter or amend that ruling on April 8, 2014. The trial court denied these motions on April 21, 2014. This appeal followed.

STATEMENT OF THE FACTS

The claims and allegations in the different suits include that Willis failed to procure the insurance purchased by the plaintiffs, stole their premium payments, improperly submitted their insurance applications, and later improperly backdated insurance applications after the plaintiffs suffered a loss. In the suit brought by Jeanette Norman, for example, she alleges that in September of 2010, she met with Willis to discuss insurance for her automobiles and real property and to fill out insurance applications. (Norman Compl. at ¶¶ 10-14 (R. 365-67).) 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 (R. 366, 367).) At that meeting, Norman paid part of what she believed to be the premium for the real estate policy. (*Id.* at ¶ 12 (R. 366).) 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 that the vehicle was not insured. (*Id.* at ¶ 15 (R. 367).) Norman alleges that Willis' tortious acts impaired her credit rating and caused her to pay a higher rate for automobile insurance both now and in the future. (*Id.* at ¶ 16 (R. 367-68).) Norman alleges the Insurers had a duty to properly investigate, train, and supervise Willis (*id.* at ¶ 8 (R. 365)), that they failed to detect and stop her wrongdoing (*id.* at ¶ 17 (R. 368-69)), and that they engaged in statutory unfair trade practices (*id.* at ¶¶ 19-23 (R. 370)), common law unfair trade practices (*id.* at ¶¶ 24-28 (R. 371)), conversion (*id.* at ¶¶ 29-32 (R. 372)),

fraud (*id.* at ¶¶ 33-41 (R. 372-73)), and negligent misrepresentation (*id.* at ¶¶ 42-48 (R. 373-74)).

Similarly, Anita Belton alleges in her Complaint that around April 19, 2011, she contacted Laura Willis regarding the purchase of insurance for her vehicles and her home. (Belton Compl. at ¶ 9 (R. 352).) Belton paid what she believed to be the insurance premium to Willis. (*Id.* (R. 352).) Belton's vehicle was subsequently involved in a collision and, when Belton informed Willis of this, Willis allegedly stated she would complete the requisite insurance verification form and would take care of any damages claimed by the third party involved in the collision. (*Id.* at ¶¶ 10-11 (R. 352-353).) Belton was subsequently contacted by the State of South Carolina, which had not received the insurance verification form, with the result that her license and registration were suspended and she was required to obtain insurance. (*Id.* at ¶ 12 (R. 353).) Belton alleges that Willis engaged in a variety of tortious acts. (*Id.* at ¶ 13 (R. 353-54).) She further alleges that the Insurers had a duty to properly investigate, train, and supervise Willis (*id.* at ¶ 8 (R. 352)), that they failed to detect and stop her wrongdoing (*id.* at ¶ 13 (R. 353-54)), and that they engaged in unfair trade practices (*id.* at ¶¶ 14-18 (R. 355-56)), civil conspiracy (*id.* at ¶¶ 19-23 (R. 356-57)), conversion (*id.* at ¶¶ 24-27 (R. 357)), fraud (*id.* at ¶¶ 28-35 (R. 358)), and negligent misrepresentation (*id.* at ¶¶ 36-42 (R. 59-60)).[3]

The suits brought by Willis' two local competitors assert similar legal claims. In the suit brought by James Shirley, for example, he alleges is the owner and operator of Ayers-Shirley Insurance Agency in Abbeville, South Carolina, and that beginning in 2008, his

[3] The factual allegations in the other suits brought by Willis' customers are variations on this theme, and the legal claims asserted against the Insurers are the same as those in the Norman and Belton Complaints.

business was hindered by Willis' tortious acts. (Shirley Amend. Compl. at ¶¶ 1, 10-11 (R. 378, 380-81).) Shirley alleges the Insurers had a duty to properly investigate, train, and supervise Willis (*id.* at ¶ 9 (R. 380)), that they failed to detect and stop her wrongdoing (*id.* at ¶ 11 (R. 381-82)), and that they engaged in statutory unfair trade practices (*id.* at ¶¶ 13-18 (R. 383-84)), common law unfair trade practices or unfair competition (*id.* at ¶¶ 19-23 (R. 384)), civil conspiracy (*id.* at ¶¶ 24-27 (R. 385)), and tortious interference with existing and future contractual relations (*id.* at ¶¶ 28-31 (R. 385-86)).

During the entire period of Willis' alleged wrongdoing, the Insurers' relationship with Willis and Southern Risk was established and governed by contract. Southern Risk was formed on May 17, 2004. (*See* S.C. Sec. of State Database, attached as Ex. F to Insurers' Reply in Support of Motion to Compel Arbitration (R. 483).) Upon its formation, Southern Risk and Dantice became agencies, sub-agents, or sub-producers of the South Carolina Agent Network ("SCAN"). (*See* Aff. of James Berry at ¶¶ 6-8, attached as Ex. K to Insurers' Reply in Support of Motion to Compel Arbitration (R. 504).)

The Montgomery Companies had previously entered into a master agency agreement with SCAN on December 1, 2003. (*See* Dec. 1, 2003 Agreement (R. 470).) That agreement contained an arbitration provision. (*Id.* at ¶ 11 (R. 473-74).) The Safeco Companies subsequently entered a similar agency agreement with SCAN on December 15, 2006 (see Dec. 15, 2006 Agreement (R. 476)), and thereafter entered a Limited Agency Agreement directly with Southern Risk on or around March 14, 2007 (*see* March 14, 2007 Agreement (R. 503)).

On September 13, 2007, after SCAN changed its name to Assure Alliance, Inc., Safeco renewed its "master" Agency Agreement with Assure Alliance. (*See* Sept. 13, 2007 Agreement (R. 495).) This master agreement, which contained an arbitration provision, expressly applied to Assure Alliance's sub-producers and employees such as Southern Risk and Willis. (*Id.* at 1 (R. 495).) Similarly, on August 15, 2007, Montgomery, acting through Liberty Mutual, entered an Agency Agreement directly with Assurance Alliance. (*See* August 15, 2007 Agreement (R. 439).) This Agreement also contained an arbitration agreement. (*Id.* at ¶ 12 (R. 444).) Finally, on or around April 1, 2010, Montgomery and Safeco, acting through Liberty Mutual, signed and sent an Agency Agreement directly to Southern Risk (the "Agency Agreement").[4] (*See* April 1, 2010 Agency Agreement (R. 451).) This Agency Agreement also contained an arbitration agreement. (*Id.* at ¶ 12 (R. 456).)

The Agency 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." (2010 Agency Agreement at ¶ 12.A (R. 456).) 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

[4] Because Peerless is a member of the Montgomery Insurance division of Liberty Mutual, any of Peerless' dealings with Southern Risk or Willis would only be pursuant to and governed by the terms of Liberty Mutual/Montgomery's 2010 Agency Agreements with Southern Risk. *See* www.montgomery-ins.com/omapps/ContentServer?pagename=MontgomeryInsurance/Views/MontgomeryInsurance&ft=1&fid=2237825802125 (noting Peerless is one of Montgomery's underwriting companies) (last visited August 11, 2014).

each party may select one of the arbitrators. (*Id.* at ¶ 12.B (R. 456).) 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 (R. 456).)

Although the Insurers have to date only been able to locate a version of the 2010 Agency Agreement unsigned by Southern Risk, the parties performed under that agreement, and prior agreements between the Insurers and Southern Risk that governed the privilege of Southern Risk, Dantice, and Willis to place insurance for the Insurers also contained arbitration provisions. (*See* Aff. of James Berry ¶¶ 6-8, 13 (R. 505, 506); *see also* Tr. 15:11-16:2, 32:4-14 (R. 413-14, 429).) Southern Risk, Dantice, and Willis operated under the terms of the 2010 Agency Agreement until it was terminated in November 2012.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)). "'[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.'" *Id.* (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)).

ARGUMENT

The plaintiffs' claims against the Insurers should be compelled to arbitration despite the fact that the plaintiffs did not personally sign the Agency Agreement(s) containing the arbitration agreement. The various agreements between Southern Risk and the Insurers, including the 2010 Agency Agreement, contain valid and enforceable arbitration provisions.

These provisions encompass the claims and allegations made here, and 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). Because valid, enforceable arbitration agreements existed and the Insurers did not waive the right to compel arbitration, the trial court erred by refusing to compel arbitration.

I. The trial court erred by ruling that no valid contract exists containing an arbitration agreement.

In its Order denying the motion to compel arbitration, the trial court ruled that because the Insurers could not locate a copy of the 2010 Agency Agreement that was signed by Southern Risk, there was no valid, binding contract by which the plaintiffs could be forced to arbitrate their claims. *See* Order at 3-4 (R. 10-11). As explained below, however, neither contract law, the Federal Arbitration Act ("FAA"),[5] nor the Statute of

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[5] The FAA applies "whenever an arbitration agreement involves interstate commerce." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, __, 759 S.E.2d 727, 731 (2014) (citations omitted). If the FAA applies, it preempts any conflicting state arbitration statute with which it conflicts. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984). For purposes of determining whether a contract is one "involving commerce" such that the FAA applied, the word "involving" is interpreted broadly and is the functional equivalent of "affecting commerce," which "normally signaled Congress' intent to exercise its Commerce Clause powers" in full. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273 (1995). *See also Dean*, 408 S.C. at __, 759 S.E.2d at 731 (noting that the FAA's reach is "coextensive with the broad reach of the Commerce Clause") (citations omitted).

Here, the Agency Agreement, the insurance business, and the alleged wrongful acts involve interstate commerce. The Agreement and its addenda note that the Insurers are located outside of South Carolina, which is true, and which is alleged in the Complaints. In addition, some or all of the insurance premiums and resulting commissions that the plaintiffs alleged they were 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 covered by the FAA. *See Dean*, 408 S.C. at 379-80, 759 S.E.2d at 732 (noting that a residency agreement between a South Carolina nursing home and a South Carolina resident implicated interstate commerce and was thus

Frauds require that the 2010 Agency Agreement must be signed to be enforceable. Furthermore, the absence of a signed copy of *that* agreement—if that absence were significant—is entirely mitigated by the existence of prior, signed agency agreements that were in force during the time of Willis' alleged wrongdoing and which contain arbitration provisions.

A. The 2010 Agency Agreement need not be signed by Southern Risk to be an enforceable contract.

Contrary to the trial court's ruling, there is no requirement in contract law or under the FAA that a contract must be signed by both or all parties in order to be enforceable. "[I]t has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both." *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986) (citing *Peddler, Inc. v. Rikard*, 266 S.C. 28, 221 S.E.2d 115 (1975)); *see also Peddler*, 266 S.C. at 32, 221 S.E.2d at 117 ("'It is not always necessary, in order to give validity to a contract, that it should be signed by both parties; it may be sufficient if it be signed by one party and accepted, held, and acted upon by the other.'") (quoting *Gladden v. Keistler*, 141 S.C. 524, 140 S.E. 161 (1927)).

Accordingly, courts have held that an arbitration provision in a contract signed by only one of the parties to that contract is nevertheless enforceable under the FAA. *See Poteat v. Rich Prods. Corp.*, 91 F. App'x 832, 834 (4th Cir. 2004) (finding an agreement to arbitrate was enforceable under South Carolina law despite the fact that the employer never signed the agreement that contained the arbitration provision); *Carter v. MasTec*

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governed by the FAA because the residency contract required the provision of "meals and medical supplies, which are instrumentalities of interstate commerce") (citation omitted).

Servs. Co., No. 2:09-2721-PMD, 2010 U.S. Dist. Lexis 10338, *11 (D.S.C. Feb. 5, 2010) ("Under South Carolina law, an arbitration provision located within an employment agreement signed by an employee but not the employer can be enforceable and binding on both parties.") (citations omitted); *Collie v. Wehr Dissolution Corp.*, 345 F. Supp. 2d 555, 558-59 (M.D.N.C. 2004) (ruling that the lack of one party's signature did not undermine the arbitration agreement's enforceability); *Clar Prods., Ltd. v. Isram Motion Picture Prod. Servs., Inc.*, 529 F. Supp. 381, 383 (S.D.N.Y. 1982) ("[I]t is settled law in this Circuit that 'a party may be bound by an agreement to arbitrate even in the absence of a signature,' [] as long as the arbitration provision itself is in writing.").

As made clear by binding South Carolina precedent and the persuasive authority from other jurisdictions, there is no requirement that Southern Risk have signed the 2010 Agency Agreement to make that agreement binding. Further, Southern Risk, Dantice, and Willis have continuously operated under a series agreements with the Insurers containing arbitration provisions. Because those co-defendants accepted and acted upon each of the agreements, including the 2010 Agency Agreement, those agreements became binding. *Jaffe*, 290 S.C. at 473, 351 S.E.2d at 346. The trial court erred by ruling otherwise.

B. The Statute of Frauds is inapplicable to the 2010 Agency Agreement.

The trial court also erred by ruling that the 2010 Agency Agreement is "invalid because it violates the Statute of Frauds." Order at 4 (R. 11). That statute states that certain enumerated types of actions may not be brought "unless the agreement upon which such action shall be brought . . . shall be in writing and signed by the party to be charged therewith." S.C. Code Ann. § 32-3-10. The trial court concluded that the 2010 Agency Agreement "is unenforceable because it cannot be performed within one year's

time and was not signed by Southern Risk." Order at 4 (R. 11). This ruling was a clear legal error because the 2010 Agency Agreement, like the prior agreements between the Insurers and Southern Risk, were for indefinite terms and could be terminated at will with as little as 90 days notice by either party, with or without cause. Because it was possible for the contract to be performed within a year, the Statute of Frauds does not apply:

> It is equally well established that the Statute of Frauds applies only to contracts which are *impossible* of performance within one year. . . . If there is a *possibility* of performance within a year, the contract is not barred by the Statute of Frauds. [] The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the scope of this clause.

Roberts v. Gaskins, 327 S.C. 478, 485, 486 S.E.2d 771, 774 (Ct. App. 1997) (emphasis added, citations omitted). Accordingly, the Statute of Frauds does not apply "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).

South Carolina and federal courts have held that a contract of an indefinite term that is terminable at will subject to reasonable notice is not subject to the Statute of Frauds. *See Center State Farms v. Campbell Soup Co.*, 58 F.3d 1030 (4th Cir. 1995); *Weber v. Perry*, 201 S.C. 8, 21 S.E.2d 193, 194 (1942) (stating that "contracts of employment for an indefinite term or on a contingency" do not fall within the statute). In sum, contrary to the trial court's unsupported assertion that the 2010 Agency Agreement cannot be performed within one year's time and thus is subject to the Statute of Frauds, the courts of this State and surrounding federal jurisdictions have held that contracts such as this are ***not*** subject to the Statute of Frauds.

C. *Pre-2010 signed agreements containing arbitration agreements were in force during much or all of the time of Willis' alleged wrongdoing.*

As explained in the Statement of the Facts, *supra*, arbitration provisions were present in the December 1, 2003 master agency agreement between Montgomery and SCAN (which applied to Southern Risk upon its formation), the September 13, 2007 master Agency Agreement between Safeco and Assure Alliance (which applied to Southern Risk and Willis), and the August 15, 2007 Agency Agreement between Montgomery and Assure Alliance. Accordingly, Southern Risk and Willis were at all times relevant to these lawsuits operating pursuant to agreements containing arbitration agreements. Furthermore, if the 2010 Agency Agreement never took effect, it would therefore never have replaced or superseded the prior agreements, which continued in force until the Insurers terminated their relationship with Southern Risk in 2012. Thus even leaving aside the validity of the 2010 agreement, the Insurers' relationship with Willis was governed by contracts containing arbitration provisions at all times relevant to these lawsuits, and the trial court erred in ruling otherwise.

II. The trial court erred by ruling that the plaintiffs' allegations here did not fall within the ambit of the supposedly "narrow" arbitration provision.

In its Order denying the motion to compel arbitration, the trial court ruled that the arbitration provision in the 2010 Agency Agreement "is too narrowly worded for the Court to enforce in the instant litigation." Order at 4 (R. 11). The Order also concludes that the arbitration provision "is 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.'" Order at 4 (quoting 2010 Agency Agreement) (R. 11). As explained below, these rulings ignore the expansive wording of the arbitration agreement

and fail to recognize that each of the claims asserted against the Insurers are premised on rights and duties that would not exist but for the Agency Agreements between the Insurers and Southern Risk.

A. South Carolina case law establishes that the arbitration provision here is a broad one.

The arbitration provision contained in the 2010 Agency Agreement requires arbitration of "any dispute or disagreement [that] arises in connection with the interpretation of this agreement, [or] its performance or nonperformance . . ." (*See* 2010 Agency Agreement at ¶ 12.A) (R. 456).) This broad language encompasses *any* dispute that has a connection with the contract's performance or nonperformance. Indeed, the trial court's attempt to distinguish this language from arbitration agreements enforced in binding precedent merely serves to highlight the similarities between this provision and others that were interpreted broadly and enforced. (*See* Order at 4 (R. 11) ("[A] clause which provides for arbitration of all disputes "arising out of and relating to" the contract is construed broadly.") (citing *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 and relating to this Agreement").)

The trial court cites no South Carolina precedent for its assertion that "[n]arrowly worded" arbitration clauses, on the other hand, are subject to strict scrutiny." (Order at 5 (R. 12).) However, our Supreme Court has held that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (emphasis added) (citations omitted). Similarly, the Court has described an arbitration agreement similar to the one at issue here as "a broad arbitration provision." *Landers v. FDIC*, 402 S.C. 100, 103, 739

S.E.2d 209, 210 (2013) (describing a provision "requiring arbitration of 'any controversy or claim arising out of or relating to this contract, or breach thereof'").

B. All of the claims against the Insurers fall within the scope of the arbitration provision because those claims are entirely premised on rights and duties that would not exist but for the Agency Agreement.

The trial court erred in concluding that the claims asserted against the Insurers fall outside that scope of the arbitration provision because the claims have no relation or connection with the performance of the Agency Agreement. *See* Order at 5 (R. 12). To the contrary, each of the plaintiffs' allegations against the Insurers is premised on the Insurers' alleged rights or duties that would not exist but for the Agency Agreement.

First, the plaintiffs allege in their Complaints that the alleged wrongdoer, Willis, operated "under the direct supervision of" the Insurers. (*See, e.g.*, Norman Compl. at ¶ 2 (R. 388).[6]) The Insurers' supervisory authority over Willis, however, if any, is grounded ***solely*** in the 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* Agency Agreement at ¶ 1.B (R. 451); *id.* at Safeco Addendum ¶ 2 (R. 462) (noting that Southern Risk, "including its employees and subproducers, is authorized to solicit and submit business" for Safeco insurance products).) Hence, plaintiffs wish to seek compensation as a result of alleged contract obligations owed by the Insurers, yet the plaintiffs do not wish to be bound by the arbitration provision in the same contract.

Second, the plaintiffs allege in their Complaints that the corporate defendants had "a legal duty to fully investigate and do full background research on" Willis. (*See, e.g.*,

[6] Each of the Complaints asserts the same allegation.

Shirley Amend. Compl. at ¶ 8 (R. 380).[7]) The Insurers' alleged ability to perform or have the agency perform a background check on Willis is also derived from the Agency Agreements. (*See* Agency Agreement at ¶ 2.F (R. 452) (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. (*Id.* at ¶ 2.C (R. 451) (representing that all agency employees and subproducers have the requisite consents, authorizations licenses, certificates, and permits).) Thus, again, the plaintiffs' claims of failure to investigate and check Willis' background are dependent upon the existence of the Agency Agreement.

Third, the plaintiffs allege in their Complaints that the Insurers had "a legal duty to properly train and supervise" Willis. (*See, e.g.*, Norman Compl. at ¶ 8 (R. 389).[8]) Yet again, this alleged duty to train and supervise, as far as it goes, is grounded in the Agency Agreements. (*See* Agency Agreement at ¶ 1.C (R. 451) ("Agency is only authorized to act as agent for Company and bind Company pursuant to written authority and guidelines furnished to Agency by Company."); *id.* at Safeco Addendum ¶ 3 (R. 462) (limiting agency's and Willis' authority to situations outlined "in product underwriting and binding authority guides . . . or in other written instructions").)

Fourth, the plaintiffs allege in their Complaints that all of Willis' wrongful acts were performed "with the express or implied permission of the other Defendants." (*See*,

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[7] The other Complaints contain essentially the same allegations. (*See, e.g.*, Norman Compl. ¶ 8 (R. 389) ("Defendants Dantice, Southern Risk, Peerless and Montgomery had a legal duty to fully investigate any prospective insurance agent and/or employee."); Wofford Compl. at ¶ 6 (R. 107) ("Defendants Jesse A. Dantice, Southern Risk Insurance Services LLC, Safeco Ins. Co, at all times have a legal duty to fully investigate any prospective insurance agent and/or employee.").)

[8] Each of the Complaints contains an identical or substantially identical assertion.

e.g., Lawton Compl. at ¶ 9 (R. 332-33).[9]) 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* Agency Agreement at ¶¶ 1.C, 1.F, and 2.A (R. 451).)

Fifth, the plaintiffs allege in their 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." (*See*, *e.g.*, Wofford Compl. at ¶ 19 (R. 110-111).[10]) 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. (*See* Agency Agreement at ¶¶ 6.C, 6.D, and 8 (R. 454, 455).) Similarly, Willis' and Southern Risk's obligation to keep accurate records is an obligation imposed by the Agreement. (*See id.* at ¶ 15.A (R. 457).)

Finally, the plaintiffs' claims implicate the Agency Agreement by giving rise to the Insurers' rights to make a demand against co-defendant Southern Risk for indemnification. (*See* Agency Agreement at ¶ 7.B (R. 454-55) (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

[9] Each of the Complaints contains an identical or substantially identical assertion.

[10] Each of the Complaints contains an identical or substantially identical assertion.

pursuant to or carrying out the terms and conditions of this Agreement").) Here, the plaintiffs' 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 (R. 456).)

In sum, because the plaintiffs' allegations against the Insurers depend upon the terms, authority, and obligations created and imposed by the Agency Agreement, they fall within the 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." (Agency Agreement at ¶ 12.A (emphasis added) (R. 456).) All of the plaintiffs' 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 209, 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 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.") (citation omitted).

III. The trial court erred by refusing to compel arbitration of the plaintiffs' claims that seek to enforce and take advantage of a contract containing a binding arbitration agreement.

The trial court erred in concluding that the arbitration provision is not enforceable against non-signatories 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 at 6 (R. 13). The trial court based this conclusion on two premises: (1) that the Plaintiffs had not previously seen a copy of the Agency Agreements prior to filing their suits and (2) that some of the wrongdoing alleged in the complaint was not contemplated by the Agency Agreement. *Id.* at 6-7 (R. 13-14). As explained below, the trial court's premises and conclusion are incorrect.

A. 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 an initial matter, 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, as in *Pearson*, the Insurers may compel arbitration of the plaintiffs' claims because their claims against the Insurers are premised on the contract(s) containing an 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 plaintiffs' Complaints against the Insurers depend on the terms, authority, and obligations created and imposed by the Agency Agreements.

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. Here, each of the plaintiffs' claims against the insurers are premised on rights and duties that exist solely because of the Agency Agreement. *See* Part II.B, *supra*. Accordingly, the plaintiffs' claims against the Insurers 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."); *Int'l Paper*, 206 F.3d at 413-14 (compelling the plaintiff's claims to arbitration despite the fact that the plaintiff-buyer had not signed the agreement containing the arbitration clause, noting that "the buyer cannot sue to enforce the guarantees and warranties of the distributor-manufacturer contract without complying with its arbitration provision"); *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). Hence, the trial court should be reversed.

B. Whether the plaintiffs saw the Agency Agreements prior to filing suit is irrelevant to the question of whether their claims should be arbitrated.

In its Order, the trial court concluded that the plaintiffs' claims were not dependent on the Agency Agreement because the plaintiffs "had never even seen the instant contract prior to the filing of Defendants' motions." Order at 6 (R. 13). Whether they had seen the Agency Agreements, however, is irrelevant to the question of whether their claims are dependant on and seek to benefit from provisions of those contracts. None of the cases cited above compelling arbitration of a non-signatories' claims reached that conclusion based on whether the non-signatory had seen the contract prior to filing his suit or whether the non-signatory was aware of the details of the contract. Rather, the

relevant question is whether a non-signatory plaintiff is asserting claims that assume or rely upon rights, duties, or obligations that exist solely as a result of the contract containing an arbitration provision.

Here, the plaintiffs cannot assert claims against the Insurers based entirely on the Insurers' alleged failure to exercise rights and duties created solely by the Agency Agreements while simultaneously asserting they are seeking to avoid other provisions of the Agency Agreement. Simply put, they cannot have one without the other. The plaintiffs expanded their dispute beyond Willis' wrongdoing to specifically include claims against the Insurers. This expansion is necessarily dependent on the alleged rights and duties that would not exist but for the Agency Agreements. Thus, regardless of whether they had previously set eyes on the agreements, there can be no question that they are seeking to enforce or take advantage of the agreements for their benefit and are subject to the arbitration provision despite their status as non-signatories.

In an effort to bolster its erroneous conclusion that the plaintiffs' claims are not premised on rights and duties created solely by the Agency Agreements, the trial court also conflates the claims against Willis with the claims against the Insurers. *See* Order at 7 (R. 14) ("[T]he 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."). Those, however, are not the claims made against the Insurers. The plaintiffs do not allege the Insurers committed theft, misappropriation, misleading calculations, fraud, or forgery. Rather, the plaintiffs allege that Insurers failed to properly train, investigate, supervise, and audit Willis—all of which are rights and duties that are contemplated and imposed solely by the Agency

Agreements. The trial court's attempt to lump the claims against the Insurers in with the claims against Willis cannot obscure the fact that all of the claims against the Insurers are, in fact, based on rights and duties contemplated by the Agency Agreements.

IV. The trial court erred by ruling the Insurers' alleged wrongdoing was so "outrageous" as to be unforeseeable and thus not subject to arbitration.

In its Order, the trial court ruled that the claims against the Insurers were not encompassed by the arbitration provision "because the alleged actions of Defendants constitute 'illegal and outrageous acts' unforeseeable to a reasonable consumer in the context of normal business dealings." Order at 7-8 (R. 14-15). This ruling is erroneous in two ways.

First, as noted in Part III.B, *supra*, the trial court's ruling fails to distinguish between the claims asserted against the Insurers and the claims asserted against Willis and Southern Risk. Rather, the trial court erroneously conflates them and concludes that the alleged wrongdoing was illegal and outrageous. With respect to the Insurers, however, even assuming *arguendo* the truth of the Complaints' allegations, the alleged wrongdoing of the Insurers—failure to sufficiently investigate, train, supervise, and audit a sub-producer—is neither illegal, outrageous, or entirely unforeseeable.

Second, the trial court ignored the recent ruling in which the South Carolina Supreme Court held that even a claim for intentional infliction of emotional distress—the quintessential "outrage" claim—can be subject to arbitration. *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013). Hence, the trial court must be reversed.

V. The trial court erred by ruling that Appellants waived their right to compel arbitration.

Finally, the trial court erred by ruling that the Insurers waived the right to compel arbitration by waiting "approximately eleven months" after the lawsuits were filed before

seeking to compel arbitration. *See* Order at 8-9 (R. 15-16).) The trial court correctly noted three factors to determine whether a party waived its right to compel arbitration, though it erred significantly in its subsequent analysis and application of those factors:

> "(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."

Order at 9 (R. 16) (quoting *Rhodes v. Benson Chryslter-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007)).

As to the first of the three factors, the trial court noted that many of the cases here had been pending for 11 months before the Insurers sought to compel arbitration. The trial court, however, neglected to consider that South Carolina cases finding waiver generally involve time ranges of 18 months to five years and involve extensive or even complete discovery and actions invoking the power of the court by the parties seeking arbitration. *See, e.g., Liberty Builders v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (noting litigation had been ongoing for two-and-a-half years, and the party seeking to compel arbitration had sought assistance from the court approximately 40 times including motions to amend, compel, dismiss, add parties, and restore under Rule 40(j)); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2013) (noting litigation had been ongoing for 19 months and the moving party had made motions, deposed the opponent, and generally had extensive discovery resulting in increased costs to the other side); *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 594 S.E.2d 523 Ct. App. 2004) (noting litigation had been ongoing for five-and-a-half

years and that thousands of documents had been produced and one claim had actually been tried to the court); *Davis v. KB Home of S. Carolina, Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) (noting litigation had been ongoing for 18 months and parties had engaged in extensive discovery including one deposition that was rescheduled five times).[11] In contrast to the cases cited above, these lawsuits had not progressed much beyond the filing of pleadings and motions to dismiss. *See* Order at 9 (R. 16) ("Plaintiffs have served Complaints and Amended Complaints, and Defendants have answered and filed Motions to Dismiss.").[12]

In analyzing the second of the three waiver factors, the trial court noted that the parties "have *commenced* discovery." Order at 9-10 (R. 16-17). However, this was of a very limited nature.[13] No depositions have been taken by or of the Insurers in these cases.

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[11] Although *Rhodes v. Benson Chryslter-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) found waiver after a delay of ten months, the parties in that case 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 for trial when the moving party attempted to compel arbitration. Thus, *Rhodes* is distinguishable from this case.

[12] In one of the lawsuits (*Wilson v. Willis et al.*), the Insurers had filed a Motion for Judgment Regarding the Claims for Civil Conspiracy and Unfair Trade Practices on January 22, 2013 and a Motion for Judgment on the Pleadings on the Claim for Common Law Unfair Trade Practices on June 28, 2013. (R. 534.) On November 6, 2013, however, after filing their motions to compel arbitration, the Insurers withdrew the motions for judgment before they were responded to or ruled upon. (R. 537.)

[13] While the Insurers did serve discovery requests on the plaintiffs, the Insurers subsequently moved to compel arbitration before receiving any responses, and specifically notified the plaintiffs' counsel there was no need to respond to those discovery requests in light of the motions to compel arbitration. Similarly, the Insurers have declined to respond to discovery requests in light of these motions, and have sought to stay discovery pending resolution of the arbitration issue, so as to avoid needless and costly proceedings. In short, the Insurers have not engaged in "extensive discovery" as would be required to waive the right to compel arbitration.

The trial court omitted any reasoning or analysis regarding the third of the three factors beyond the conclusory assertion that an order compelling arbitration would prejudice the plaintiffs. Order at 10 (R. 17). No such prejudice would occur.

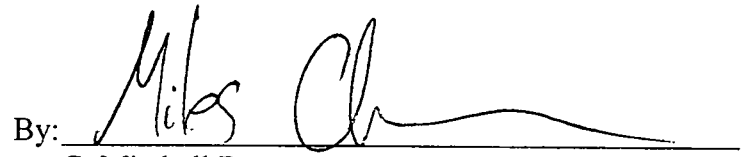
In sum, the lapse of time before the Insurers filed the motions to compel arbitration was minimal, the Insurers had not previously engaged in extensive discovery or invoked the power of the court, and the trial court identified no prejudice to the plaintiffs that resulted from the delay in seeking arbitration. Accordingly, the trial court erred in concluding that the Insurers waived their right to compel arbitration.

CONCLUSION

For the foregoing reasons, the Insurers respectfully request this Court reverse the trial court's order denying the Insurer's Motion to Compel Arbitration and Dismiss the Claims and remand with instructions to the trial court to compel all claims against the Insurers to arbitration and to dismiss the claims against them in these suits.

[*SIGNATURE PAGE ATTACHED*]

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January 27, 2015
Columbia, South Carolina

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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. 2014-000946

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 Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., SOUTHERN RISK INSURANCE SERVICES, LLC, TRAVELERS CASUALTY INSURANCE CO. OF AMERICA, ALLIED PROPERTY AND CASUALTY INSURANCE CO., PEERLESS INSURANCE CO., MONTGOMERY MUTUAL INSURANCE CO., SAFECO INSURANCE CO. OF AMERICA, and FOREMOST INSURANCE CO., and Laurie Williams, ... Defendants,

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

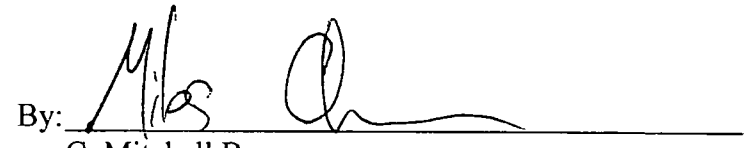
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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

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

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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):

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

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STATEMENT OF ISSUES ON APPEAL

1. The trial court was correct in ruling no valid agreement containing an arbitration provision existed between the parties.
2. The trial court correctly refused to compel arbitration on the non-signatory respondents where the specific dispute fell outside of the scope of the alleged agreement and where the respondents in no way relied upon the alleged agreement in support of their claims.
3. The trial court correctly ruled that, even if the alleged agreement were potentially applicable to the allegations of the complaints, it was simply too "narrowly worded" to encompass the causes of action at issue.
4. The trial court correctly held Appellants waived their right to compel arbitration in this matter.
5. The trial court was without error in determining that the potential liability of the appellants could be based on a statutory duty making the corporate defendant liable for the "outrageous conduct" of their authorized and/or acting agents under the *respondeat superior* doctrine.

STATEMENT OF THE CASE

This appeal arises from the trial court's denial of Appellants Peerless Insurance Company, Montgomery Insurance Company and Safeco Insurance Company's ("the Insurers") Motions to Compel Arbitration and Dismiss Claims in a total of fourteen actions involving the respondents. The Insurers seek to enforce against Respondents an arbitration provision contained in an alleged agreement between Jesse Dantice ("Dantice"), a defendant in each of the fourteen actions, and the Insurers.

Beginning in November 2012, Respondents 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 ("the Insureds") filed suit in Abbeville County against two local insurance agents, Defendants Laura Willis ("Willis") and Dantice, and their agency, Southern Risk Insurance Services, LLC ("Southern Risk"), alleging, among other causes of action, violations of the S.C. Unfair Trade Practices Act, common law unfair trade practices, fraud and conversion. (*See, e.g.*, R. pp. 323-26, ¶ 15-35[1]). The Insureds also named several national insurance companies, including the Insurers, as defendants in the action under a *respondeat superior* theory, alleging the Insurers failed to supervise or audit Willis or the Southern Risk agency, resulting in various harms to the individual Insureds. (*See* R. pp. 320-21, ¶ 9).

Respondents Richard Wilson and James Robert Shirley ("the Agents") are two local insurance agents who worked in direct competition with Defendants Willis, Dantice and Southern Risk. These Agents allege Willis, Southern Risk and the Insurers engaged in illegal business practices, effectively prohibiting them from competing in the local insurance market and resulting in a substantial loss of clients and revenue. (*See* R. p.120, ¶ 13.[2])

In October 2013, the Insurers filed Motions to Compel Arbitration, seeking to apply against the Insureds and Agents an arbitration provision found in an alleged agreement entered into between the Insurers and the Southern Risk agency. As a basis for their Motions

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[1] The *Antoniak* Complaint and other pleadings are representative of and substantially similar to all complaints, and the pleadings in *Antoniak* and will be referenced throughout.

[2] The *Wilson* Complaint and other pleadings are representative of and substantially similar to the complaint filed by Shirley, the other Agent in this case, and the pleadings in *Wilson* will be referenced throughout.

to Compel, the Insurers argue that because the Insureds and Agents seek to recover against them based on duties that would not exist but for the alleged agency agreement at issue, the court should compel arbitration based on the arbitration provisions found in the subject agreement. (R. pp. 562-65). The Insureds and Agents filed a Memorandum in Opposition to the motions, asserting no valid or enforceable agreement to arbitrate exists because the agreement on which the Insurers base their motions is unsigned by any representative of Southern Risk. (R. pp. 619-20). Furthermore, the Insureds and Agents were neither signatories nor parties to the alleged agreement, and their claims against the Insurers are not within the scope of the arbitration clause contained within the agreement. (R. pp. 624-26). The Court heard oral arguments on the motions on January 21, 2014, and the Insureds and Agents filed their briefs in opposition to the motions the same day. The Insurers filed a reply memorandum on February 11, 2014 and attached additional evidence for the court to consider, including an opinion affidavit of an employee of Insurers.[3]

On March 25, 2014, the Court issued an order denying the Insurers' motion, finding the Insurers "have failed to meet their burden of proof in establishing a valid, binding contract by which the [Insureds and Agents] should be forced to arbitrate their claims." (R. p. 10). Thereafter, on April 8, 2014, the Insurers filed Motions to Alter or Amend. The court denied the Motions to Alter or Amend on April 21, 2014. (*See* R. pp. 20-21).

The Insurers filed their Notice of Appeal on April 25, 2014. (*See* Notice of Appeal). Thereafter, the Insurers filed a Consent Motion to Consolidate Appeals in all fourteen cases.

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[3] The presiding judge granted the Insurers' request to file a reply brief only to address two points raised in the Insureds' Memoranda in Opposition. He specifically declined to leave the record open for the addition of any new evidence. (R. p. 436, lines 7-11 (Hite: "So I'm assuming that by allowing them to do a reply brief, you're not leaving this hearing open." Court: "No. Just to respond to the issues that you raised that they were not apprised to it. It's just two as I understand it.")).

(*See* Consent Mtn. to Consolidate). The Court granted the Motion, consolidating the appeals pursuant to Rule 214, SCACR, on June 18, 2014. (*See* Order).

STATEMENT OF THE FACTS

From 2008 until 2012, Laura Willis and Jesse Dantice, defendants in the underlying actions, operated an independent insurance agency in Abbeville, South Carolina, selling insurance products offered by national insurance companies including the Insurers. The Insureds in this case were all customers of Willis and Dantice and their agency, Southern Risk. The Insureds allege while customers of Willis and Dantice, they were "the victims of many illegal and improper tactics used by [Willis, Dantice and the Insurers] to corner the retail insurance market in Abbeville County, South Carolina and destroy all competition." (R. pp. 320-21, ¶ 9). Specifically, the Insureds allege Willis, as agent for the Insurers, forged insurance documents; issued policies on unsigned applications; changed or omitted information on insurance applications, without the permission of the Insureds, to reduce quoted premiums; submitted applications using her own personal identifying information, such as driver's license and social security numbers to reduce quoted premiums; accepted cash payments for which she converted to her own use and issued bogus insurance policies unbeknownst to the customers, among other illegal and fraudulent activity. (*Id.).* The Insureds allege all of these actions resulted in harm to them and to their credit rating within the insurance industry. (R. pp. 326-27, ¶ 41*).*

The Insureds seek to recover against Dantice, Southern Risk, and the Insurers on the basis these parties, as principals of agent Willis, had a duty to investigate, train and supervise her, especially after Willis "was fined, publicly reprimanded and placed on probation for dishonesty by the South Carolina Insurance Commission in October 2011." (R. p. 320, ¶ 8).

The Insureds further allege because Willis at all times acted as an agent for the Insurers, her actions "should have been discovered and stopped by the [Insurers], through reasonable direct supervision ... as well as through auditing computer programs which reveal fraud and/or misconduct of agents and/or customers." (R. p. 321, ¶ 9). The Insureds also allege the Insurers should have been on notice of Willis's illegal and fraudulent activities based on the sheer volume of new business she generated in a short amount of time, but the Insurers failed to investigate Willis's activities because doing so would have "slowed down the rapid growth of the [Insurers'] insurance business and profits." (R. p. 322, ¶ 10).

In their Answers, the Insurers denied the majority of substantive claims raised by the Insureds and set forth the following defenses: failure to state a claim; statutory bar by § 39-5-40(c); comparative fault; intervening actions of third party; scope of agency[4]; set-off; failure to properly allege special damages; unconstitutionality of punitive damages and limitation on or bar to punitive damages. (R. pp. 344-46, ¶ 44-53). Notably, the Insurers failed to raise arbitration as a defense in any of the Answers filed in the instant cases.

The Complaints filed by Agents Wilson and Shirley set forth the same allegations of illegal and improper conduct of Defendant Willis. The Agents assert causes of action against Willis, the Insurers and other Defendants for violations of the S.C. Unfair Trade Practices Act, common law unfair trade practices/unfair competition, civil conspiracy, and tortious interference with existing contractual relations and future contractual relations. (*See* R. pp. 122-25, ¶¶ 15-33). The Agents allege that due to the illegal and improper tactics of the Defendants, including the Insurers, premiums in the Abbeville insurance market were

[4] The Insurers expressly deny any agency relationship existed between them and Willis in their Answer, but assert that in the event Willis was their agent, she was acting outside of the scope of the agency relationship in committing the actions alleged in the complaints. (*See* R. p. 345, ¶ 48).

artificially lowered "so that legitimate and responsible insurance agents, like [Wilson and Shirley], could not compete and lost many existing and prospective new insurance customers." (R. p. 122, ¶ 14).

In answering the Agents' Complaints, the Insurers expressly denied that Willis was their "'authorized and acting agent and/or servant'" and denied she acted with any permission of the Insurers. (R. p. 197, ¶ 13). They denied each of the factual allegations set forth in support of the causes of action raised by the Agents and asserted a variety of defenses. In responding to the Agents' Complaints, the Insurers reserved their rights to raise additional defenses not stated in their Answer, but failed to raise arbitration as a defense. (R. p. 204, ¶ 48).

On October 31, 2013, almost a full year after the Insureds first began filing their actions in November 2012, the Insurers filed the instant Motions to Compel Arbitration and Dismiss Claims. The Insurers grounded their Motions to Compel Arbitration on a 2010 Agency Agreement between Liberty Mutual Insurance Company, a parent company of Insurers Montgomery and Safeco, and the Southern Risk agency. This 2010 Agreement contains an arbitration provision, requiring the parties to arbitrate in the event "any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance or nonperformance." (R. p. 456, ¶ 12.A). The Insurers allege that because the Insureds' Complaints center on an alleged agency relationship and duties arising therefrom, the Insureds are bound by the 2010 Agency Agreement and the arbitration clause contained within it. (R. pp. 562-65).

In opposition to the Motion, the Insureds and Agents argue no valid agreement exists in which to compel arbitration because no representative of Southern Risk ever signed the

2010 Agreement or any of the agreements timely presented to the court by the Insurers. (R. pp. 619-20). The Insureds and Agents point out they were not parties to the 2010 Agreement and never signed any agreements, whether the 2010 Agreement or any prior agreements. They further dispute the Insurers' claims that they relied on the alleged agreements, noting they could not possibly have based their claims against the Insurers on these agreements because they were unaware these agreements even existed. (R. p. 626). In fact, the Insureds and Agents first learned of the alleged agreements upon receipt of the Insurers' Motions to Compel Arbitration. Incredibly, the Insurers failed to raise the issue of arbitration in their responsive pleadings, objected to producing the alleged agreements during discovery, despite a specific request for the same, and failed to produce the alleged agreements after the court issued a Consent Discovery Order protecting any document which could be deemed confidential. Additionally, in the *Gary* action, the Insurers filed declaratory judgment, first in federal court and then in state court, regarding the insurance policy at issue. The Insurers did not seek arbitration when filing those actions and sought relief from the court under the same factual scenario at issue here. The Insureds and Agents had no knowledge of the existence of these alleged agreements for almost one year during the pendency of these cases. As non-signatories to the agreements and with no knowledge of the agreements or their substance, the Insureds argue they could not possibly have based their claims against the Insurers on these agreements; therefore, the circuit court judge correctly denied the Motions to Compel Arbitration and Dismiss Claims.

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

The Insureds and Agents argue ample evidence exists to reasonably support the trial court's denial of the Insurers' Motion to Compel Arbitration and Dismiss Claims, where the Insurers seek to apply an unsigned arbitration provision contained in an alleged agency agreement to the Insureds and Agents, who are third parties and non-signatories to the alleged agreement.

I. The trial court correctly ruled the Insurers and Southern Risk never entered into a valid contract containing an arbitration provision applicable to the facts of these cases.

The trial court was correct in first ascertaining if a valid contract containing an arbitration clause existed in this case. The Court correctly determined because the Insurers failed to produce a valid, signed agency agreement, they failed to establish that Southern Risk ever agreed to submit any dispute to arbitration and therefore the Motions should be denied.

A. The Agreements at Issue are Unsigned and Improperly Dated, and the Insurers Have Failed to Establish a Meeting of the Minds

South Carolina law is clear that "[a]rbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 (citations omitted). Our courts have held "where there has been no agreement to arbitrate, a party cannot be forced into compulsory

arbitration." *Hilton Head Resort Four Seasons Ct. Horizontal Prop. Regime Council v. Resort Inv. Corp*, 311 S.C. 394, 397-98, 429 S.E.2d 459, 462 (Ct. App. 1993) (citation omitted). In this case, the Insurers attempt to bind the Insureds and Agents to an arbitration provision contained within an alleged agency agreement between the Insurers and Southern Risk. However, the Insurers failed to meet their burden in producing any evidence to establish Southern Risk agreed to arbitration.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." *Player v. Chandler,* 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989)(emphasis in original); *see also Potomac Leasing Co. v. Otts Mkt., Inc.,* 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct.App.1987) ("It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms."). "The necessary elements of a contract are an offer, acceptance, and valuable consideration." *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (quoting *Roberts v. Gaskins,* 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997)). The Insurers in this case produced absolutely no evidence to the trial court of an offer, acceptance and valuable consideration between them and Southern Risk. In support of their motion, the Insurers initially relied exclusively on the 2010 "Liberty Mutual Agency Corporation Agency Agreement" allegedly entered into by the Insurers and Southern Risk. (*See* R. pp. 451-59). The 2010 Agency Agreement put into evidence at the motion hearing, that is at the center of the Insurers' claim for arbitration, is without dispute, unsigned by Southern Risk Insurance Services, LLC. In fact, counsel for Southern Risk acknowledged to the court during the hearing on Insurers' Motion that he had no knowledge of the 2010

Agency Agreement and that his client had not agreed to arbitration. (*See* R. p. 433, lines 2-4 ("There is no written agency agreement that my client Jesse Dantese [sic] and Southern Risk have entered into with [the Insurers].")).

Not only is the 2010 Agency Agreement unsigned, but also the Agreement is back-dated with the date affixed thereto by the Insurers of May 2012, a time period after which most of the Insureds' and Agents' claims arose. A close review of page 9 of 9 of the 2010 Agreement reveals the following contradicting language: "This agreement is effective April 01, 2010." (R. p. 459). However, the signature block for Southern Risk Insurance Services, LLC contains a different date affixed thereto by the Insurers, May 31, 2012 – a fact that is devastating to the Insurers' argument. (*See id.*). A common sense analysis reveals the alleged agreement on which the Insurers so doggedly rely apparently was never even presented to Southern Risk for a signature until May 31, 2012, when the causes of action in most of the instant complaints had already occurred. All of the Insureds' and Agents' allegations of wrongdoing against the Insurers, Willis and Dantice occurred prior to May 31, 2012. The Insurers are, in effect, against every principal of the law of contracts, trying to retroactively enforce an unsigned and back-dated agency agreement of which even counsel for Southern Risk disputes the validity.

The Addendums to the 2010 Agency Agreement are of no help to the Insurers because they are also unsigned. Additionally, these Addendums are dated May 31, 2012, and therefore should not be considered because they fall outside of the time period in which the majority of the Insureds' and Agents' claims arose. (*See* R. pp. 460-66). On the second page of the document entitled Montgomery Insurance Addendum to Agency Agreement, Exhibit "B" to Motion to Compel, there is a signature under Montgomery Insurance by Michael J.

Plavnicky with the same critical May 31, 2012 date, but there is no signature of any kind for Southern Risk and no date affixed where the Southern Risk representative was supposed to sign. (*See* R. p. 461). The agreement entitled Safeco Insurance Addendum to the Liberty Mutual Agency Corporation Agency Agreement is also not signed and dated May 31, 2012. (*See* R. p. 466). There is no signature from anyone representing Southern Risk Insurance Services, LLC and no date where the signature could have been affixed. (*See id.).* For all of the reasons stated above, this Court should affirm the ruling of the lower court denying the Motions to Compel Arbitration because no valid contract containing a valid arbitration clause exists.

In their Motions to Compel, the Insurers conceded any prior agreements were "replaced and superseded" by the 2010 Agency Agreement discussed above, and asserted the only relevant arbitration provision was found in the 2010 agreement. (R. p. 560; *see also* R. p. 419, lines 21-25 – p. 420, lines 1-2). In their brief before this Court, however, the Insurers take a contrary position and attempt to revive several alleged earlier agreements in support of their claim for arbitration, in the event the 2010 unsigned agreement is not binding[5]. (*See* Brief of Appellants, p. 8 (arguing "the absence of a signed copy of [the 2010] agreement ... is entirely mitigated by the existence of prior, signed agency agreements")). The Insureds and Agents submit any arguments regarding previous agency agreements must fail because (1) the issue of the validity of these prior agreements was not raised below; and (2) just like the 2010 agreement, none of these prior agreements on which the Insurers relied are signed by Southern Risk.

[5] Insureds and Agents argue these prior agreements should not be considered because this issue was not raised below. *See Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (At a minimum, issue preservation requires that an issue be "raised to and ruled upon by the trial judge."); *see also Malloy v. Thompson,* 409 S.C. 557, 762 S.E. 2d 690 (2014).

In reviewing the preceding agreements relied upon by the Insurers, only the 2007 Agreement is signed, albeit by two separate parties, unrelated to the instant actions. (*See* R. p. 447). This agreement, however, is between AssureAlliance, Inc. and Liberty Mutual Insurance Company.

The Insureds and Agents submit that the Insurers have failed to establish any relationship between AssureAlliance and Southern Risk, and therefore, the Court should disregard this Agreement. The only document ever produced in this case at any time by the Insurers which was actually signed by Jesse Dantice, as representative of Southern Risk, was a one-page document drafted by Insurer Safeco, entitled Safeco Limited Agency Appointment and Agreement (*See* R. p. 503). This document, however, contains no arbitration or dispute resolution language whatsoever and has no date affixed.[6] This document, obviously, cannot be utilized to compel arbitration, but did create legal duties between Insurer Safeco and Southern Risk which the Insurers want this court to ignore.

B. Insurers Cannot Establish the Agreements at Issue Controlled their Relationship with Southern Risk

In support of their claims, the Insurers also introduced as part of their Reply Brief (*see FN 1 above),* an affidavit of James E. Berry who was identified as the territory manager for Safeco Insurance Company and Montgomery Ins. Company. (R. pp. 504-06). The affidavit was submitted to support the Insurers' contention that any relationship between Southern Risk and them was governed by the 2010 Agency Agreement and/or any prior agreement. A close review of the document, however, establishes that Mr. Berry could not affirmatively establish that the relationship between the Insurers and Southern Risk was in fact so governed. In his

[6] The only date contained on this document is a fax date of 4/13/2007 at the top of the page.

affidavit, Berry struck out the printed words of the affidavit, initialed the change, and wrote on the document that his understanding of the relationship between Southern Risk and the Insurers was based only "upon information and belief". (R. p. 506, ¶ 13). The Insureds and Agents respectfully submit that the reason Mr. Berry would not sign the paragraph as written, instead marking the document with the handwritten words "*upon information and belief*," was because he knew the agency agreements at issue had never been signed by anyone from Southern Risk Insurance Services LLC and were therefore not binding on anyone. This is another ground and basis for this court to uphold the ruling of the lower court.

A close review of the documents submitted in support of the Insurers' Motions to Compel Arbitration conclusively establishes no contract between the Insurers and Southern Risk ever existed, and clearly there was no meeting of the minds regarding arbitration between any of these parties.

C. The Statute of Frauds Bars Application of the Arbitration Clause Contained Within the 2010 Agreement

The lower court also denied the Insurers' Motions to Compel Arbitration on the basis of the Statute of Frauds. Although the Insurers argue the court erred, the Insureds and Agents submit the court correctly ruled on this ground as well. South Carolina law requires certain agreements be in writing and signed to be enforceable. *See* S.C. Code 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)(emphasis added). Further, "[t]he burden of proof is on the party seeking to enforce the contract." *Id.* "In addition, the Statute of Frauds requires that a contract that cannot be

performed within one year be in writing and signed by the parties." *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005) (citing S.C.Code Ann. § 32–3–10 (1991)).

The Insureds and Agents submit that 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* S.C. Code Ann. § 32-3-10(d). The unsigned agency contract on its face has a beginning date of April 1, 2010 but no termination date, and by the terms of the agreement, it was not capable of being performed within one year.[7] Even counsel for the Insurers admitted during oral argument that these agreements were continuing in nature, which implies they could not be performed in one year. *(See* R. p. 413, lines 22-24 ("the terms of [the agreement] says [sic] continues in force until there's another one where there's a termination")). South Carolina law is clear that, where there is no contingency expressed upon the face of the contract, or implied from the circumstances, upon the happening of which within a year the contract or agreement will be performed, the agreement would be void under the Statute of Frauds. *Roberts,* 327 S.C. at 484, 486 S.E.2d at 774 (Ct. App. 1997). Therefore, the lower court was correct in denying the Motions to Compel Arbitration on this additional ground.

II. The trial court correctly refused to compel arbitration on the non-signatory Insureds and Agents, where their claims were based on a statutory duty unrelated to any of the alleged agreements and where they in no way relied on the agreements to support the causes of action in their complaints.

The claims at issue in the instant litigation are in no way derived from the alleged agency agreements relied upon by the Insurers to support their motion. Because the Insureds

[7] As argued in Section I.A above, the 2010 Agency Agreement contains two different dates. Without having a clear effective date or signature, there is no way to say with certainty that this agreement could be performed within a year's time.

and Agents did not rely on the provisions of the alleged agency agreements to support their claims, they cannot be bound to arbitrate as non-signatories of the agreements.

South Carolina law only allows non-signatories to be bound by arbitration provisions in certain specific circumstances. In the recent case of *Malloy v. Thompson*, 409 S.C. 557, 762 S.E.2d 690 (2014), the court recognized "five theories 'aris[ing] out of common law principles of contract and agency law' could provide a basis 'for binding non-signatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel.'" *Malloy,* 409 S.C. at 562, 762 S.E.2d at 692 (quoting *Pearson v. Hilton Head Hosp.,* 400 S.C. 281, 288, 733 S.E.2d 597, 601 (Ct.App.2012)). "In addition to these theories, some federal courts have recognized that a third-party beneficiary of a contract containing an arbitration clause may be compelled to arbitrate as a non-signatory." *Id.* (citing *Bridas S.A.P.I.C. v. Gov't of Turkmenistan,* 345 F.3d 347 (5th Cir.2003)).

In this case, the Insureds and Agents do not rely upon common law principles of contract or agency law, or on any of the five grounds stated in *Malloy,* to support their causes of action. Instead, the Insureds and Agents ground their Complaints exclusively on South Carolina Code § 38-43-10, *et. seq.*, and § 38-51-10 to establish the Insurers' liability for the acts of agents Laura Willis and Jesse Dantice as producers of insurance.

In all times relevant to the allegations in the underlying complaints, Willis and Dantice were producers of insurance, acting on behalf of the Insurers pursuant to the definition set forth in § 38-43-10. Further, pursuant to § 38-51-10(h), Willis and Dantice were agents of the Insurers. *See* S.C. Code Ann. § 38-51-10(h) ("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."). Any liability the Insureds and Agents assert against Willis, Dantice, and the Insurers derives from this section alone, not from the agency agreements submitted in support of the Motions to Compel.

Under these statutory sections, Willis and/or Jesse Dantice are agents of the Insurers, 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). The allegations of the Insureds and Agents which seek to impose liability on the appellants pursuant to § 38-51-10, under the *respondeat superior* doctrine, are totally unrelated to any agency agreement. Further there are no allegations in the subject 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.

The Insurers argue the lower court erred in refusing to compel arbitration on a non-signatory on the basis of equitable estoppel. According to the Insurers, because the Insureds and Agents relied on the Agency Agreements to assert their claims, they should be equitably

estopped from denying the existence of the agreement containing the arbitration clause. In *Pearson,* the Court of Appeals 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 (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 418 (4th Cir. 2000)). In this case, the Insureds and Agents do not seek to benefit from the agency agreements at issue. The agency agreements set forth only the business relationship between the Insurers and Southern Risk, and do not address the types of conduct on which the Insureds and Agents ground their Complaints.

Unlike the factual pattern in *Pearson,* in the instant litigation absolutely no evidence whatsoever exists to establish that the Insureds and Agents have maintained that the provisions of the agency agreement between Insurers and Southern Risk should be enforced to benefit them. In fact, as mentioned above, the Insureds and Agents assert they had no knowledge of and had never even seen the instant contract prior to the filing of the Insurers' motions. Further, a close reading of the 2010 Agency Agreement reveals that the allegations for which the Insureds and Agents 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). A close reading of the unsigned agency agreement at issue in these motions and presented to the Court reveals the agreement controls only the business relationship between the Insurers and Southern Risk, including payment of commissions, limits on advertising, and use of the company's name by the agency. The agency agreement does not control acts of negligence by agents, which is an issue of South Carolina law.

In their complaints, the Insureds and Agents do not seek to receive any benefits from the alleged agency agreement, and their claims do not hinge on any alleged rights found in the agency agreement. As outlined above, the Insureds' and Agents' claims are grounded exclusively on specific South Carolina statutes. As this Court recently held in *Malloy, supra,* where the claim is not based on a duty specifically derived from the arbitration agreement at issue, a non-signatory cannot be compelled to arbitrate under that agreement. The trial court in this case, therefore was correct in finding that the Insureds and Agents sought *no direct benefit* from the agency agreement and in denying the Motions to Compel on this ground.

III. The trial court was correct in ruling that, even if the arbitration provision was potentially applicable to the allegations of the complaints, it was simply too "narrowly worded" to encompass the causes of action raised by the Insureds and Agents.

The Insurers argue the arbitration clause, as found in the 2010 Agency Agreement, is sufficient in scope to cover the instant dispute. The Insureds and Agents, however, aver the clause in the subject agreement is "too narrow" for enforcement in this case, and the lower

court correctly agreed in denying the Motions to Compel on this ground. It is respectfully submitted that a "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 or relate to any of terms of this contract shall be settled by binding arbitration.**" (Emphasis added). Recently, our Supreme Court provided guidance regarding what is a broadly worded arbitration agreement, holding "[a] clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213-14 (2013); *see also 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").

In *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir.1961), the Second Circuit discussed the language "arising out of *or relating to*" as the standard language recommended by the American Arbitration Association to make an arbitration clause "broad". The court further stated that when an arbitration clause "refers to disputes or controversies 'under' or 'arising out of' the contract," arbitration is restricted to "disputes and controversies relating to the Interpretation of the contract and matters of performance." *Kinoshita* at 953. The Ninth Circuit Court of Appeals, in considering the same issue, held the phrase "arising under" is narrower in scope than the phrase "arising out of or relating to." *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983).

Courts are confronted often with arbitration language in a contract that is both "broad" and "narrow," and the discussion of the difference between the language could shed some

light on the language at issue in the 2010 Agency Agreement relied upon by the Insurers. In *Masztal v. Meritplan Ins. Co.*, 586 F. Supp. 2d 662 (S.D. Miss. 2008), when confronted with this issue, the court stated: "The contract in this case contains both narrow language, "arising out of," and broad language, "relating in any manner to." *Masztal* at 667. "[C]ourts distinguish 'narrow' arbitration clauses that only require arbitration of disputes 'arising out of' the contract from broad arbitration clauses governing disputes that 'relate to' or 'are connected with' the contract." *Pennzoil Exploration & Prod. Co. v. Ramco Energy,* 139 F.3d 1061, 1067 (5th Cir.1998). Insureds and Agents assert South Carolina should adopt a similar common sense rule.

The 2010 Agency Agreement on which the Insurers base their claims 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...." (*See* R. p. 456, ¶ 12.A (emphasis added)). The Insurers conceded this fact during oral argument. (R. p. 429, lines 24-25). As set forth above, the language applicable to this case is not only the judicially recognized restrictive phrase, "*arises in connection with*" used but that phrase is followed by even more restrictive language, "*the interpretation of this agreement.*" A *narrow* arbitration clause only submits certain, denominated disputes to arbitration, or it may exclude from arbitration specific issues. Where a narrow clause is used, if an issue of arbitrability arises, then the court must rule whether or not the parties have contracted to arbitrate a given dispute. *See* 83 Am. Jur. Proof of Facts 3d 1. The court in *Gerling Global Reinsurance Co.-U.S. Branch v. Ace Prop. & Cas. Ins. Co.*, 42 F. App'x 522,

523-24 (2d Cir. 2002), for example, held that the arbitration clause found in the contract in that case lacked the all-encompassing language requisite to a broad arbitration clause. *Gerling* at 523 (citing *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224-26 (2d Cir.2001)). The *Gerling* court found that the arbitration clause in that case was narrow, applying only to "irreconcilable difference[s] of opinion that concern the interpretation of the certificates." *Id.* In the case at hand the arbitration clause is limited to disagreement to the interpretation of the agency agreement itself, and it is understandable why Appellants admitted to the court during argument that the agreement was "narrow".

Despite conceding at oral argument that the Agency Agreement was "narrow," Appellants in their brief now try to convince the Court that the agreement is "broadly worded." Whether an arbitration agreement is "broadly worded" or "narrowly worded" is critical 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); *see also 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,* 402 S.C. at 109-10, 739 S.E.2d at 213 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,* 402 S.C. at 109, 739 S.E.2d at 213. The lower court, therefore, correctly ruled the clause at issue was too "narrowly worded" to be enforced.

IV. The trial court was correct in ruling the Insurers waived their right to compel arbitration.

"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). At least as to Wilson, Williams, Calhouns, Spires, Wiley, Bosler, Woffords, Garys, Wiltshire, Antoniaks and Lawton, if not all the Insureds and Agents, all three relevant factors are met.

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. In the case of Agent Wilson, for example, he filed his action in November 2012. Approximately 11 months later, after answering the Complaint, serving and responding and/or objecting to extensive discovery[8], and filing a Motion for Judgment on the Pleadings and/or Motion to Dismiss, the Insurers filed the Motion to Compel Arbitration. Eleven months is certainly an unreasonable length of time to delay seeking arbitration considering that the alleged binding agency agreement was intentionally withheld from the Insureds and Agents in the course of discovery. As to the Insureds, Williams, Calhoun, Spires and Wiley, for example, filed the Summons &

[8] Agent Wilson specifically asked for any contracts between the Insurers and Dantice, Southern Risk or Willis to be produced in discovery. The Insurers stated a standard objection and refused to produce any responsive documents.

Complaints in their respective cases on December 13, 2012. On approximately April 4, 2013, the Insurers answered. On October 31, 2013, almost seven months after appearing and answering and after serving respondents with extensive discovery requests, the Insurers filed the instant motion. Likewise, Insureds Bosler, Woffords, Garys and Wiltshire filed their Complaints in February 2013. By April 2013, the Insurers had served and filed answers. After these cases had been pending in excess of six months and after the Insurers served extensive discovery requests, the Insurers filed the Motions to Compel.

Since Agent Wilson filed the first of these related actions in December 2012 and through the time the parties presented oral arguments, these cases currently had been pending approximately thirteen months.[9] The Insureds and Agents argue that thirteen months, or more than one year, is an unreasonable length of time for the Insurers 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.

The Insurers argue that South Carolina cases involving waiver typically involve time frames of "18 months to five years." (Brief of Appellants, p. 23). This argument is flawed because as the Court in *Hyload* held, the analysis in determining a substantial length of time involves not the number of months or years but is dependent upon "the facts of each case." *Hyload,* 308 S.C. at 280, 417 S.E.2d at 624 ("There is no set rule as to what constitutes a waiver ...."). Likewise, 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.

[9] From the time of the initial action filed by Wilson through the date the Insured and Agents filed their Respondents' Brief, twenty-one months have passed.

The second factor South Carolina courts consider in analyzing waive involves whether the parties engaged in "extensive discovery before moving to compel arbitration." *Id.* In this case, the Insureds and Agents submit extensive discovery had begun at the time the Insurers filed their motions, given the sheer volume of discovery requests served and exchanged. Although no depositions had yet been taken, the Insurers had served the Insureds and Agents with extensive discovery requests, and the parties had spent months gathering documents to respond to discovery and preparing and serving initial discovery requests. Additionally, counsel for the Insureds and Agents had begun consultation with expert witnesses and spent considerable amounts of time and money preparing these cases.

The third factor for the court's consideration in determining whether waiver applies involves considering prejudice to the non-moving party by the delay in seeking arbitration. In this case, the delay in seeking arbitration was highly prejudicial to the Insureds and Agents. Although the Order of the lower court does not address this factor in detail, the Insureds and Agents clearly described this factor in their brief and at oral argument. In reviewing the record in this case, the Insureds and Agents would point out to the court that between November 1, 2012 and October 31, 2013, in the *Wilson* case for example, the parties filed forty-five documents in the Abbeville County Clerk of Court's office. These documents included original complaints, amended complaints, original answers, amended answers, one amended answer and counterclaim, certificates of service of multiple interrogatories and requests to produce, certificates of service for answers to two different sets of interrogatories and requests to produce of the Insurers, two motions to dismiss filed by the Insurers which were set for hearings which were later cancelled by the Insurers, and memorandums by the parties on the motions to dismiss which were pending before the court. Additionally, the

Insurers consented to Agent Wilson's Motion for a Protective Order that was issued by Judge Griffith on August 7, 2013.

Despite all of this activity, the Insurers waited until October 31, 2013 to file their Motions to Compel Arbitration and waited until November 6, 2013 to withdraw their motions to dismiss which were set for a hearing on November 14, 2013. During this year, the Insurers availed themselves of assistance by the Court on four occasions, filing two motions and accompanying briefs which were set for hearing, preparing one letter to the court withdrawing the motion and cancelling the hearing, and agreeing to a consent motion for a protective order to apply to discovery. Also during this time, the Insureds and Agents retained two expert witnesses but delayed taking depositions until the voluminous discovery of all parties had been answered, including what had been objected to by the Insurers. Although no depositions were taken, the parties had spent considerable amounts of time and resources litigating these cases. To force the parties to arbitrate when the Insurers intentionally delayed in filing their Motions to Compel Arbitration would substantially prejudice the Insureds and Agents.

As an alternative ground, the Insureds and Agents submit the Insurers' delay in filing for arbitration is prejudicial on the basis the Insurers have affirmatively asked this court as plaintiffs in a declaratory judgment action in the *Gary* litigation to rule on the same factual issues at issue in the instant cases, yet now seek to prevent litigation and arbitrate these claims. The Insureds and Agents have spent considerable amounts of time, money, and other resources preparing for litigation in this case. The Insurers at all times have actively litigated the claims, even filing for declaratory judgment, and then at the last minute, filed Motions to Compel Arbitration. This delay tactic is highly prejudicial to the Insureds and Agents, and the Court should affirm the trial court on this ground as well.

As stated above, from the time the parties filed their initial pleadings until the time the Insurers filed their Motions to Compel, both sides of this litigation had a great deal of time invested in review of documents, research, expert witness consultations, and discovery, and a substantial length of time passed and a substantial amount of resources were spent in litigating these cases. To allow the Insurers to succeed in compelling arbitration after such a substantial amount of time and a substantial amount of work had transpired, all while intentionally withholding allegedly applicable arbitration documents and knowing all along that this defense was available to them, would be contrary to the test set forth in *Rhodes*. Therefore, the lower court correctly denied arbitration on this ground.

V. The trial court was correct in determining that the potential liability of the corporate Insurers could be based on a statutory duty which could make the Insurers liable for the "outrageous conduct" of their authorized and/or acting agents under the *respondeat superior* doctrine.

The Insureds and Agents assert, as the plaintiff did in *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 493-95, 689 S.E.2d 602, 604-05 (2010), that even if the Court held that their claims are encompassed by language of the arbitration clause, the clause does not apply because the alleged actions of the Insurers 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, as did the lower court in the instant case. (*See* R. pp. 14-15).

The Insureds and Agents base their complaints on allegations of fraudulent conduct and misrepresentations of the Insurers as principals for agent Willis and Dantice, arguing these Insurers are liable under S.C. Code § 38-43-10 and the *respondeat superior* doctrine. The trial court correctly found that the Insureds and Agents could not have foreseen outrageous actions of Willis and therefore cannot be bound to arbitration under the unsigned

agency agreement between the Insurers and Defendant Southern Risk Insurance Services LLC. The Insurers argue in their brief before this Court that the trial court "conflated" the actions of Willis with the actions of the Insurers. The Insureds and Agents respectfully disagree, and submit that a close review of the Order and other pleadings in this case will support the fact that the Insurers and Dantice and Willis acted illegally and fraudulently in procuring and issuing insurance policies. The Insurers, as the principals of Dantice and Willis and under a respondeat superior doctrine, are liable for Dantice and Willis' actions, which could not be foreseen by a reasonable consumer in the context of normal business dealings. Therefore, the rule espoused in *Partain* applies equally to the Insurers, as principals, as it does to Dantice and Willis, and arbitration should not be compelled.

Finally, the Insurers argue that the lower court erroneously denied the motion on this ground because it failed to consider the recent case of *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013), where the South Carolina Supreme Court held even claims for intentional infliction of emotional distress may be subject to arbitration. The *Landers* case is clearly distinguishable from the facts at issue in the instant case. First, the Insureds and Agents do not seek to recover under a theory of intentional infliction of emotional distress. The outrageous conduct discussed in the complaints and the type of conduct held to be outside of the scope of arbitration in *Partain* is conduct not foreseeable by a consumer in normal business dealings and not the same as the type of conduct comprising the tort of outrage arising from an employer-employee relationship which is arguably foreseeable. Secondly, the *Landers* case involved an employment contract containing an arbitration provision and the outrageous conduct for which Landers sought to recover stemmed *directly* from that employment contract. In this case, the type of conduct for which the Insureds and Agents

seek to recover is completely outside of the scope of the purported agency agreement between the Insurers and Southern Risk. Further, the Insureds and Agents were not parties to the agreement containing the arbitration provision. Therefore, *Landers* is inapplicable to the facts at hand, and the trial court correctly denied the motion on the ground the conduct at issue was outrageous.

ADDITIONAL SUSTAINING GROUNDS

The Insureds and Agents argue two additional grounds exist on which this Court should affirm the ruling of the lower court denying the Motions to Compel Arbitration.

1. **The trial court could have denied the Insurers' motions on the ground that the alleged agreements containing the arbitration clauses were intentionally withheld from the Insureds and Agents in discovery to prevent the same from being challenged by them.**

Substantive due process and the S. C. Rules of Civil Procedure require that critical documents to a matter pending in court, which could potentially end the trial and compel arbitration, must be timely provided to the other parties in the case in order that the documents can be appropriately challenged through discovery and appropriate cross-examination of the person or persons having knowledge concerning the documents. Specifically a portion of the attorney's oath requires "...fairness, integrity, and civility, not only in court, but also in all written and oral communications." Rule 402, SCACR. Further, Rule 37 of the South Carolina Rules of Civil Procedure prohibits situations where a party intentionally refuses to respond to specific questions in interrogatories and requests for production. In the Wilson case, the trial court issued an extensive discovery Order on August 9, 2013 (R. pp. 1-7), to which Insurers' attorneys consented, which protected the confidentiality of the agency agreement, and still Insurers did not produce the agency agreement until the filing of the Motions to Compel almost two months later on October 31, 2013.

Sanctions for discovery abuse are left to the sound discretion of the trial court. *See Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2010). However, severe sanctions, such as the dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights. *See Orlando v. Boyd,* 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996); *Baughman v. Am. Tel. & Tel. Co.,* 306 S.C. 101, 108-09, 410 S.E.2d 537, 541-42 (1991); *McNair v. Fairfield Cnty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.,* 334 S.C. 193, 198-99, 511 S.E.2d 716, 719 (Ct.App.1999).

It is respectfully submitted that this case is analogous to *Hilton Head Beach & Tennis Resort v Sea Cabin Corp.*, 305 S.C. 517, 409 S.E.2d 434 (Ct. App. 1991), wherein this court found that a trial court abused its discretion in admitting into evidence a copy of a gummed paper warning label which the defendant lumber supplier claimed was on the lumber at issue in the plaintiff's case. The crux of the *Hilton Head* case was whether the supplier had adequately warned the builder that the lumber at issue was not to be used outdoors. The court found the warning label should not have been admitted into evidence where the label had not been produced during discovery, although the defendant had been served a request for production at the time he was added to the litigation 15 months prior to trial and his responses were provided 11 months later, and the builder pushed the case to trial over the supplier's objection that discovery was not complete. In the case at hand, the agency agreements were specifically requested in discovery. The Insurers objected to responding to this request, and instead, waited months to file the Motions to Compel Arbitration. Based on the reasoning in

Hilton Head, the trial could have found the 2010 Agency Agreement, and the prior agreements later submitted by the Insurers, inadmissible in ruling on the instant motions.

It is not disputed that neither the Insureds and Agents nor any other adverse parties were ever given the opportunity to challenge the alleged agency agreements relied on by the Insurers to try to compel arbitration in this case. Judge Griffith could have denied the Insurers' motion on that basis alone and would have been correct had he done so.

2. The Insurers' Motion to Compel Arbitration as to the Insureds 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.

In their Memorandum in Opposition to the Insurers' Motion to Compel, the Insureds raised S.C. Code § 15-48-10, arguing arbitration cannot be enforced against them as insureds under policies of insurance issued by Insurers. (R. p. 616). As argued in their Memorandum but not ruled upon either way by the trial judge, the Insureds assert South Carolina's Uniform Arbitration Act specifically exempts any insured under any insurance policy from being bound by arbitration provisions. (*Id.*, citing S.C. Code Ann. § 15-48-10(b)(4)). As held by this Court, the purpose of § 15-48-10(b) is to regulate the business of insurance. *See Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 401 (Ct. App. 2001). This statutory section "reverse preempts" the Federal Arbitration Act through the application of the McCarran-Ferguson Act and specifically exempts insurance arbitration clauses. *Cox*, 347 S.C. at 468, 556 S.E.2d at 401. It is without dispute that each of the Insureds in this case were insureds under policies either issued, or paid for and purported to have been issued, by the Insurers. Although no South Carolina court has spoken as to whether this exemption may be applied to exempt insureds from arbitration clauses found in documents other than insurance policies, the Insureds and Agents submit the Court should so extend the exemption

in keeping with the intention of the legislature in adopting the statute. To allow insurance companies to force third party insureds to arbitrate claims found in various contracts between the companies and their agencies would effectively prohibit insureds from litigating any insurance disputes. The exception outlined in § 15-48-10(b) above, therefore, should apply in the instant case, and the lower court could have correctly denied arbitration on this ground as well.

CONCLUSION

For the reasons stated above the Motions to Compel Arbitration were appropriately denied by the trial court and the appeal in this matter should be dismissed with costs.

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENTS

Abbeville, South Carolina
January 23, 2015

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 Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co.,.....Defendants,

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are.....Appellants,

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 23, 2015

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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 Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co.,.....Defendants,

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are.....Appellants,

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

PROOF OF SERVICE

I, the undersigned attorney with the law offices of Hite and Stone, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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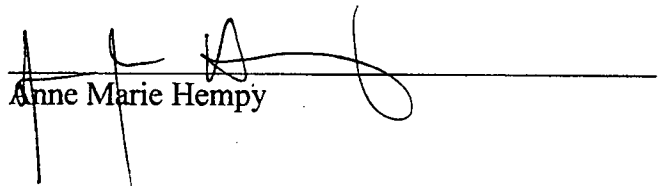
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APPEAL FROM ABBEVILLE COUNTY
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v.

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 Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., and Laurie Williams,.....Defendants,

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are.....Appellants,

and

Of whom Laurie Williams is a .....Respondent.

FINAL BRIEF OF RESPONDENT LAURIE WILLIAMS

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STATEMENT OF ISSUES ON APPEAL

1. The trial court was correct in ruling no valid agreement containing an arbitration provision existed between the parties.

2. The trial court correctly refused to compel arbitration on the non-signatory respondents where the specific dispute fell outside of the scope of the alleged agreement and where the respondents in no way relied upon the alleged agreement in support of their claims.

3. The trial court correctly ruled that, even if the alleged agreement were potentially applicable to the allegations of the complaints, it was simply too "narrowly worded" to encompass the causes of action at issue.

4. The trial court correctly held appellants waived their right to compel arbitration in this matter.

5. The trial court was without error in determining that the potential liability of the appellants could be based on a statutory duty making the corporate defendant liable for the "outrageous conduct" of their authorized and/or acting agents under the *respondeat superior* doctrine.

STATEMENT OF THE CASE

This appeal arises from the trial court's denial of Appellants Peerless Insurance Company, Montgomery Insurance Company and Safeco Insurance Company's (Insurers) Motions to Compel Arbitration and Dismiss Claims in a total of fourteen actions involving the above-named Respondents and Laurie Williams (Ms. Williams). Insurers named Laurie Williams as Defendant in its cross claim filed on April 15, 2013. (R. pp. 205-228).

On May 28, 2013, Ms. Williams filed a cross claim against Insurers for claims substantially similar to those made by Plaintiff customers (the Insureds) in the cases consolidated for this appeal. (R. pp. 710-722). In her cross claim, Ms. Williams filed suit against two local insurance agents, Defendants Laura Willis (Willis) and Jesse Dantice (Dantice), and their agency, Southern Risk Insurance Services, LLC (Southern Risk), for breach of contract and violations of the S.C. Unfair Trade Practices Act. (R. pp. 717-719, ¶¶ 48-70). Ms. Williams also named several national insurance companies, including Appellants, in her cross claim under a *respondeat superior* theory, alleging Appellants failed to supervise or audit Willis or Southern Risk, resulting in various harms to her. (R. pp. 719-720, ¶¶ 71-76). Appellants served their Answer to Laurie Williams' cross claim on June 28, 2013. (R. pp. 727-735).

The Insurers filed a motion to compel arbitration on October 31, 2013. Insurers sought to enforce an arbitration provision contained in an alleged agreement (Agency Agreement) between Appellants and Dantice, a defendant in each of the fourteen related actions. The Insurers argue that because the Insureds seek to recover from them based on duties that would not exist but for the alleged agency agreement at issue, the court should compel arbitration based on the arbitration provisions found in the subject agreement.

The Insureds filed a Memorandum in Opposition to the motions, asserting no valid or enforceable agreement to arbitrate exists because the agency agreement on which the Insurers base their motions is unsigned by any representative of Southern Risk. The Insureds were neither

signatories nor parties to the alleged agency agreement, and their claims against the Insurers are not within the scope of the arbitration clause contained within the agreement. The Court heard oral arguments on the motions on January 21, 2014, and the Insureds filed their briefs in opposition to the motions the same day. The Insurers filed a reply memorandum on February 11, 2014 and attached additional evidence for the court to consider, including an opinion affidavit of an employee of Insurers.[1] (R. pp. 504-506, pp. 629-636).

On March 25, 2014, the Court issued its order denying the Insurers' motion, finding the Insurers "failed to meet their burden of proof in establishing a valid, binding contract by which the [Insureds] should be forced to arbitrate their claims." (R. p. 10). Thereafter, on April 8, 2014, the Insurers filed Motions to Alter or Amend. (R. pp. 658-668). The court denied the Motions to Alter or Amend on April 21, 2014. (R. pp. 20-21).

The Insurers filed their Notice of Appeal on April 25, 2014. (*See* Notice of Appeal). Thereafter, the Insurers filed a Consent Motion to Consolidate Appeals in all fourteen cases. (*See* Consent Motion to

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[1] The presiding judge granted the Insurers' request to file a reply brief only to address two points raised in the Insureds' Memoranda in Opposition. He specifically declined to leave the record open for the addition of any new evidence. (R. p. 436, lines 7-11 ("So I'm assuming that by allowing them to do a reply brief, you're not leaving this hearing open." "No. Just to respond to the issues that you raised that they were not apprised to it. It's just two as I understand it.")).

Consolidate). The Court granted the Motion, consolidating the appeals pursuant to Rule 214, SCACR, on June 18, 2014. (*See* Order).

STATEMENT OF THE FACTS

Cynthia Gary's sports utility vehicle struck Laurie Williams while she was walking along a rural road on July 26, 2012. Ms. Williams sustained serious injuries as a result of this collision. A few months after the collision, on October 30, 2012, one of the Insurers, First National Insurance Company of America, filed suit against Wayne Gary and Cynthia Gary (the Garys) and Laurie Wilson Williams (Ms. Williams) in the United States District Court of South Carolina. (R. pp. 22-77). The insurer sought a judgment declaring it had no duty to defend or indemnify the Garys for the July 26, 2012 collision in which Laurie Williams was seriously injured. (R. p. 25, ¶¶ a.). The insurer alleged the Garys fraudulently procured the applicable insurance policy. (R. pp. 23-25, ¶¶ 10-20). The Insurers' Complaint made no mention of arbitration. (R. pp. 22-25). After Ms. Williams and the Garys answered and counterclaimed, the parties stipulated to dismiss the federal court action. (R. pp. 98-103).

After the Garys filed suit in state court against the Insurers and other Defendants, Insurers answered and filed a cross claim against Ms. Williams. (R. pp. 205-313). Insurer's cross claim made no mention of an arbitration clause. (R. pp. 216-226, ¶¶ 45-112, pp. 227-228, ¶¶ a – h). Ms. Williams filed a cross claim against Insurers. (R. pp. 710-722). In their Answer to Ms. Williams' cross claim, Insurers set forth nine affirmative

defenses, but like their prior pleadings, made no mention of arbitration. (R. pp. 731-734, ¶¶ 28-37).

In addition to these facts, Ms. Williams adopts the entire Statement of the Facts in the Brief of Respondents filed by Hite and Stone. Rule 208(b)(6), SCACR.

STANDARD OF REVIEW

The denial of a motion to compel arbitration is subject to de novo review; however, the trial court's factual findings will not be overruled if reasonably supported by any evidence. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009); *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010).

ARGUMENT

There is more than ample evidence to reasonably support the trial court's denial of the Insurers' Motion to Compel Arbitration and Dismiss Claims, where the Insurers ignore the statutory law of our state and instead seek to apply an unsigned arbitration provision contained in an alleged agency agreement to the Insureds, who are third parties and non-signatories to the alleged agreement.

1. The trial court was correct in ruling no valid agreement containing an arbitration provision existed between the parties.

Respondent Williams adopts the Insureds' Argument I., in its entirety, in the Brief of Respondents filed by Hite and Stone. Rule 208(b)(6), SCACR. This adoption includes the law and documents to which Respondents cite. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596,

553 S.E.2d 110, 118 (2001); *Hilton Head Resort Four Seasons Ct. Horizontal Prop. Regime Council v. Resort Inv. Corp.*, 311 S.C. 394, 397-98, 429 S.E.2d 459, 462 (Ct. App. 1993); *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989); *Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987); *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009); *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997); S.C. Code Ann. § 32-3-10; *Fici v. Koon*, 372 S.C. 341, 346, 642 S.E.2d 602, 604 (2007); *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005); S.C. Code Ann. § 32-3-10 (1991); *Roberts v. Gaskins*, 327 S.C. 478, 484, 486 S.E.2d 771, 774 (Ct. App. 1997).

While Ms. Williams adopts the Insureds' arguments in section I., additional information is pertinent to her case. The Insurers extensively discuss the purported Agency Agreement that they argue contains a binding arbitration clause. However, the Insurers fail to cite even one South Carolina statute relating to insurance, despite our code devoting an entire title to "The Insurance Law." S.C. Code Ann. § 38-1-10, *et. seq.* (1976, as amended).

The Insurers have obligations under South Carolina statutory law separate and apart from any an alleged Agency Agreement may impose. S.C. Code Ann. § 38-1-10, *et. seq.* (1976, as amended); S.C. Code Ann. § 38-1-20 (33) ("'Insurer' includes a corporation, fraternal organization, burial association, other association, partnership, society, order, individual, or aggregation of individuals engaging or proposing or attempting to engage as principals in any kind of insurance or surety business, including the

exchanging of reciprocal or interinsurance contracts between individuals, partnerships, and corporations.").

Willis and Dantice were agents of the Insurers. S.C. Code Ann. § 38-51-10(h) ("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."). Any liability the Insureds and Agents assert against Willis, Dantice, and the Insurers derives from our state's statutory law and not from the purported agency agreements submitted in support of the Motions to Compel.

Under these statutory sections, Willis and/or Jesse Dantice are agents of the Insurers, 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). The Insureds seek to impose liability on the Insurers pursuant to § 38-51-10, under the *respondeat superior* doctrine. This is unrelated to the alleged agency

agreement and nothing in Respondents' pleadings relate to a dispute or disagreement in the interpretation of the agreement, its performance or nonperformance, or its termination. Even if this Court holds the alleged agency agreements are valid binding contracts between Insurers and Dantice and Willis such contract and arbitration agreement clearly do not apply to the Insureds' cases.

2. The trial court correctly refused to compel arbitration on the non-signatory respondents where the specific dispute fell outside of the scope of the alleged agreement and where the respondents in no way relied upon the alleged agreement in support of their claims.

Respondent Williams adopts the Insureds' Argument II., in its entirety, in the Brief of Respondents filed by Hite and Stone. Rule 208(b)(6), SCACR. This adoption includes the law and documents to which Respondents cited. *Malloy v. Thompson*, 409 S.C. 557, 762 S.E.2d 690 (2014); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 601 (Ct. App. 2012); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000); *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003); S.C. Code Ann. § 38-43-10, *et. seq.*; S.C. Code Ann. § 38-51-10; *S. Carolina Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 180, 348 S.E.2d 617, 622 (Ct. App. 1986); *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, Inc.*, 384 F.3d 157, 161 (4th Cir. 2001).

3. The trial court correctly ruled that, even if the alleged agreement were potentially applicable to the allegations of the complaints, it was simply too "narrowly worded" to encompass the causes of action at issue.

Respondent Williams adopts the Insureds' Argument III., in its entirety, in the Brief of Respondents filed by Hite and Stone. Rule 208(b)(6), SCACR. This adoption includes the law and documents to which Respondents cite. *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213-14 (2013); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961); *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983); *Masztal v. Meritplan Ins. Co.*, 586 F. Supp. 2d 662, 667 (S.D. Miss. 2008); *Pennzoil Exploration & Prod. Co. v. Ramco Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998); *International Broth. of Elec. Workers, Local No. 4, AFL-CIO v. KTVI-TV, Inc.*, 985 F.2d 415 (8th Cir. 1993); *Global Reinsurance Co.-U.S. Branch v. Ace Prop. & Cas. Ins. Co.*, 42 F. App'x 522, 523-24 (2d Cir. 2002); *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224-26 (2d Cir. 2001); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960).

4. The trial court correctly held appellants waived their right to compel arbitration in this matter.

Respondent Williams adopts the Insureds' Argument IV. in the Brief of Respondents filed by Hite and Stone. Rule 208(b)(6), SCACR. This adoption includes the law and documents to which Respondents cite. *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); *Hyload, Inc. v. Pre–Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992); *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994); *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985); *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

While Ms. Williams adopts the Respondents' arguments in section IV., additional information is pertinent to Ms. William's case. In determining whether a party has waived its right to compel arbitration, our courts have looked to the following factors: 1) the length of time between commencement of the action and the filing of the motion to compel, 2) if the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and 3) the prejudice on the non-moving party by the moving party's delay in seeking arbitration. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). All three factors are met and the Court should uphold the trial court's denial of Insurers' Motion to Compel Arbitration.

Our Court of Appeals 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. Insurers did not first seek to arbitrate any matter with Ms. Williams before it filed suit against her in federal court in October 2012. (R. pp. 22-77). Insurers knew, or should have known, about the arbitration clause when it filed this suit in federal court. Insurers again failed to request arbitration when it filed its cross claim against Ms. Williams in state court in April 2013. (R. pp. 205-313). Insurers answered Ms. Williams' cross claim in June 2013 and again, never mentioned or requested arbitration. (R. pp. 727-735).

More than one year passed before Insurers filed their Motion to Compel Arbitration and the Motion was Ms. Williams' first notice of the purported agency agreement and the alleged arbitration clause in the agency agreement. While our courts have not drawn a bright line for how long is too long before moving to compel arbitration, more than one year is a significant delay when Insurers have had multiple opportunities to request Ms. Williams participate in arbitration and failed to do so until in multiple pleadings it filed in both federal and state courts against Ms. Williams.

Insurers have engaged in discovery during the pendency of this action and during the pendency of the federal action. While the Insurers may not have yet taken depositions or been deposed, they admit they ceased responding to any discovery causing the delay in the discovery

process. Now, they rely on their declination to answer discovery requests to support their argument that arbitration should be compelled.

The prejudice to the nonmoving party is the last factor to consider. Ms. Williams was severely injured in a collision in July of 2012. Ms. Williams filed a separate negligence action related to the collision. (R. pp. 723-726). Discovery is nearly complete in the companion negligence action, but is stayed until this action is resolved. (R. p. 676). Ms. Williams is significantly prejudiced by Insurers' considerable delay in moving to compel arbitration as she cannot proceed in the negligence action until this matter is resolved.

5. The trial court was without error in determining that the potential liability of the appellants could be based on a statutory duty making the corporate defendant liable for the "outrageous conduct" of their authorized and/or acting agents under the *respondeat superior* doctrine.

Respondent Williams adopts the Insureds' Argument V., in its entirety, in the Brief of Respondents filed by Hite and Stone. Rule 208(b)(6), SCACR. This adoption includes the law and documents to which Respondents cite. *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 493-95, 689 S.E.2d 602, 604-05 (2010).

ADDITIONAL SUSTAINING GROUNDS

Respondent Williams adopts the Insureds' arguments to support additional sustaining grounds in its entirety, in the Brief of Respondents filed by Hite and Stone. Rule 208(b)(6), SCACR. This adoption includes the law and documents to which Respondents cite. Rule 402, SCACR; Rule 37, SCRCP; *Barnette v. Adams Brothers Logging, Inc.*, 355 S.C. 588, 593, 586

S.E.2d 572, 575 (2010). However, severe sanctions, such as the dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights. *See Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 108-09, 410 S.E.2d 537, 541-42 (1991); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198-99, 511 S.E.2d 716, 719 (Ct. App. 1999). *McNair v. Fairfield Cnty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008).

It is respectfully submitted that this case is analogous to *Hilton Head Beach & Tennis Resort v Sea Cabin Corp.*, wherein this court found that the trial court abused its discretion in admitting into evidence a copy of a gummed paper warning label which the defendant lumber supplier claimed was on the lumber supplied to the plaintiff builder where (1) the label identified the product as "Interior Fire-X," (2) the label had not been produced during discovery, although the defendant had been served a request for production at the time he was added to the litigation 15 months prior to trial and his responses were provided 11 months later, (3) the builder pushed the case to trial over the supplier's objection that discovery was not complete, and (4) the crux of the case was whether the supplier had adequately warned the builder that the lumber was not to be used outdoors. 305 S.C. 517, 519-20, 409 S.E.2d 434, 435-36 (Ct. App. 1991).

It is undisputed that neither the Insureds and Agents nor any other adverse parties were ever given the opportunity to challenge the alleged agency agreements relied on by Insurers to try to compel arbitration in

this case. Judge Griffith could have denied the Insurers' motion on that basis alone and would have been correct in doing so.

The Insurers' Motion to Compel Arbitration as to the Insureds 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.

In their Memorandum in Opposition to the Insurers' Motion to Compel, the Insureds raised S.C. Code § 15-48-10, arguing arbitration cannot be enforced against them as Insureds under policies of insurance issued by Insurers. As argued in their Memorandum but not ruled upon either way by the trial judge, the Insureds assert South Carolina's Uniform Arbitration Act specifically exempts any insured under any insurance policy from being bound by arbitration provisions. (R. p. 616 (citing S.C. Code Ann. § 15-48-10(b)(4). As held by this Court, the purpose of section 15-48-10(b) is to regulate the business of insurance. *See Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 401 (Ct. App. 2001). This statutory section "reverse preempts" the Federal Arbitration Act through the application of the McCarran-Ferguson Act and specifically exempts insurance arbitration clauses. *Cox*, 347 S.C. at 468, 556 S.E.2d at 401.

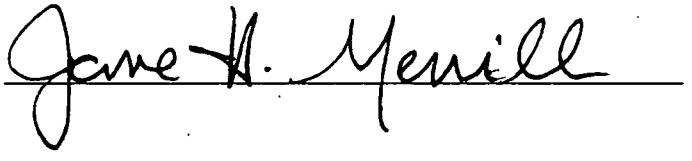
It is without dispute that each of the Insureds in this case were insureds under policies either issued, or paid for and purported to have been issued, by the Insurers. Although no South Carolina court has spoken as to whether this exemption may be applied to exempt Insureds

from arbitration clauses found in documents other than insurance policies, the Insureds submit the Court should so extend the exemption in keeping with the intention of the legislature in adopting the statute. To allow insurance companies to force third party Insureds to arbitrate claims found in various contracts between the companies and their agencies would effectively prohibit Insureds from litigating any insurance disputes. The exception in section 15-48-10(b) outlined above, therefore, should apply in the instant case, and the lower court could have correctly denied arbitration on this ground as well.

CONCLUSION

For the above stated reasons, the Motions to Compel Arbitration were appropriately denied by the trial court and the appeal in this matter should be dismissed with costs.

Respectfully Submitted,
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February 26, 2015
Greenwood, 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

RECEIVED
MAR 02 2015
SC Court of Appeals

Case No. 2012-CP-01-00306
Appellate Case No. 2014-000946

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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 Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., and Laurie Williams,.....Defendants,

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are.....Appellants,

and

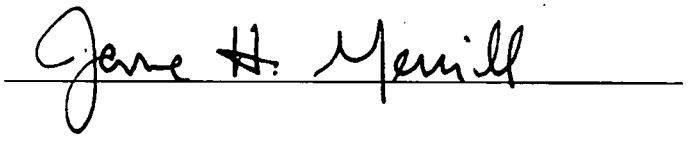
Of whom Laurie Williams is a .....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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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 Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., and Laurie Williams,.....Defendants,

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are.....Appellants,

and

Of whom Laurie Williams is a .....Respondent.

CERTIFICATE OF SERVICE

I, the undersigned attorney, certify I have served all counsel of record with a copy of the pleading(s) listed below by mailing same by United States Mail, postage prepaid, to the following:

Pleadings:

Final Brief of Respondent Laurie Williams
Certificate of Counsel
Certificate of Service

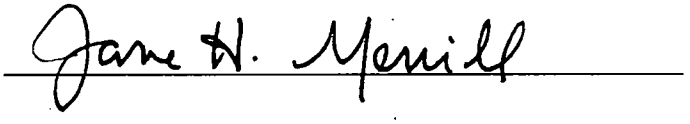
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v.

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

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

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Of whom Laurie Williams is a ..... Respondent.

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INTRODUCTION

This appeal arises from the trial court's denial of Peerless Insurance Company's, Montgomery Mutual Insurance Company's, and Safeco Insurance Company of America's (collectively "the Insurers") motions to compel arbitration of the claims made against them and to dismiss them from 14 related suits. The Respondents subsequently filed two briefs: one on behalf of Laurie Williams and the other on behalf of the other named Respondents. Ms. Williams subsequently filed a Motion for Clarification to determine whether she was, in fact, a Respondent in this suit.[1] The Insurers filed a response consenting to the motion and noting they did not object to Ms. Williams being included as a Respondent. While the motion was pending, the Insurers filed their Initial Reply Brief to the brief of the other Respondents. On November 26, 2014, this Court filed an Order clarifying that Ms. Williams is a Respondent in this appeal and allowing

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[1] Ms. Williams' involvement stems from an injury she sustained on July 26, 2012, when a vehicle driven by one of the other Respondents, Cynthia Gary, struck Ms. Williams. At that time, Ms. Williams was insured by Peerless, but she had declined underinsured motorist coverage. The Garys were uninsured. Shortly after the accident, the Garys met with Laura Willis to obtain new car insurance. First National Insurance Company of America subsequently received a false and backdated insurance application.

When First National learned the facts of the matter, it filed a declaratory judgment action in federal court on October 30, 2012 against the Garys and Ms. Williams, seeking a declaration that there was no coverage and that, as a result of the fraudulent insurance application, it had no duty to defend or indemnify the Garys for the collision. (R. 22.) The parties subsequently stipulated to dismissal of the action.

Shortly thereafter, the Garys filed a lawsuit in state court against the Insurers. The Insurers answered and cross-claimed against Ms. Williams, again seeking a declaration that there was no coverage under either the Gary's policy or Ms. Williams' policy, and that there was no duty to indemnify and defend the Garys. Williams answered and asserted cross claims of her own against the Insurers. The Insurers subsequently sought an "order compelling arbitration and dismissing the claims against the Insurers." The trial court denied the motion, and this appeal followed.

the Insurers ten days to file an amended Reply Brief. The Insurers now submit this Amended Reply Brief rebutting the arguments raised in the briefs of all Respondents.

ARGUMENT

As explained in the Insurers' primary brief, the Respondents' claims against the Insurers should be compelled to arbitration despite the fact that the plaintiffs did not personally sign the Agency Agreements containing the arbitration agreement. Various binding Agency Agreements between co-defendant Southern Risk Insurance Services, LLC ("Southern Risk") and the Insurers contain valid and enforceable arbitration provisions that encompass the claims and allegations made here, and 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 an attempt to avoid this result, Respondents raise several arguments in their briefs, each of which is rebutted below.

I. There are valid contracts between Southern Risk and the Insurers containing arbitration agreements.

As explained in detail in the Insurers' primary brief, the 2010 Agency Agreement establishing the Insurers' relationship with and the rights and obligations toward Southern Risk, Jesse Dantice, and Laura Willis was a valid, binding contract. *See* App.'s Brief at 8-11.[2] In addition, the Insurers explained that even if the absence of a signed

[2] After the Insurers filed their initial opening brief in this appeal, the trial court in a separate suit between the Insurers and Southern Risk ruled that the unsigned 2010 agreement between the Insurers and Southern Risk is a valid, binding agreement. *See Southern Risk Ins. Servs., LLC v. Safeco Ins. et al.* (No. 2013-CP-04-1287), Order filed October 13, 2014 at 7 ("Southern Risk admits it performed pursuant to a contractual relationship. Southern Risk continually sold Safeco insurance products to its customers from 2004 through the termination date of 2012. Nonetheless, Southern Risk argues that due to the lack of signature, the arbitration provision should not be enforced. . . . South

copy of *that* agreement were significant, there still existed a prior, signed agency agreement that was in force during the time of Willis' alleged wrongdoing and which also contain arbitration provisions. *Id.* at 11-12. The Respondents' arguments to the contrary are unavailing.[3]

A. The agreements conclusively prove that Southern Risk agreed to arbitrate disputes with the Insurers.

As explained in the Insurers' primary brief, multiple agreements definitively show that at all times relevant to Willis' alleged wrongdoing, Southern Risk had agreed to arbitrate any disputes it had with the Insurers. *See* App.'s Brief at 5-7, 9-10. The Respondents nevertheless argue that "the Insurers failed to meet their burden of proof in producing any evidence to establish Southern Risk agreed to arbitration." Resp. Brief at 10. As explained below, this conclusion is incorrect and is premised on a series of mistaken, misleading, or erroneous statements of fact and law.

Carolina law mandates that performance can satisfy any signature requirement. The unopposed affidavit of James Berry, Territory Manager for Safeco, shows that the parties were operating pursuant to the written contract and its terms. As such, under South Carolina law, the terms of the contract, including the arbitration provision, applies [sic] to this dispute."). This Court may take judicial notice of matters of public record such as the trial court's filing quoted in the preceding paragraph. *See Cox v. Fleetwood Homes of Georgia, Inc.*, 329 S.C. 157, 160 n.2, 494 S.E.2d 462, 463 n.2 (Ct. App. 1997), rev'd on other grounds, 334 S.C. 55, 512 S.E.2d 498 (1999); *State v. Little*, 227 S.C. 60, 69, 86 S.E.2d 875, 879 (1955); *see also Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) ("[A] court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records."); Rule 201(b), SCRE ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

[3] Where necessary, the analysis below cites to the brief of the group of Respondents. Ms. Williams adopted the other Respondents' arguments by reference in brief. *See* Williams' Brief at 6. She also makes a *respondeat superior* argument that is essentially identical to the other Respondents' argument, *see* Williams' Brief at 7-8, and which is rebutted on pages 11-13, *infra*, of this brief.

1. The Insurers have and continue to rely on multiple agency agreements spanning the period of Willis' alleged wrongdoing.

Respondents wrongly state that the Insurers' motions to compel arbitration "relied exclusively" on the 2010 Agency Agreement. *See* Resp. Brief at 10-11. This is incorrect. In actuality, the Insurers relied on multiple binding agency agreements in their motions, replies, oral arguments, and motions to alter or amend.

In each of the 14 motions to compel arbitration, the Insurers relied on the agency agreements relevant to that particular plaintiff's claims. For example, in lawsuits where the alleged wrongdoing occurred in or before early 2010, the Insurers' motion to compel relied on both the 2007 agency agreements and the 2010 agency agreement. *See, e.g.*, Motion to Compel Arbitration in *Wilson v. Willis* (R. 559); Motion to Compel Arbitration in *Lawton v. Willis* (R. 591-92); *see also* Hearing Transcript at 7, 15, and 32 (relying on and discussing a 2007 agency agreement) (R. 405, 413, 429, 439-49).[4] Similarly, in instances where Safeco but not Montgomery was named as a defendant, the motion relied on the 2007 and 2010 agency agreements between Safeco and Southern Risk, but not on agreements between Montgomery and Southern Risk. *See, e.g.*, Motion to Compel Arbitration in *Wofford v. Willis* (R. 570-71).

The Insurers' reliance on multiple agency agreements is significant because, as explained in the Insurers' primary brief, even assuming *arguendo* that the unsigned 2010 Agency Agreement is not binding—an assumption with which the Insurers disagree—the prior binding agreements also compel arbitration. *See* App.'s Brief at 11-12. The Respondents incorrectly state that this argument is unpreserved because it was not raised

[4] Of course, in instances where the alleged wrongdoing arose in 2012, the motion to compel cited solely the 2010 Agency Agreement. *See, e.g.*, Motion to Compel Arbitration in *Spires v. Willis* (R. 580-82).

to the trial court. *See* Resp. Brief at 12 n.5 and accompanying text. In fact, the Insurers *did* argue to the trial court that past agency agreements were relevant and contained binding arbitration agreements. *See, e.g.*, Motion to Compel Arbitration in *Lawton v. Willis* at 2 (R. 592) ("During the entire period of Willis' alleged wrongdoing, Peerless' relationship with Willis and Southern Risk was established and governed by *two* contracts.") (emphasis added);[5] Insurers' Reply in Support of Mot. to Compel Arbitration in *Wilson v. Willis* at 4 (R. 632) ("Dantice and Southern Risk were bound by contracts [note: plural], both signed and unsigned . . . ."); Hearing Transcript at 15:9-16:2 (R. 413-14) ("[T]here is a signed writing in this case. Exhibit A is a signed agreement, Your Honor, between our company and him. There's a 2007 agreement. . . . He's either operating under the other one [*i.e.*, the 2007 agreement], the terms of it says [it] continues in force until there's another one . . . so we've got a written agreement."); Insurers' Motion to Alter or Amend at 3 (R. 660) ("[T]he 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."). In sum, Respondents are simply incorrect in their assertion that the Insurers "relied exclusively" on the unsigned 2010 Agency Agreement.

2. The pre-2010 agency agreements are binding on Southern Risk, Dantice, and Willis.

As explained above, the Insurers' arguments seeking to compel arbitration relied on multiple agency agreements in force between 2003 and 2012. *See* App.'s Brief at 5-7, 11-12. The Respondents, however, wrongly argue that these agreements are ineffective

[5] The motions to compel also noted that the 2010 Agency Agreement stated it replaced and superseded any prior agreements, thus the Insurers stated the relevant arbitration provision is the one found in this Agreement. *See, e.g.*, Motion to Compel in *Lawton v. Willis* at 3 (R. 593). As noted above, however, the Insurers made clear that, assuming *arguendo* the unsigned 2010 agreement was not enforceable, there were prior signed agreements upon which they relied.

because "none of these prior agreements on which the Insurers relied are signed by Southern Risk" and "the Insurers have failed to establish any relationship between Assure Alliance"—who signed the 2007 agreement—"and Southern Risk." *See* Resp. Brief at 13. This is incorrect.

As explained in the Insurers' primary brief, at the time of Southern Risk's formation in 2004, Southern Risk and Dantice were agencies, sub-agents, or sub-producers of the South Carolina Agent Network ("SCAN"). *See* App.'s Brief at 5 (citation omitted); *see also* March 14, 2007 Limited Agency Agreement (R. 503) (noting that Southern Risk was appointed for the purpose of "placing Safeco Insurance products in the name of SOUTH CAROLINA AGENT NTWRK Inc.," and signed by Jesse Dantice).[6] Both Montgomery and Safeco had agency agreements with SCAN that contained binding arbitration provisions. *See* App.'s Brief at 5.

When SCAN changed its name to Assure Alliance in 2007, Safeco and Montgomery entered into new agency agreements with Assure Alliance. *Id.* These agreements contained arbitration provisions that expressly applied to Assure Alliance's sub-producers and employees such as Southern Risk, Dantice, and Willis. *See id.*; *see also* Sept. 13, 2007 Agency Agreement with Assure Alliance at 1 and 6-7 (R. 495) (noting that the agreement applied to sub-producers and required arbitration of disputes).[7] In short, contrary to the Respondents' arguments, the Insurers *have* established a relationship between Assure Alliance and Safeco and *have* demonstrated that the arbitration agreements apply to Southern Risk, Dantice, and Willis.

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[6] This agreement was attached as Ex. J to Insurers Reply in Support of Motion to Compel Arbitration. (R. 503.)

[7] This agreement was attached as Ex. I to Insurers Reply in Support of Motion to Compel Arbitration. (R. 495.)

In addition, the Respondents quote Dantice's and Southern Risk's counsel for the proposition that "'[t]here is no written agency agreement'" between Southern Risk and the Insurers, and that "his client had not agreed to arbitration." *See* Resp. Brief at 11 (quoting Hearing Transcript at 36:2-4). When this snippet of argument from the hearing is placed in its context, however, it reveals that Southern Risk's counsel was asserting his position that he had not seen "an agency agreement *signed by Jesse Dantese* [sic] or Southern Risk." Hearing Transcript at 35:19-22 (emphasis added) (R. 432).[8] As the Insurers explained at the hearing, in the motions to compel, and in the Insurers' primary brief, however, the absence of Dantice's signature on the 2010 Agency Agreement is inconsequential here and, in any event, prior agency agreements with arbitration provisions were binding on Southern Risk even if signed by someone under whom Dantice and Southern Risk were operating rather than by Dantice himself. *See, e.g.*, Hearing Transcript at 15-16, 32 (R. 413-14, 429); App.'s Brief at 11-12.

3. The apparent retroactive effective date of the 2010 Agency Agreement has no effect on its validity and enforceability.

The Respondents argue that the 2010 Agency Agreement "is back-dated" and that this fact "is devastating to the Insurers' argument." Resp. Brief at 11. However, South Carolina law establishes that contracts *may* be made retroactively effective. *See Dixon v. W. Assur. Co.*, 251 S.C. 511, 521, 164 S.E.2d 214, 219 (1968) ("It is a general rule that the parties to an insurance contract may, by the terms of their contract, make it effective as of the time of the issuance, as of an earlier time, or as of a later time.") (citation omitted).

[8] As a factual matter, this comment from counsel was incorrect. Dantice signed a March 14, 2007 Limited Agency Appointment and Agreement with Safeco. *See* Ex. J to Insurers Reply in Support of Motion to Compel Arbitration (R. 503).

The courts of other jurisdictions have likewise held that a contract with an effective date prior to the date of signature or delivery is permissible. *See, e.g., Mutual Life Ins. Co. of N.Y. v. Hurni Packing Co.*, 263 U.S. 167, 175-76 (1923) ("It was competent for the parties to agree that the effective date of the policy should be one prior to its actual execution or issue; and this, in our opinion, is what they did."); *Brewer v. Nat. Surety Corp.*, 169 F.2d 926, 928 (10th Cir. 1948) ("It is competent for the parties to agree that a written contract shall take effect as of a date earlier than that on which it was executed, and when this is done, the parties will be bound by such agreement."); *B-S Stel of Kan., Inc. v. Tex. Indus.*, 327 F. Supp. 2d 1252, 1257 (D. Kan. 2004) (noting that in a prior order the court had held that an arbitration agreement in a contract "signed in February 1997 and effective after July 1, 1996 was 'valid and enforceable'"); *Viacom Int'l Inc. v. Tandem Prods., Inc.*, 368 F. Supp. 1264, 1270 (S.D.N.Y. 1974) ("When a written contract provides that it shall be effective 'as of' an earlier date, it generally is retroactive to the earlier date."); *S&B Mining Co. v. N. Comm. Co.*, 813 P.2d 264, 268 (Alaska 1991) ("It is undisputed that the parties may agree to give retroactive effect to their contracts."); *Goldstein v. Ipswich Hosiery Co.*, 122 SE2d 339, 345 (Ga. Ct. App. 1961) ("It is elemental that contracting parties may agree to give retroactive effect . . . to their contracts as they may see fit.").

In sum, none of the Respondents' erroneous arguments alter the fact that valid, binding contracts containing arbitration agreements existed and the trial court thus erred by refusing to compel arbitration.

B. The agreements at issue controlled the relationship between the Insurers, Southern Risk, Dantice, and Willis.

As explained above and in the Insurers' primary brief, the various agency agreements at issue created, established, and controlled the relationship between the Insurers and Southern Risk, Dantice, and Willis. In the absence of those agreements, there would be no relationship and Southern Risk, Dantice, and Willis would be unable to sell the Insurers' products. But for those agreements, there would be no basis upon which Respondents could claim the Insurers had an obligation to train, supervise, audit, and investigate Willis.

Nevertheless, the Respondents argue that the Insurers have failed to establish that the agency agreements controlled their relationship with Southern Risk. *See* Resp. Brief at 14. The Respondents' sole basis for this argument is speculation that a handwritten notation in an affidavit indicates that the affiant—a non-lawyer—was uncertain about the legal question of whether an unsigned contract could be binding. *See id.* The Respondents' speculative argument should be rejected. There are any number of reasons the affiant, Mr. Berry, might have added the handwritten words, "Uppon [sic] information and belief," prior to one paragraph of his affidavit. Respondents' guess as to what the reason might be is simply speculation and supposition. In short, the Respondents have offered no viable basis to question the fact that the agreements at issue controlled the Insurers' relationship with Southern Risk, Dantice, and Willis.

C. The Statute of Frauds does not bar application of the agency agreements.

As explained in the Insurers' primary brief, the statute of frauds does not apply to contracts such as the 2010 Agency Agreement that are for an indefinite term and are terminable at will. *See* App.'s Brief at 10-11. The Respondents nevertheless argue that a

contract with an indefinite term cannot be performed within one year's time and thus the statute of frauds required that the agreement be signed by Southern Risk. The Respondent's argument is contrary to South Carolina case law, which clearly states that an indefinite contract terminable at will does not fall within the statute of frauds. *See Weber v. Perry*, 201 S.C. 8, 21 S.E.2d 193 (1942) ("A permanent employment contract is not within the Statute of Frauds, for it is deemed possible of performance within one year.") (citations omitted); *Cline v. Southern R. Co.*, 110 S.C. 534, 554, 96 S.E. 532, 538 (1918) ("The period of its performance was left uncertain. . . . The contract pleaded does not fall within the statute."); *see also Center State Farms v. Campbell Soup Co.*, 58 F.3d 1030, 1032 (4th Cir. 1995) ("The contract claimed by Center State Farms was indefinite in time and was to continue so long as Center State Farms performed satisfactorily. Under South Carolina law, such an arrangement is terminable at will, subject to reasonable notice. [] A contract terminable at will does not fall under South Carolina's statute of frauds.").

Accordingly, contrary to the Respondents' assertion, the 2010 agency does not fall within the statute of frauds, and the fact the Insurers have not yet located a copy of the agreement signed by Southern Risk does not prevent enforcement of that agreement.

II. The claims against the insurers are premised on and seek to enforce the rights, duties, and obligations found solely in the agency agreements.

In the Insurers' primary brief, they explained and demonstrated that each of the Respondents' allegations against the Insurers is premised on the Insurers' alleged rights or duties that would not exist but for the Agency Agreements. *See* App.'s Brief at 13-17. In response, the Respondents argue their claims are premised on *statutory rights*, not on the

rights, duties, and obligations found in the agreements. *See* Resp. Brief at 16-20.[9] As explained below, their argument falls short for a number of reasons.

First, the Respondents state that they "ground their Complaints *exclusively* on South Carolina Code § 38-43-10, *et. seq.*, and § 38-51-10 to establish the Insurers' liability for the acts of agents Laura Willis and Jesse Dantice as producers of insurance." *Id.* at 17 (emphasis added). This is incorrect. Not one of the Respondents' complaints cites these statutes or makes any claim or suggestion that the Insurers are vicariously liable for Willis' tortious acts. Rather, the complaints clearly allege that the Insurers are liable for their *own* alleged failure to supervise, train, investigate, audit, etc. *See* App.'s Brief at 13-17. Respondents may not now tack on a statutory claim that is absent from the complaints.

Second, the Respondents' argument hinges on a definition of "agent" supposedly found in S.C. Code Ann. § 38-51-10. *See* Resp. Brief at 17. Specifically, the Respondents note that "Willis and Dantice were producers of insurance" pursuant to section 38-43-10,[10] but then proceed to argue that "pursuant to § 38-51-10(b) Willis and Dantice were agents of the Insurers." *Id.* The Respondents then purport to quote section 38-51-10 at length and state, "Any liability the Insureds and Agents assert against Willis, Dantice, and the Insurers derives from *this section alone*," *Id.* (emphasis added). The quoted

[9] Ms. Williams' brief adopts by reference the arguments of these arguments of the other Respondents. *See* Williams' Brief at 8.

[10] This statute states that a person who performs acts related to the making of an insurance contract "must be an appointed producer of the insurer." S.C. Code Ann. § 38-43-10.

material found in Respondent's brief, however, no longer appears in section 38-51-10 or anywhere in the Code,[11] and thus Willis' status as an "agent" is not established by statute.

Third, the Respondents argue that under these supposed statutory definitions, the Insurers "are liable for the wrongful acts of their agents under the doctrine of *respondeat superior*." Resp. Brief at 17.[12] Yet again, this argument falls short. As noted above, none of the complaints assert any claim, theory, or cause of action based on vicarious liability or *respondeat superior*. Furthermore, as also noted above, none of the complaints claim or allege that the Insurers are responsible for *Willis'* wrongful acts. Rather, they allege the Insurers are liable for their *own* supposed failings to perform adequate background checks, properly train and supervise her, conduct computerized audits, and the like.

Even assuming the Respondents had properly raised the doctrine of *respondeat superior*, that claim would fail. This Court has previously considered conduct similar to Willis' alleged conduct and has held the insurer was not vicariously liable for it. *See Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). In *Vereen*, an insurance agent procured an insurance policy "by lying on the application" and subsequently assisted the beneficiary in making "a fraudulent claim for benefits." *Id.* at 428, 412 S.E.2d at 429. The court held such conduct was outside the scope of the agent's authority and thus rejected the plaintiff's claim that the doctrine of *respondeat superior* made the insurer liable for the agent's acts. The court noted that the agent was not acting in furtherance of the insurer's business as evidenced by the fact that he lied about his conduct, falsified the application for insurance, never attempted to deliver the policy to

[11] The closest analog is in section 38-43-10, which, as the Respondents concede and as noted above, at most indicates that Willis was an appointed producer for the Insurers.

[12] Ms. Williams raises an essentially identical *respondeat superior* argument. *See* Williams' Brief at 7-8.

the insured, and personally profited financially from his wrongdoing. *Id.* at 429, 412 S.E.2d at 429. Here, Willis is alleged to have engaged in the same type of wrongful acts as the agent in *Vereen*, and thus her conduct was outside the scope of her authority.

Next, the Respondents argue their claims are unrelated to the Agency Agreements because "there are no allegations in the subject tort complaints which allege or relate to . . . [the agreements'] performance or nonperformance." *See* Resp. Brief at 18. This argument ignores the fact that every claim made against the Insurers is premised on alleged rights and duties that would not exist but for the Agency Agreement. *See* App.'s Brief at 13-17. The Insurers' alleged supervisory authority over Willis, their alleged ability to perform a background check on her, their alleged duty to train and supervise her, and their ability to audit her work are all grounded in and made possible solely by the agency agreements. The alleged failures to exercise these rights and perform these duties are issues relating to the agreements' "performance or nonperformance," and thus fall within the arbitration provision.

Finally, the Respondents argue they cannot be compelled to arbitration because they have not sought to enforce the provisions of the agency agreement to their benefit, stating that the allegations for which they seek to recover—"stealing, misappropriation of funds, artificial premium calculations, fraud, and forgery—are not contemplated by the agency agreement at hand." Resp. Brief at 19. Here, yet again, the Respondents ignore or obfuscate the difference between their claims against Willis and their claims against the Insurers. No one alleges that the Insurers' stole, misappropriated funds, or committed fraud or forgery, and the Respondents are not seeking to recover from the Insurers for those acts. Rather, as explained above, the Respondents are seeking to enforce

contractual provisions relating to hiring, training, supervising, auditing, and the like. *See also* App.'s Brief at 20-21. Because they rely on and seek to benefit from right and duties in the agency agreements, the Respondents cannot avoid those agreements' arbitration provisions.

III. The arbitration agreements at issue encompass the claims made here.

As explained in the Insurers' primary brief, the arbitration agreements at issue here are worded broadly enough to encompass the claims here and to compel those claims to arbitration. *See* App.'s Brief at 12-13. The Respondents, however, argue that the arbitration agreements here are too narrow to encompass their causes of action. *See* Resp. Brief at 20-24.[13] The Respondents' argument is summarized thusly: where an arbitration agreement refers to disputes "arising out of *or related to*" the contract, it is broad; but where the arbitration agreement merely refers to disputes "arising out of" the contract, it is narrow. The Respondents cite a handful of out-of-jurisdiction cases that supposedly support this distinction. The courts of South Carolina, however, do not adhere to this formulaic and mechanical approach. *See Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 127, 647 S.E.2d 249, 252 (Ct. App. 2007) ("[O]ur law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry.").

Indeed, our courts have held that "[t]he phrase 'arising out of' should be broadly construed in a clause of inclusion." *Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs.*, 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997) (citation omitted); *see also Howard v. State Farm. Mut. Auto. Ins. Co.*, 316 S.C. 445, 450, 450 S.E.2d 582, 585

[13] Ms. Williams' brief adopts by reference these arguments of the other Respondents. *See* Williams' Brief at 8.

(1994) (requiring "clauses of inclusion to be broadly construed" and noting a "broad construction of 'arising from' includes 'causal relation to,' 'incident to,' 'flowing from,' or 'having connection with'") (citations omitted).

In any event, regardless of whether the relevant arbitration agreements are described as "broad" or "narrow," the fact-intensive inquiry required by *Rhodes* indicates that the Respondents' claims against the Insurers fall within the scope of the arbitration agreements. As explained in prior sections of this brief, the Respondents' claims against the Insurers undoubtedly arise out of the performance or nonperformance of rights and duties that would not exist but for the Agency Agreements. Accordingly, these claims fall squarely within the ambit of the arbitration agreements.

IV. The Insurers did not waive their right to compel arbitration.

In their primary brief, the Insurers explained that, in light of the limited lapse of time, extremely limited discovery, and lack of prejudice, they had not waived their right to compel arbitration. *See* App.'s Brief at 22-24. The counter-arguments of the Respondents and Ms. Williams are unavailing and are rebutted below.

A. The supposed "delay" and "extensive discovery" here are insufficient to waive the right to compel arbitration.

In their response, the Respondents concede that, in most of these lawsuits the Insurers waited only six or seven months after the complaints were filed (and in one case 11 months) before moving to compel arbitration, but nevertheless argue that these delays were unreasonably long and constituted a waiver of the right to compel arbitration. *See* Resp. Brief at 24-28.[14] The Respondents, however, do not point to a single South

[14] Ms. Williams adopts the other Respondents' arguments by reference. *See* Williams' Brief at 9.

Carolina case—and the Insurers' counsel is aware of none—holding that a delay of six or seven months after a complaint is sufficient delay to waive the right to compel arbitration.[15] Although there are no bright-line rules as to what length of delay constitutes a waiver, the absence of any case law finding waiver in this time frame weighs heavily against finding waiver here.

In addition, the Respondents argue that "extensive discovery had begun" at the time the Insurers filed their motions to compel arbitration. *See* Resp. Brief at 26. This statement is not correct. What had, in fact, occurred was that written discovery *requests* had been served by the Respondents on the Insurers and vice versa. No depositions of the Insurers had been (or have been) taken, and the Insurers have taken no depositions. Once the Insurers moved to compel arbitration, the Insurers alerted Respondents in writing that the Respondents need not respond to the Insurers' written discovery.[16] No South Carolina court has held that the mere service of discovery requests waives the right to compel arbitration, and the trial court here erred by holding otherwise.

Next, the Respondents argue that the delay in seeking arbitration was "highly prejudicial" to them. *See* Resp. Brief at 27. In support of this assertion, the Respondents state that in one of the lawsuits, the parties had filed a combined total of 45 documents with the court prior to the motion to compel. *Id.* The Respondents concede, however, that this number includes numerous pleadings (*e.g.*, "complaints, amended complaints, original answers, amended answers, [and] one amended answer and counterclaim") and

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[15] Similarly, as noted in the Insurers' primary brief, one case holding a 10-month delay was sufficient to constitute waiver is easily distinguishable from the cases at bar. *See* App.'s Brief at 23 n.11.

[16] This letter exists but was not submitted to the trial court as there was no anticipated claim that there had been "extensive discovery" in this matter. No "extensive" discovery has occurred as a matter of fact in this case.

numerous certificates of service associated with discovery requests. *Id.* Yet again, no South Carolina court has held that the mere filing of pleadings constitutes prejudice or creates a waiver of the right to compel arbitration.

Lastly, the Respondents argue that the Insurers "availed themselves of the assistance of the court," supposedly by filing and then withdrawing[17] two motions and by agreeing to a consent order. *Id.* The Insurers are unsure how filing and then withdrawing a motion (before a hearing and before it was ruled upon) or agreeing to a *consent* motion constitutes seeking or relying on the assistance of the court. In any event, there is no South Carolina authority stating that such actions as these, either independently or in concert with the other minimal progress of these lawsuits, waives the right to seek to compel arbitration. Put simply, the case law does not support waiver in these circumstances.

B. There is no delay or prejudice relating to the motion to compel arbitration of Ms. Williams' counterclaims that waives the right to so move.

Ms. Williams incorrectly argues that the Insurers' supposed delay in moving to compel arbitration involves a greater length of time (12 months) in her case than in others. *See* Williams' Brief at 9-10. She reaches this 12-month figure by measuring the lapse in time between the date First National filed a subsequently-dismissed federal declaratory judgment suit[18] and the date the Insurers filed their motions to compel arbitration in the state court action giving rise to this appeal. This fundamentally misunderstands the nature of the waiver inquiry, and Ms. Williams cites no case in

[17] *See* Letter from the Insurers' counsel to the Honorable Frank R. Addy, Jr., withdrawing the Insurers' prior Motions for Judgment on the Claims for Civil Conspiracy, Unfair Trade Practices, and Common Law Unfair Trade Practices. Mailed on November 6, 2013 in *Wilson v. Willis et al.* (No. 2012-CP-01-306) (R. 537).

[18] This action was dismissed without prejudice pursuant to stipulation of dismissal.

support of the idea that the lapse in time can be measured by using different events in different suits. Rather, the relevant calculation is the lapse of time from when the complaint was filed in this lawsuit (February 22, 2013) to the date the Insurers filed the motion to compel arbitration (November 1, 2013)—a delay of only eight months. As explained in the Insurers' primary brief, South Carolina courts have not previously held such a short time period, especially in these kinds of circumstances, waives the right to compel arbitration. *See* App.'s Brief at 22-24.

In addition, Ms. Williams argues that the Insurers' motion to compel arbitration resulted in greater prejudice to her specifically than to others. *See* Williams' Brief at 10-11. She points out that she filed a separate negligence action related to being struck by Ms. Gary's car, and that action is stayed "until this action is resolved." *Id.* at 11. This alleged prejudice, however, is not a result of the *Insurers' delay* in seeking arbitration. *See Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) (noting that waiver may be found if "the non-moving party was prejudiced by the delay in seeking arbitration"). Ms. Williams cites no case law in support of the proposition that when a motion to compel arbitration in one suit results in the stay of another suit, the movant has thereby waived his right to compel arbitration. While Ms. Williams undoubtedly desires an expeditious resolution to her negligence suit, its stay is not a result of the Insurers' delay, thus the stay in *that* suit is not the type of prejudice that results in waiver of the right to compel arbitration in *this* suit.

V. The Insurers' alleged failures are not "outrageous conduct" that falls outside the scope of arbitrability.

As explained in the Insurers' primary brief, the trial court erred by ruling that the Insurers' alleged wrongdoing was so "outrageous" as to be unforeseeable and thus not

subject to arbitration. *See* App.'s Brief at 21-22. The Respondents' arguments in response are easily rebutted.[19]

First, the Respondents argue that they "base their complaints on allegations of fraudulent conduct and misrepresentations of the Insurers as principals . . . arguing these Insurers are liable under S.C. Code [Ann.] § 38-43-10 and the *respondeat superior* doctrine." Resp. Brief at 29. As explained in Part II, *supra*, not one of the Respondents' complaints cites this statute or makes any claim or suggestion that the Insurers are vicariously liable for Willis' tortious acts.[20] Rather, the complaints allege the Insurers are liable for their *own* alleged failure to supervise, train, investigate, and audit. No South Carolina case has held an insurer's allegedly inadequate training, supervision, investigation, or auditing was conduct so outrageous and unforeseeable that it could not be subject to arbitration, and the trial court erred by holding otherwise.

Second, the Respondents attempt to distinguish *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013) by noting it involved a different cause of action and that the wrongdoing in that case stemmed directly from the contract. *See* Resp. Brief at 30. This argument misses the point for which the Insurers cited *Landers*, namely that if a claim involving intentional infliction of emotional distress—the very definition of an "outrage" claim—can be subject to arbitration, surely the much more benign claims leveled against the Insurers are subject to arbitration.

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[19] Ms. Williams' brief adopts by reference the arguments of the other Respondents, which are rebutted below. *See* Williams Brief at 11.

[20] Even if the complaints did allege vicarious liability, South Carolina case law has held that an insurer is not vicariously liable for conduct such as Willis' conduct here. *See Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991).

VI. The Insurers did not nefariously withhold the agency agreements from the plaintiffs' discovery requests.

The Respondents purport to raise an additional sustaining ground, arguing that the trial court *could* have denied the motions to compel arbitration on the ground that the Insurers had intentionally withheld the agency agreements from the Respondents in discovery to prevent the Respondents' from challenging them. *See* Resp. Brief at 31-32.[21] The Respondents are incorrect. The Insurers did not sneakily withhold the agency agreements nor is there any rational basis to accuse them of doing so. Their objections to the Respondents' discovery requests were legitimate, legally supported, reasonable, and not unusual. To now impute some evil motive and speculate that the trial court might have sanctioned the Insurers by denying their motions on that basis must be rejected.

The case upon which the Respondents primarily rely—*Hilton Head Beach & Tennis Resort v. Sea Cabin Corp.*, 305 S.C. 517, 409 S.E.2d 434 (Ct. App. 1991)—is easily distinguishable. In *Hilton Head*, the defendant had responded to discovery requests but had not produced a particular item. The defendant subsequently introduced that item into evidence at trial. The court of appeals held this was error.

The distinctions between *Hilton Head* and the case at bar are significant. First, in *Hilton Head*, the defendant responded to discovery but withheld one item. Here, in contrast, the Insurers legitimately objected to discovery and did not produce *any* items. Second, the holding in *Hilton Head* is the unsurprising rule that evidence not disclosed prior to trial should not be introduced as evidence at trial. Here, in contrast, there are no evidentiary rules in play and, in any event, the Respondents received copies of the agency

[21] Ms. Williams adopts by reference the other Respondents' arguments on this point. *See* Williams Brief at 11.

agreements (which were attached as exhibits to the motions to compel) well in advance of the hearing and with sufficient time to review, challenge, and respond to them.

In sum, there is no conceivable basis upon which the trial court could permissibly have denied the Insurers' motions as a sanction for their legitimate and reasonable objections to discovery.

VII. Code section 15-48-10 does not apply here.

Finally, the Respondents assert a second additional sustaining ground, arguing that the trial court could have denied the motions to compel arbitration on the ground that S.C. Code Ann. § 15-48-10 prohibits the enforcement of arbitration agreements found in insurance policies. *See* Resp. Brief at 33.[22] As explained below, however, this argument suffers from a fatal defect, namely that this Court has previously expressly rejected it.

Section 15-48-10 states that the South Carolina Uniform Arbitration Act "shall not apply to . . . Any claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract." S.C. Code Ann. § 15-48-10(b). This Court and the federal district court have interpreted this provision as invalidating arbitration agreements found *in insurance policies. See Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 582 (D.S.C. 2003) (holding that section 15-48-10(b)(4) "prohibits the enforcement of arbitration clauses *in insurance policies* governed by South Carolina law") (emphasis added); *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 210, 731 S.E.2d 324, 326 (Ct. App. 2012) (holding that section 15-48-10(b) "was instead intended to apply directly to an insurance contract"); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 401 (Ct. App.

[22] Ms. Williams adopts by reference the other Respondents' arguments on this point. *See* Williams Brief at 11.

2001) (noting that section 15-48-10(b) "expressly invalidates a provision contained *in an insurance policy*") (emphasis added).

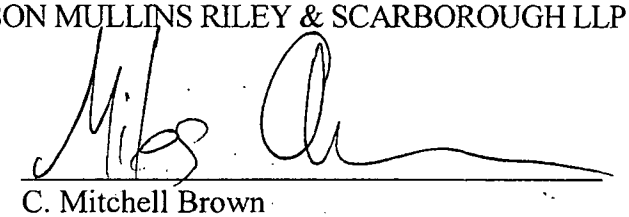
Here, the arbitration agreement is not found in an insurance policy and thus section 15-48-10(b) does not apply. Contrary to the Respondents' assertion, it is not a novel question whether this statute applies to documents other than insurance policies. This Court has previously held that this statute does *not* apply to arbitration agreements found in documents other than insurance policies, even if the document has some tangential relationship to insurance. *See Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 209, 731 S.E.2d 324, 326 (Ct. App. 2012) ("The contract in dispute here is not an insurance contract, and the provision in the lease did not create an insurance policy or a duty to insure. Therefore, Mary's causes of action against Harrelson are not the claims of 'any insured or beneficiary under any insurance policy' that would exempt this action from arbitration."). The *Walden* court expressly held that this statute was *not* intended to apply to "agreements that only have a tangential relationship to an insurance policy, but was instead intended to apply directly to an insurance contract." *Id.* at 210, 731 S.E.2d at 326.

Here, the arbitration agreements at issue are not found in insurance policies, thus the statutory exemption does not apply. Because this Court has previously expressly rejected the argument raised by Respondents, their argument cannot provide an additional sustaining ground for the trial court's erroneous ruling.

CONCLUSION

For the foregoing reasons, the Insurers respectfully request this Court reverse the trial court's order denying the Insurers' Motions to Compel Arbitration and Dismiss the Claims and remand with instructions to the trial court to compel all claims against the Insurers to arbitration and to dismiss the claims against them in these suits.

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January 27, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
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SC 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. 2014-000946

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 Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., SOUTHERN RISK INSURANCE SERVICES, LLC, TRAVELERS CASUALTY INSURANCE CO. OF AMERICA, ALLIED PROPERTY AND CASUALTY INSURANCE CO., PEERLESS INSURANCE CO., MONTGOMERY MUTUAL INSURANCE CO., SAFECO INSURANCE CO. OF AMERICA, and FOREMOST INSURANCE CO., 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 COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

SIGNATURE PAGE ATTACHED

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January 27, 2015
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM ABBEVILLE COUNTY
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Case No. 2012-CP-01-00306
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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):

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January 27, 2015

THE STATE OF SOUTH CAROLINA
In The 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, Defendants,

Of whom Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America are the Appellants,

And

Of whom Laurie Williams is a Respondent.

Appellate Case No. 2014-000946

Appeal From Abbeville County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5387
Heard December 8, 2015 – Filed March 2, 2016

REVERSED AND REMANDED

C. Mitchell Brown, William C. Wood, Jr., Allen Mattison Bogan, and Miles Edward Coleman, of Columbia; and Robert Curt Calamari, of Myrtle Beach, all of Nelson Mullins Riley & Scarborough, LLP, for Appellants.

Thomas E. Hite, Jr., of Hite and Stone, of Abbeville, for Respondents Richard Wilson, Cynthia Gary, Robert Wayne Gary, Robert W. Spires, Crystal Spires Wiley, Lewis S. Williams, Michael J. Antoniak, Jr., Marsha L. Antoniak, Eugene P. Lawton, Jr., Anita L. Belton, Jeanette Norman, James Robert Shirley, Johnny Calhoun, Sallie Calhoun, Benjamin Franklin Wofford, Jr., Rebecca Hammond Wofford, Prescott Darren Bosler, and Janie Wiltshire; and Jane Hawthorne Merrill, of Hawthorne Merrill Law, LLC, of Greenwood, for Respondent Laurie Wilson Williams.

WILLIAMS, J.: Peerless Insurance Company (Peerless), Montgomery Mutual Insurance Company (Montgomery), and Safeco Insurance Company (Safeco) (collectively "the Insurers") appeal the circuit court's denial of their motions to dismiss the claims and compel arbitration in fourteen related actions. The Insurers argue the court erred in (1) ruling no valid contract containing an arbitration provision existed between the parties, (2) determining the arbitration provision at issue was too narrow to encompass the causes of action, (3) refusing to compel arbitration of claims brought by nonsignatories, (4) finding the claims against the Insurers were not encompassed by the arbitration provision because their alleged actions constituted illegal and outrageous acts unforeseeable to a reasonable

consumer in the context of normal business dealings, and (5) holding the Insurers waived their right to compel arbitration. We reverse and remand.

FACTS/PROCEDURAL HISTORY

This appeal arises from fourteen related lawsuits—filed in Abbeville County, South Carolina, between November 1, 2012, and August 28, 2013—against two local insurance agents, Laura Willis and Jesse Dantice, and their agency, Southern Risk Insurance Services, LLC (Southern Risk). Willis's customers (the Insureds) brought twelve of the suits,[1] alleging causes of action for violation of the South Carolina Unfair Trade Practices Act,[2] common law unfair trade practices, fraud, and conversion. The Insureds also named the Insurers as defendants in the action, arguing they were liable under a respondeat superior theory for failure to supervise or audit Willis and Southern Risk.

The Insureds allege that, while customers of Willis and Dantice, they were "victims of many illegal and improper tactics used by [Willis, Dantice, and the Insurers] to corner the retail insurance market in Abbeville County, South Carolina[,] and destroy all competition." The claims and allegations in all of the suits include, *inter alia*, that Willis forged insurance documents; issued policies on unsigned applications; changed or omitted information on insurance applications, without the Insureds' permission, to reduce quoted premiums; submitted applications using her own personal identifying information, such as driver's license and Social Security numbers, to reduce quoted premiums; accepted cash payments she converted to her own use; and issued fake policies to customers.

According to the Insureds, Willis's actions resulted in harm to them as well as their credit rating within the insurance industry. The Insureds seek to recover from Dantice, Southern Risk, and the Insurers because these parties—as principals of their agent, Willis—had a duty to investigate, train, and supervise Willis,

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[1] The Insureds who filed suit—Lewis Williams, Johnny and Sally Calhoun, Robert Spires, Crystal Spires Wiley, Prescott Darren Bolser, Benjamin and Rebecca Wofford, Robert and Cynthia Gary, Janie Wiltshire, Marsha and Michael Antoniak, Eugene Lawton, Anita Belton, and Jeanette Norman—were all residents of Abbeville County. Laurie Williams, who filed a separate but substantially similar brief, is also a respondent in the instant appeal alongside the Insureds.

[2] S.C. Code Ann. §§ 39-5-10 through -560 (1985 & Supp. 2015).

particularly after she "was fined, publicly reprimanded[,] and placed on probation for dishonesty by the South Carolina Insurance Commission in October 2011."

Richard Wilson and Robert Shirley (collectively "the Agents")—both of whom were local competitors of Willis and Southern Risk—filed the other two suits at issue in this case. The Agents alleged Willis, Dantice, Southern Risk, and the Insurers engaged in illegal business practices that effectively prohibited them from competing in the local insurance market, resulting in a substantial loss of clients and revenue. Further, the Agents argued the Insurers owed a duty to properly investigate, train, and supervise Willis; failed to detect and stop her wrongdoing; and engaged in statutory unfair trade practices, common law unfair trade practices or unfair competition, and tortious interference with existing and prospective contractual relations.

In their answers, the Insurers denied the majority of the Insureds' substantive claims and set forth the following defenses: failure to state a claim, statutory bar by section 39-5-40(c) of the South Carolina Code (Supp. 2015), comparative fault, intervening actions of third parties, scope of agency, set off, failure to properly allege special damages, unconstitutionality of punitive damages, and limitation or bar to punitive damages. The Insurers, however, did not raise arbitration as a defense in their answers to the Insureds.

Likewise, in answering the Agents' complaints, the Insurers denied each of the factual allegations set forth and raised a number of defenses. The Insurers, for example, denied that Willis was their "authorized and acting agent and/or servant" and denied that she acted with their permission. Nevertheless, the Insurers did not assert arbitration as a defense in their answers to the Agents.

On October 31, 2013, the Insurers filed motions to compel arbitration and dismiss the suits, seeking to apply against the Insureds and Agents an arbitration provision from a 2010 agency agreement (the 2010 Agency Agreement) the Insurers entered into with Southern Risk.[3] The main thrust of the Insurers' argument in these motions was that each of the Insureds and Agents' claims was premised on alleged duties that would not exist but for the Insurers' contractual relationship with Southern Risk and, thus, the court should compel arbitration based upon the arbitration provision found in the 2010 Agency Agreement. According to the Insurers, the Insureds and Agents could not rely on—and seek to recover damages

[3] Specifically, Liberty Mutual Insurance Company (Liberty), a parent company of Montgomery and Safeco, entered into the agreement with Southern Risk.

from the Insurers based upon—some provisions, while ignoring the arbitration provision in the agreement.

The circuit court heard arguments on the motions on January 21, 2014, and the Insureds and Agents filed memoranda in opposition to the Insurers' motions that same day. In their memoranda, the Insureds and Agents asserted no valid or enforceable agreement to arbitrate existed because the agreement upon which the Insurers based their motion was not signed by any representative of Southern Risk. The Insureds and Agents further alleged they were not signatories or parties to the 2010 Agency Agreement, and their claims against the Insurers did not fall within the arbitration clause in the agreement. The Insurers subsequently filed reply memoranda in support of their motion on February 11, 2014.[4]

On March 25, 2014, the circuit court issued an order in which it denied the Insurers' motions to compel arbitration and dismiss the suits. The Insurers then filed motions to alter or amend the court's ruling, and the court denied these motions on April 21, 2014. This appeal followed.[5]

ISSUES ON APPEAL

I. Did the circuit court err in ruling no valid contract containing an arbitration provision existed between the parties?

II. Did the circuit court err in determining the arbitration provision was too narrow to encompass the causes of action raised by the Insureds and Agents?

III. Did the circuit court err in refusing to compel arbitration of claims against the Insurers because the Insureds and Agents were nonsignatories?

IV. Did the circuit court err in finding the claims were not encompassed by the arbitration provision because the Insurers' alleged actions constituted illegal

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[4] The circuit court granted the Insurers' request to file a reply brief only to address two points raised in the memoranda in opposition. While the Insurers attached an affidavit of one of their employees to the reply memorandum, the court specifically declined to leave the record open for the addition of new evidence. Because the affidavit was not properly admitted into evidence below, we do not consider it as part of the record on appeal.

[5] This court granted the Insurers' motion to consolidate the appeal in all fourteen actions pursuant to Rule 214, SCACR.

and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings?

V. Did the circuit court err in holding the Insurers waived their right to compel 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 Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Arbitrability determinations are subject to de novo review." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (emphasis omitted). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). "It is the policy of this state and federal law to favor arbitration[,] and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015) (alteration in original) (quoting *Dean*, 408 S.C. at 379, 759 S.E.2d at 731).

LAW/ANALYSIS

I. Existence of a Valid Contract with an Arbitration Provision

First, the Insurers contend the circuit court erred in ruling no valid contract containing an arbitration provision existed. We agree.

A. Signature Requirement

The Insurers argue that, contrary to the circuit court's ruling, no requirement exists under the Federal Arbitration Act[6] (FAA) or in contract law that a contract must be signed by all parties to be enforceable. We agree.

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit." *Chassereau v. Glob.-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005).

[6] 9 U.S.C. §§ 1–16 (2012).

"Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Id.* (quoting *Zabinski*, 346 S.C. at 596–97, 553 S.E.2d at 118). Unless the parties contract otherwise, the FAA[7] applies to any arbitration agreement involving interstate commerce, regardless of whether the parties contemplated an interstate transaction.[8] *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Nonetheless, "[g]eneral contract principles of state law apply to arbitration clauses governed by the FAA." *Id.* at 539, 542 S.E.2d at 364.

"The necessary elements of a contract are an offer, acceptance, and valuable consideration." *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (quoting *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997)). "[I]t has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both." *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986). "A contract does not always require the signature of both parties; it may be sufficient[] if signed by one and accepted and acted on by the other." *Id.*; *see also Peddler, Inc. v. Rikard*, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975) (stating to give validity to a contract, it is not

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[7] The FAA, in pertinent part, provides the following:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2012).

[8] The Insureds and Agents do not dispute that the 2010 Agency Agreement involves interstate commerce—presumably because they contest the validity of the agreement in its entirety. Nevertheless, we find the 2010 Agency Agreement did involve interstate commerce. The agreement, along with its addenda, indicated the Insurers are located outside of South Carolina. Further, some or all of the insurance premiums to which the Insureds claimed they were entitled—as well as any resulting commissions of which the Agents claimed they were deprived—would have been sent from outside of South Carolina. Accordingly, we find the transaction involved interstate commerce and, thus, is covered by the FAA.

always necessary that it be signed by both parties, but rather it may be sufficient if one party signed the contract and the other party accepted, held, and acted upon it).

In the instant case, the circuit court held the Insurers "failed to meet their burden of proof in establishing a valid, binding contract by which the [Insureds and Agents] should be forced to arbitrate their claims" because the 2010 Agency Agreement was not signed by Southern Risk. We initially note that South Carolina law does not necessarily require both parties to sign a contract for it to be enforceable. *See Jaffe*, 290 S.C. at 473, 351 S.E.2d at 346; *Peddler*, 266 S.C. at 32, 221 S.E.2d at 117. Further, based upon our review of the record, Southern Risk, Dantice, and Willis accepted and acted upon the 2010 Agency Agreement. At all relevant times, Southern Risk, Dantice, and Willis sold insurance policies on behalf of the Insurers—a fact which is undisputed—and the 2010 Agency Agreement, along with the predecessor agreements, provided the sole source of authorization for them to do so.

Therefore, although Southern Risk did not sign the 2010 Agency Agreement, we hold the agreement—as well as the arbitration provision contained therein—was valid and binding upon the parties during the relevant period of Willis's alleged wrongdoing.[9] *See Jaffe*, 290 S.C. at 473, 351 S.E.2d at 346; *Peddler*, 266 S.C. at 32, 221 S.E.2d at 117; *see also Poteat v. Rich Prods. Corp.*, 91 F. App'x 832, 834 (4th Cir. 2004) (finding an agreement to arbitrate enforceable under South Carolina law, despite the fact that the employer never signed the agreement containing the arbitration provision).

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[9] In light of our holding, the question of whether prior agreements governed the parties' relationship is immaterial. Assuming, *arguendo*, we found the 2010 Agency Agreement was not binding upon the parties, we note the 2007 Agency Agreement—which contains an identical arbitration provision and was signed by a Southern Risk representative—would have remained in effect during the period of Willis's alleged wrongdoing. In the end, at all relevant times, the parties' relationship was governed by one of two agency agreements with identical arbitration provisions through which Southern Risk was permitted to sell insurance on behalf of the Insurers. We find the Insureds and Agents' arguments to the contrary unavailing and further reject the argument that the Insurers failed to preserve this argument. Starting with the motion to compel arbitration, the Insurers have repeatedly argued directly, or in the alternative, that their relationship with Southern Risk was governed by multiple agreements.

B. Statute of Frauds

The Insurers further argue the circuit court erred in ruling the 2010 Agency Agreement is invalid because it violates the statute of frauds. We agree.

Under the statute of frauds, "a contract that cannot be performed within one year [must] be in writing and signed by the parties." *Springob v. Univ. of S.C.*, 407 S.C. 490, 495, 757 S.E.2d 384, 387 (2014) (quoting *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005)); *see also* S.C. Code Ann. § 32-3-10 (2007) ("No action shall be brought . . . [t]o charge any person upon any agreement that is not to be performed within the space of one year from the making thereof . . . [u]nless the agreement . . . [is] in writing and signed by the party to be charged therewith . . . .").

To satisfy the statute of frauds, the writing must be "signed by the party against whom enforcement is sought." *Springob*, 407 S.C. at 496, 757 S.E.2d at 387. The statute of frauds only applies to contracts that are impossible to perform within one year. *Roberts*, 327 S.C. at 484, 486 S.E.2d at 774. If performance of a contract is possible within a year, then the statute of frauds is not a bar to enforcement of the contract. *Id.* "The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the scope of th[e statute of frauds]." *Id.*

Contrary to the circuit court, we find performance of the 2010 Agency Agreement was possible within a one-year period because the agreement was for an indefinite term and either party could terminate it at will—with or without cause—by giving as little as ninety days' notice. Given that it was possible for the 2010 Agency Agreement to be performed within a year, we hold the statute of frauds does not apply in this case. *See Roberts*, 327 S.C. at 484, 486 S.E.2d at 774 (asserting the statute of frauds is not a bar to enforcement of a contract if performance is possible within a year because the statute of frauds only applies to contracts that are impossible to perform within one year); *see also Ctr. State Farms v. Campbell Soup Co.*, 58 F.3d 1030, 1032 (4th Cir. 1995) (stating "[a] contract terminable at will does not fall under South Carolina's statute of frauds"); *Weber v. Perry*, 201 S.C. 8, 11, 21 S.E.2d 193, 194 (1942) (providing that "contracts of employment for an indefinite term or on a contingency" do not fall within the statute of frauds).

Based on the foregoing, we find the circuit court erred in ruling the arbitration provision was unenforceable because the 2010 Agency Agreement did not satisfy the statute of frauds. In our view, the statute of frauds did not apply to the 2010

Agency Agreement and, thus, the absence of a signature from a Southern Risk representative could not—without more—act as a bar to its enforcement.

II. Scope of the Arbitration Provision

Next, the Insurers contend the circuit court erred in determining the arbitration provision was too narrowly worded to encompass the causes of action raised by the Insureds and Agents. Specifically, the Insurers argue the court erred in concluding the claims had no relation to, and were not in connection with, the performance or interpretation of the 2010 Agency Agreement. We agree.

"The policy of the United States and South Carolina is to favor arbitration of disputes." *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. "The heavy presumption of arbitrability requires that[,] when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Landers*, 402 S.C. at 109, 739 S.E.2d at 213 (quoting *Am. Recovery*, 96 F.3d at 94). "Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered." *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603–04 (2010) (per curiam). "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012) (quoting *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118–19).

"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.* (quoting *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* (quoting *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118).

"[E]ven if the court finds that a claim is outside the scope of the arbitration clause, the clause may still apply." *Partain*, 386 S.C. at 492, 689 S.E.2d at 604. Both the U.S. Court of Appeals for the Fourth Circuit and our supreme 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." *Landers*, 402 S.C. at 109, 739 S.E.2d at 214 (citing *J.J. Ryan*, 863 F.2d at 319; *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119). "Thus, a claim falls within the scope of an arbitration clause if it is

encompassed by the language of the clause or if a 'significant relationship' exists between the claim and the contract." *Partain*, 386 S.C. at 492, 689 S.E.2d at 604.

The arbitration provision at issue in this case, located in section 12.A of the 2010 Agency Agreement, provided as follows:

> 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 . . . .

(emphasis added).

Applying the principles outlined above, we find the arbitration provision in the 2010 Agency Agreement was sufficiently broad to encompass a wide array of claims and should be construed accordingly. *Cf. J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988) (stating "[t]he difference between the phrases 'in connection with' and 'may arise out of or in relation to' is largely semantic. Any difference is immaterial in view of the Supreme Court's admonition that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" (footnote omitted) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983))). We further find the Insureds and Agents' proposed rule and reliance upon cases from other jurisdictions unpersuasive because the body of law in this state, as well as the Fourth Circuit, makes clear that arbitration provisions like the one at issue in this case should be broadly construed. *See J.J. Ryan*, 863 F.2d at 319; *Landers*, 402 S.C. at 109, 739 S.E.2d at 214; *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119.

In broadly construing the arbitration provision, we must determine whether the claims against the Insurers are encompassed by the language of the arbitration clause or if the claims bear a significant relationship to the 2010 Agency Agreement. *See Partain*, 386 S.C. at 492, 689 S.E.2d at 604. The Insurers argue the claims in the instant case are premised on rights and duties that would not exist but for the 2010 Agency Agreement. The Insurers correctly assert that the claims are inextricably linked to their duties to investigate, train, supervise, and audit—all

of which arose out of the agency relationship created by the 2010 Agency Agreement. Our inquiry, however, does not end here. As our supreme court has noted, "[a]pplying what amounts to a 'but-for' causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 150, 644 S.E.2d 705, 708 (2007). Nevertheless, "under the expansive reach of the FAA[,] a tort claim need not raise an issue that requires reference to or the construction of the contract . . . to be encompassed by a broadly-worded arbitration clause." *Landers*, 402 S.C. at 111, 739 S.E.2d at 214.

Turning to the 2010 Agency Agreement, we find all of the duties the Insurers allegedly breached directly arose out of and touched upon the provisions of the agreement. The duties to train and supervise, for example, relate to paragraph 1.C of the agreement, under which Southern Risk was "only authorized to act as agent for [the Insurers] pursuant to written authority and guidelines furnished" by the Insurers. Additionally, paragraph 2.E of the agreement, which concerns Southern Risk's duty to notify the Insurers when any employees have their licenses suspended, implicates the duties to investigate and supervise. Paragraph 2.C—a provision requiring that all Southern Risk employees have the proper licensing and authority to sell insurance—also touches upon the duty to investigate and conduct background checks. Even more specifically, paragraph 2.F directly spells out the duty to assist in conducting background checks of all Southern Risk personnel. Finally, paragraphs 6.A–D outline the billing and accounting practices, as well as collection procedures, the Insurers expected Southern Risk to follow, all of which implicated a duty to audit. Although the Insureds and Agents seek to focus on the fraud, forgery, and misappropriation claims, these allegations related specifically to Willis's conduct. As to the Insurers, on the other hand, the main crux of the Insureds and Agents' claims was that they failed in their duties to investigate, train, supervise, and audit Willis. Willis, in her role as a subproducer, had no authority to sell insurance on behalf of the Insurers in the absence of the 2010 Agency Agreement the Insurers entered into with her employer, Southern Risk.

Accordingly, in light of the breadth of the 2010 Agency Agreement, as well as the particular manner in which the Insureds and Agents pled their underlying factual allegations, we find their tort claims against the Insurers were encompassed by the language of the arbitration clause in the 2010 Agency Agreement.[10] *See Partain*,

[10] Given our finding that the claims were encompassed by the language of the arbitration clause, we need not reach the significant relationship question.

386 S.C. at 492, 689 S.E.2d at 604; *Landers*, 402 S.C. at 112, 739 S.E.2d at 215. Therefore, we hold the circuit court erred in finding the arbitration provision was too narrowly worded to reach the type of claims asserted in this case.

III. Compelling Arbitration on Nonsignatories

The Insurers contend the circuit court further erred in refusing to compel arbitration of the claims against them based upon the fact that the Insureds and Agents were nonsignatories to the 2010 Agency Agreement. We agree.

"While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, '[i]t does not follow . . . that[,] under the [FAA,] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.'" *Pearson*, 400 S.C. at 288, 733 S.E.2d at 600 (first and third alterations in original) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000)). "Rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause." *Id.* (quoting *Int'l Paper*, 206 F.3d at 416).

"The rule in the Fourth Circuit is that '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.'" *Id.* (quoting *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001)). "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." *Id.* (quoting *Int'l Paper*, 206 F.3d at 416–17).

"Equitable estoppel precludes a party from asserting rights 'he otherwise would have had against another' when his own conduct renders assertion of those rights contrary to equity." *Id.* at 290, 733 S.E.2d at 601 (quoting *Int'l Paper*, 206 F.3d at 417–18). "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." *Int'l Paper*, 206 F.3d at 418. "To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA]." *Id.* (first alteration in original) (quoting *Avila Grp., Inc. v. Norma J. of Calif.*, 426 F. Supp. 537, 542 (S.D.N.Y. 1977)). "A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a "direct benefit" from a contract containing an

arbitration clause.'" *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)).

In the instant case, although the Insureds and Agents admittedly did not see the 2010 Agency Agreement prior to bringing this action, this does not control our inquiry because the allegations in their complaints necessarily depend upon the terms, authority, and duties created and imposed by that agreement.[11] In other words, while the Insureds and Agents do not expressly rely upon other provisions in the 2010 Agency Agreement, they would not be able to reach the Insurers with their claims in the absence of the agreement establishing the agency relationship between the Insurers and Southern Risk, Dantice, and Willis. Because the duties the Insureds and Agents contend the Insurers allegedly breached arise from the 2010 Agency Agreement, the Insureds and Agents receive a "direct benefit" from that agreement. Accordingly, we find the Insureds and Agents are equitably estopped from arguing their status as nonsignatories precludes enforcement of the arbitration provision when their complaints seek to benefit from the enforcement of other provisions in the 2010 Agency Agreement. *See Pearson*, 400 S.C. at 297, 733 S.E.2d at 605; *see also Int'l Paper*, 206 F.3d at 413–14, 418 (concluding the plaintiff–buyer could not "sue to enforce the guarantees and warranties of the

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[11] The Insureds and Agents argue they rely upon section 38-51-10(h) of the South Carolina Code as the basis for establishing the Insurers' agency relationship with Willis, Dantice, and Southern Risk. The provision cited, however, does not appear in the current version of the Code. *See* S.C. Code Ann. § 38-51-10 (2015). Indeed, a review of the legislative history reveals the subsection relied upon was removed from the statute in 1987. *See* Act No. 155, 1987 S.C. Acts 741–42. In any event, because the current version of section 38-51-10 defines "administrator" and lists a number of exceptions for that term, we find it inapplicable to the instant case. Additionally, while the Insureds and Agents also rely upon section 38-43-10 of the South Carolina Code (2015), this statute merely lists the requirements for being appointed a producer of insurance on behalf of an insurer. Given that section 38-43-55 of the South Carolina Code (2015) lists the procedures an insurer must follow when it "cancel[s] a producer contract"—thereby divesting the producer of the appointment mentioned in section 38-43-10—we find the General Assembly contemplated that agency relationships such as the one at issue here would be governed by a contract. Thus, even looking to the statutes upon which the Insureds and Agents purportedly rely, we find they still cannot reach the Insurers without the 2010 Agency Agreement. The agreement defined the parameters of the authority for Willis, Dantice, and Southern Risk to sell insurance on behalf of the Insurers and exclusively governed the agency relationship between them.

distributor–manufacturer contract without complying with its arbitration provision" and, therefore, compelling the nonsignatory plaintiff's claims to arbitration under a theory of equitable estoppel).

Therefore, we find the circuit court erred in concluding the doctrine of equitable estoppel was inapplicable to the instant case.

IV. Outrageous Conduct

Additionally, the Insurers contend the circuit court erred in finding the claims were not encompassed by the arbitration provision because the Insurers' alleged actions constituted illegal and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings. We agree.

"Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, [an appellate c]ourt 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. Nevertheless, our supreme court "did not seek to exclude all intentional torts from the scope of arbitration [in *Aiken*], 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.'" *Partain*, 386 S.C. at 493–94, 689 S.E.2d at 605 (quoting *Aiken*, 373 S.C. at 152, 644 S.E.2d at 709). "Where parties have contractually agreed to arbitrate a claim, a party may not escape its commitment simply by presenting his claim as a tort. Only where the claim presented was clearly not within the contemplation of the parties will a court decline to enforce an otherwise proper arbitration agreement." *Id.* at 494–95, 689 S.E.2d at 605.

In this case, the circuit court found the Insureds and Agents "grounded their [c]omplaints on allegations of fraudulent conduct and misrepresentation." As noted in Part II, *supra*, we disagree with this characterization of the Insureds and Agents' claims against the Insurers. In our view, the Insureds and Agents' claims—even under a respondeat superior theory—center on the Insurers' alleged failure to sufficiently investigate, train, supervise, and audit Willis. Given that such tort claims are rather commonplace, and do not involve intentional or otherwise outrageous conduct, we cannot say these claims were "clearly not within the contemplation of the parties" to the 2010 Agency Agreement. *Cf. Partain*, 386 S.C. at 494–95, 689 S.E.2d at 605. To the contrary, we believe the parties to the 2010 Agency Agreement did contemplate that ordinary claims directly related to their agency relationship would be submitted to arbitration pursuant to the

agreement governing that relationship. Thus, because their claims against the Insurers did not contain allegations of the type of outrageous conduct contemplated under the *Aiken* line of cases, we find the arbitration clause in the 2010 Agency Agreement should apply to the Insureds and Agents.

Based on the foregoing, we hold the circuit court erred in finding the claims were not encompassed by the arbitration provision because the Insurers' alleged actions constituted illegal and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings.

V. Waiver of Right to Compel Arbitration

Finally, the Insurers contend the circuit court erred in holding they waived their right to compel arbitration in this case. We agree.

Although South Carolina favors arbitration, the right to enforce an arbitration clause may be waived. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "[T]o establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). No set rule exists "as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) (quoting *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)).

Our courts consider the following three factors when determining whether a party has 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, 374 S.C. at 126, 647 S.E.2d at 251.

"Thus, a party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration." *Id.* What constitutes a substantial length of

time can vary from one case to the next, depending upon the extent of discovery conducted and whether the party opposing arbitration is prejudiced. *Id.*

"To establish prejudice, the non-moving party must show something more than 'mere inconvenience.'" *Id.* at 127, 647 S.E.2d at 251 (quoting *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003)). "In addition to the above factors, this court has also considered the extent to which the parties have availed themselves of the circuit court's assistance." *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 257, 743 S.E.2d 868, 872 (Ct. App. 2013).

> To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took "advantage of the judicial system by engaging in discovery." This inquiry, however, is just part of a broader, common sense approach our courts take to determine whether a motion to compel arbitration should be granted or denied: (1) if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," prejudice will not likely exist, and the law would favor arbitration; (2) if the parties conduct significant discovery, then the party seeking arbitration has "taken advantage of the judicial system," prejudice will likely exist, and the law would disfavor arbitration. Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.

Rhodes, 374 S.C. at 127, 647 S.E.2d at 251–52 (internal citation omitted).

We hold the Insurers did not waive their right to compel arbitration under the 2010 Agency Agreement in this case. Turning to the first factor, we find a substantial length of time did not transpire between the Insureds and Agents commencing these lawsuits and the Insurers filing their motions to compel arbitration. Although many of the actions had been pending for anywhere from six to eleven months prior to the Insurers seeking to compel arbitration, this time frame does not appear to be substantial under our line of waiver cases or the facts of the instant case. *Compare Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d

523, 526 (Ct. App. 2004) (finding a five-and-a-half-year period in which the parties "conducted a significant amount of discovery, resulting in the production of thousands of documents" was sufficient for waiver), *Evans*, 352 S.C. at 548, 575 S.E.2d at 75–76 (finding a nineteen-month period in which the parties exchanged written interrogatories, requests for production, and the party requesting arbitration took two depositions demonstrated waiver), *and Liberty Builders*, 336 S.C. at 666, 521 S.E.2d at 753–54 (finding a two-and-a-half-year period in which the parties sought assistance from the court on approximately forty occasions constituted waiver), *with Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen-month period in which discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and the respondent "had not held any depositions," did not demonstrate waiver), *Rich v. Walsh*, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (finding a thirteen-month period in which "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes did not amount to waiver), *and Gen. Equip.*, 344 S.C. at 557, 544 S.E.2d at 645 (finding a period of less than eight months in which the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories" did not establish waiver).

Regarding the second factor, we find the limited amount of discovery the parties engaged in further supports the notion that a substantial amount of time had not transpired in this case before the Insurers moved to compel arbitration. Although the *Rhodes* court upheld a finding of waiver when the appellant waited ten months to file its motion to compel arbitration, the parties in that case had conducted virtually all discovery—including written interrogatories, requests for production, and five depositions—and the case was already set on the trial docket at the time the motion was filed. The instant case, on the other hand, had not progressed much beyond the filing of pleadings and motions to dismiss. The Insureds and Agents had served complaints and amended complaints, and the Insurers had answered and filed motions to dismiss. Neither party, however, had taken any depositions in this case. While the parties had certainly "commenced discovery," as the circuit court noted, they had not "engaged in extensive discovery" as is required under the test. Further, when the Insurers filed the motions to compel arbitration, they alerted the Insureds and Agents in writing that they need not respond to the Insurers' written discovery while the motion was pending.

As to the third and final factor, we disagree with the circuit court's finding that the Insureds and Agents were prejudiced as a result of the Insurers waiting, in some

instances, eleven months to file motions to compel arbitration. In our opinion, the Insureds and Agents are unable to show anything beyond "mere inconvenience" to reach the requisite level of prejudice to establish waiver. Moreover, unlike the circuit court, we believe the complexity of this matter goes against a finding of prejudice in the instant case. Instead, we find the complicated nature of this action rendered the eleven-month period even more reasonable under the circumstances.

We do, however, acknowledge it is a closer call on the third factor because the Insurers took some actions that could be deemed taking advantage of the judicial system or availing themselves of the circuit court's assistance. The Insurers, for example, filed two motions for judgment on the claims of civil conspiracy, unfair trade practices, and common law unfair trade practices. Nevertheless, the Insurers withdrew both motions prior to the circuit court holding a hearing and ruling upon them. Additionally, while the Insurers filed an action in federal court seeking a declaratory judgment against Williams, this action was dismissed pursuant to a stipulation of dismissal. Thus, although the Insurers did take some minimal action availing themselves of the court system, we find such action—when viewed in light of the minimal amount of discovery conducted in this case and the amount of time that transpired—does not rise to the level of prejudice necessary to waive the right to compel arbitration against the Insureds or Agents, or Williams in particular, under our line of waiver cases.

Accordingly, we hold the circuit court erred in finding the Insurers waived their right to compel arbitration in this case.

VI. Additional Sustaining Grounds

While this court has discretion regarding whether to address additional sustaining grounds,[12] we take the opportunity to do so here to clarify the law discussed in the Insureds and Agents' arguments.

A. Production of the 2010 Agency Agreement

As an additional sustaining ground, the Insureds and Agents first argue the circuit court could have denied the Insurers' motions on the ground that the agreements containing the arbitration clauses were intentionally withheld during discovery to prevent the Insureds and Agents from challenging them. We disagree.

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[12] *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420 n.9, 526 S.E.2d 716, 723 n.9 (2000) (noting "[t]he appellate court may or may not wish to address such grounds when it reverses the lower court's decision").

In support of their argument, the Insureds and Agents broadly assert the following:

> Substantive due process and the [South Carolina] Rules of Civil Procedure require that critical documents to a matter pending in court, which could potentially end the trial and compel arbitration, must be timely provided to the other parties in the case . . . [so] the documents can be appropriately challenged through discovery and appropriate cross-examination of the person or persons having knowledge concerning the documents.

They further note that the attorney's oath in Rule 402, SCACR, requires "fairness, integrity, and civility . . . in all written and oral communications," and Rule 37, SCRCP, prohibits a party from intentionally refusing to respond to specific questions in interrogatories and requests for production. The Insurers, on the other hand, argue "[t]heir objections to the [Insureds and Agents]' discovery requests were legitimate, legally supported, reasonable, and not unusual."

Whether to impose sanctions is a decision left to the sound discretion of the circuit court. *Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014). "Therefore, an appellate court will not interfere with 'a [circuit] court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters' unless the court abuses its discretion." *Id.* (quoting *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997)).

We find the primary case upon which the Insureds and Agents rely, *Hilton Head Beach & Tennis Resort v. Sea Cabin Corp.*, 305 S.C. 517, 409 S.E.2d 434 (Ct. App. 1991), is distinguishable from the case at hand. Unlike the defendant in *Sea Cabin*, who responded to discovery but withheld one item, the Insurers raised legitimate objections to discovery in the instant case and did not produce any items. 305 S.C. at 519–20, 409 S.E.2d at 436. Indeed, had the Insurers engaged in further discovery, such action could have caused them to waive their right to compel arbitration of the claims in this case. Further, in *Sea Cabin*, the defendant failed to produce an important piece of evidence until the final day of trial, leaving the plaintiffs with no time to properly investigate it. 305 S.C. at 520, 409 S.E.2d at 436. In this case, however, the Insurers produced the 2010 Agency Agreement—along with the prior agreements—well in advance of the hearing on the motion to compel arbitration, giving the Insureds and Agents sufficient time to review, challenge, and respond to this evidence.

Our review of the record reveals the Insurers, who admittedly found themselves in a bit of a Catch-22 situation,[13] did not intentionally withhold the 2010 Agency Agreement to prevent the Insureds and Agents from challenging it. Nor did the Insurers, or their counsel, violate any of the procedural or ethical rules cited above in turning over the documents when they did. Instead, the Insurers properly waited to serve copies of the 2010 Agency Agreement and its predecessors with their motions to compel arbitration. Accordingly, we find it would be inappropriate to invade the province of the circuit court by deciding this appeal on the unsupported ground that the court abused its discretion by not sanctioning the Insurers. *See Davis*, 409 S.C. at 281, 762 S.E.2d at 543 (noting the decision of whether to impose sanctions is left to the sound discretion of the circuit court).

B. Arbitration Exemption for Insureds

As a second additional sustaining ground, the Insureds and Agents argue the circuit court should have denied the Insurers' motion to compel arbitration on the basis that section 15-48-10 of the South Carolina Code (2005) "specifically exempts any insured or beneficiary under any insurance policy from arbitration." We disagree.

Subsection 15-48-10(b)(4) states the South Carolina Uniform Arbitration Act[14] "shall not apply to . . . [a]ny claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract." As this court has held, subsection 15-48-10(b)(4) "was enacted for the purpose of regulating the business of insurance" and, as such, reverse preempted the FAA through application of the McCarran-Ferguson Act.[15] *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 401, 402 (Ct. App. 2001). Nevertheless, "[t]he FAA and section 15-48-10(b)(4) conflict with one another only when a litigant seeks to enforce an arbitration agreement contained in an insurance policy governed by South Carolina law." *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 210, 731 S.E.2d 324, 326 (Ct. App. 2012).

Similar to the contract in *Walden*, the 2010 Agency Agreement at issue in the instant case is not an insurance policy. 399 S.C. at 210, 731 S.E.2d at 326. Like the *Walden* court, we find the causes of action against the Insurers are, therefore,

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[13] *See generally* JOSEPH HELLER, CATCH-22 1–453 (1961) (setting up a plot in which the main character finds himself in a paradoxical, no-win situation).

[14] S.C. Code Ann. §§ 15-48-10 through -240 (2005).

[15] 15 U.S.C. §§ 1011–15 (2012).

not the claims of "any insured or beneficiary under any insurance policy" that would exempt this action from arbitration pursuant to subsection 15-48-10(b)(4). 399 S.C. at 209, 731 S.E.2d at 326. Accordingly, we reject the Insureds and Agents' expansive interpretation of the statute and decline to decide the case on this alternate sustaining ground. *See id.* at 210, 731 S.E.2d at 326 (holding subsection 15-48-10(b)(4) was not intended to apply to "agreements that only have a tangential relationship to an insurance policy, but was instead intended to apply directly to an insurance contract"); *Cox*, 347 S.C. at 468, 556 S.E.2d at 401 (noting subsection 15-48-10(b)(4) "expressly invalidates a[n arbitration] provision contained in an insurance policy"); *see also Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 582 (D.S.C. 2003) (holding subsection 15-48-10(b)(4) "prohibits the enforcement of arbitration clauses in insurance policies governed by South Carolina law").

CONCLUSION

Based on the foregoing analysis, we **REVERSE** the order of the circuit court and **REMAND** with instructions to grant the Insurers' motions to dismiss the Insureds and Agents' claims and compel them to arbitration.

HUFF, A.C.J., and THOMAS, J., concur.

79101

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 30 2016
SC 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 Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., and Laurie Williams, ... Defendants,

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

Of Whom Laurie Williams is, ... Respondent.

PETITION FOR REHEARING

This petition is filed pursuant to Rule 221, SCACR. This Court issued its decision March 2, 2016. *See* Op. No. 5387 (Shearouse Adv. Sh. No. 9 at 73).

Respondents filed a motion to extend the deadline for this petition. This Court granted the request, extending the deadline to April 1, 2016.

The Respondents resubmit all arguments from their Final Briefs on the merits and additionally submit that the Court may have overlooked or misapprehended the following points in its decision:

1. The issues in this case are novel and the Court's opinion mistakenly extends the federal arbitration umbrella further than any South Carolina precedent and to the detriment of Respondents' constitutional right to a jury trial.

a) In the instant case, the Court considered a variety of novel issues regarding an arbitration contract, to include the fact that Respondents were non-signatories and non-parties, the agreement was unsigned and backdated, and the agreement involved entities not parties to the instant litigation. Further, the Court in this case subjects the Respondents, who are plaintiffs, to the arbitration provision found in an alleged agreement between defendants, including Appellants, in this case. By failing to address each of these novel issues in detail, the Court extended the arbitration umbrella further than any South Carolina court to date, basically holding if there is a contract (signed or unsigned) and if it touches upon the issues in the litigation, the arbitration provision contained within it controls. Under the holding in the instant case, an agency agreement containing an arbitration clause must only be signed by the insurance company and not the agent. The agreement also does not have to be authenticated by anyone in Court and it can be backdated to fit the time frame in question. The holding in this case is expansive. For example, it could be used by an insurance company "A" to force arbitration on a pedestrian injured by a negligent automobile driver insured by company "A" if there is an issue about the negligent driver's application or coverage limits. Under

the holding in this case, that dispute, and any other that is related, would require arbitration as long as company "A" can produce a purported copy of an unsigned agreement between it and the negligent driver's insurance agent, as long as the agreement contains an arbitration clause. That is exactly what is happening to some of the Respondents here, as is explained on Section 9 of this petition. Another example of the extension of this decision can occur when the arbitration clause in the agency agreement between company "A" and its agent is used as an offensive shield to deny a third party's right to a jury trial on a tort claim against insurance company "A" and its agent. This holding would be applicable in the future even when the third-party plaintiff has no contractual relationship whatsoever with insurance company "A" or its agent. *See* (Record pp. 78-88, 115-126, 376-386) (Complaints of Agents Wilson and Shirley).

b) The Court in its opinion has forced parties and *non-parties* to resolve their disputes through means not intended at the time of the formation of the contract. "The [United States] Supreme Court has reiterated the contractual nature of arbitration agreements, careful to avoid forcing parties to resolve their disputes through means not intended at the time of contract formation." *Dell Webb Communities, Inc. vs. Carlson*, No. 15-1385, 2016 WL 1178829, at *5 (4th Cir. Mar. 28, 2016) (citing *Stolt-Nielsen S.A. vs. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010)) ("[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'"); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("[A]rbitration 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.") (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)); *First*

Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995) ("[A] party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration....").

As explained in detail hereafter, there is no evidence in the record from which the Court could conclude that the parties to this case intended to arbitrate any dispute, much less a dispute involving non-parties. The only evidence before this Court, which was not authenticated, is a signed agreement between the Appellants and entities that are not even parties to this litigation.

c) This decision further creates an exception to Rule 901, SCRE, by allowing counsel's arguments at the motion hearing *alone* to authenticate a copy of a document. Rule 901 requires a document's authentication before it can be received into evidence since a document is not subject to cross-examination. Authentication requires presenting competent evidence of the genuineness of a document and its execution by the party by whom it purports to be executed. *Williams v. Milling-Nelson Motors*, 209 S.C. 407, 410, 40 S.E.2d 633, 634 (1946). Here, Appellants made no effort to authenticate the arbitration agreement at the hearing before the circuit court. In fact, Appellants have never even been able to locate the original arbitration agreement at issue. Appellants attempted to authenticate the arbitration agreement *after* the hearing by submitting an affidavit of an employee, but as this Court correctly recognized, the circuit court excluded this untimely affidavit from consideration. Op. No. 5387 (Adv. Sh. at 77 n.4) ("While the Insurers attached an affidavit of one of their employees to the reply memorandum, the court specifically declined to leave the record open for the addition of new evidence. Because the affidavit was not properly admitted into evidence below, we do not consider it as part of the record on appeal.").

By affirming that the record was closed following the motion hearing, this Court should not have considered any of the additional evidence submitted after the hearing by the Appellants to authenticate the Agency Agreement at issue. Without consideration of such evidence, Appellants failed to authenticate and prove the existence of the contested documents at the motion hearing and thus removed any basis for overruling the trial court's finding that the agreements were not enforceable.

2. The Court overlooked or misapprehended critical issues regarding the 2010 Agency Agreement in establishing the agreement's validity.

In holding that the arbitration agreement was a valid contract, the Court discusses in detail the requirements for compelling a non-signatory to arbitration. In so doing, however, the Court never distinguishes between non-signatories who are parties to the agreement, and non-signatories who are *not* parties to the agreement. The Court overlooked the fact that the various agreements submitted by the Appellants/Insurers were between a variety of parties, some not even involved in the instant suit and none of whom were the Respondents. The Court further overlooked that none of the agency agreements were ever authenticated in any manner at the motion hearing by Appellants. *See* Section 1, *supra*. The agreements were only signed by one party, the Respondents have no legal ties to either of the parties to the agreement, and the effective dates of the agreements preceded the signature dates.

In order to enforce an unsigned contract, South Carolina law clearly establishes that the contract must be "accepted and acted on by [the non-signatory party]." *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986). This Court held "Southern Risk, Dantice, and Willis accepted and acted upon the 2010 Agency Agreement," Op. No. 5387 (Adv. Sh. at 80), but the Court failed to distinguish that

Respondents neither accepted the agreement nor acted on it. The Court never acknowledges the fact that Respondents were not parties to the arbitration agreement.

In *Malloy v. Thompson*, 409 S.C. 557, 762 S.E.2d 690 (2014), the Supreme Court considered whether a non-party/alleged third-party beneficiary of a contract containing an arbitration clause may be compelled to arbitrate as a non-signatory. The *Malloy* court held where the plaintiff's claims were based on duties owed to all persons generally and not specifically on the duties in the alleged contract, the plaintiff would not be bound to arbitrate. 409 S.C. at 562, 762 S.E.2d at 692-93. The facts in the instant case mirror those in *Malloy*, with the exception of the fact that the arbitration agreement considered here was not even signed by the other party and was also backdated with no evidence in the record concerning when the agreement became effective. The Court's decision effectively overrules *Malloy* but does not acknowledge its precedent or explain why arbitration can be foisted upon innocent citizens who had no knowledge of the underlying arrangement between an insurance agent and the agent's parent company and were not "intended beneficiaries" of that agreement.[1]

In support of the Motion to Compel Arbitration, Appellants submitted two different arbitration agreements to the circuit court, including their addendums, with one containing a signature and the other without a signature. The first agreement submitted in support of the Motion to Compel Arbitration contained an effective date of August 15, 2007, was signed on August 21, 2007 by a representative of Liberty Mutual Insurance Company, and signed on January 5, 2008 by a representative of Assure Alliance, Inc.

[1] Respondents addressed *Malloy* in their Final Brief, (Final Brief of Respondents, pp. 15, 18), and during oral arguments.

(Record pp. 439-50). Other than oral arguments presented by counsel, Appellants submitted no evidence at the hearing before the circuit court to establish the relationship between Assure Alliance, a corporate entity which is not a party to this case, and Southern Risk Insurance, one of the named defendants. After the hearing, Appellants attempted to establish a relationship by submitting additional documentation with their reply brief, to include an affidavit of a Liberty Mutual employee. The circuit court, however, closed the record after the hearing and thus none of the additional evidence was considered. *See* Op. No. 5387 (Adv. Sh. at 77 n.4). The Court's decision overlooked the fact that the 2007 Agreement is between an entity that is not a party to this litigation and the Court's decision never addresses the fact that no evidence was submitted to establish a relationship between that party and Southern Risk. Further, **and significantly**, the Court misapprehended the 2007 Agreement as being signed by a representative of Southern Risk. *See id.* (Advance Sheet at 81 n.9) ("we note the 2007 Agency Agreement—which contains an identical arbitration provision and was signed by a Southern Risk representative—would have remained in effect during the period of Willis's alleged wrongdoing."). The 2007 Agreement was in fact signed by a representative of Assure Alliance.[2]

The second agreement before the Court, coined the 2010 Agency Agreement, contained no signature of Southern Risk Insurance and included an effective date of April 1, 2010. (Record, pp. 451-467). The signature line for Southern Risk is dated May 31, 2012, but was never signed, and neither were the addendums to the agreement from

[2] As discussed in Section 6, *infra*, the only agreement in the Record that was actually signed by a representative of Southern Risk was the 2007 Safeco Limited Agency Appointment and Agreement (Record p. 503), submitted after the record was closed. Significantly, this Agreement does *not* contain any arbitration provision.

Safeco and Montgomery. The Court addresses at length the issue of the agreement never being signed, but overlooks the fact that the 2010 Agreement was dated for signature some two years after the effective date. It is difficult to believe the law in South Carolina would allow an unsigned contract to be in effect for two years before the other party is required to sign it. Finally, the Court overlooked the fact that there were no original copies of the 2007 Agreement or the 2010 Agreement produced to this Court or to the circuit court, creating the evidentiary issues as outlined in Section 1 above.

Finally, the Court's decision ignored basic principles of contract law that "when a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Cobb v. Benjamin*, 325 S.C. 573, 578, 482 S.E.2d 589, 591 (Ct. App. 1997). The contract does not envision or discuss fraudulent acts of agents, as occurred in the instant case. It is difficult to imagine the parties to these contracts would (or could) have reasonably foreseen the wrongful acts that this insurance agent is alleged to have perpetrated. Respectfully, the Court erred in holding that the Respondents' allegations of wrongdoing "arose out" of the 2010 Agency Agreement.

3. The Court overlooked general principles of agency law in holding that "but for" the Agency Agreements, the Appellants/Insurers would owe no duty to the Respondents/Insureds.

The opinion, as it stands, overturns a well-established body of case law in South Carolina in which liability for the wrongful acts of an insurance agent can be imputed to the insurance companies with whom the agent works. *See Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 298, 468 S.E.2d 292, 296-97 (1996) ("The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has

certain authority. Accordingly, the principal is bound by the acts of its agent when it places the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe that the agent has certain authority and they in turn deal with the agent based upon that assumption.") Pursuant to *Rickborn*, insurance companies are liable for the wrongful acts of their agents under the doctrine of respondeat superior and under agency principles of apparent authority. This is so even when an agent acts against the principal's instructions.

This Court held "the allegations in [the Respondents'] complaints necessarily depend upon the terms, authority and duties created and imposed by that agreement." *See* Op. No. 5387 (Adv. Sh. at 86-87). But none of the 14 Complaints filed by Respondents cite to or reference the agency agreements or outline any duties arising from the agreements. (Record, pp. 78-97, 104-193, 314-337, 348-388) (referencing all Complaints of Respondents). The Court overlooked *Rickborn* and its progeny in stating that Respondents cannot reach the Appellants/Insurers without the 2010 Agency Agreement. Op. No. 5387 (Adv. Sh. at 87) (holding Respondents "would not be able to reach the Insurers with their claims in the absence of the agreement establishing the agency relationship between the Insurers, and Southern Risk, Dantice and Willis"). *But see Noisette v. Ismail*, 299 S.C. 243, 250, 384 S.E.2d 310, 314, *rev'd on* other grounds at *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991) (citing J. Appleman and J. Appleman, Insurance Law and Practice § 8693 at 259–61 (1981)) ("The restrictions and limitations existing upon the authority of a general agent as between such agent and the company are not binding upon policyholders in their dealings with such agent, in the absence of knowledge of [sic] their part of such limitations.").

By overlooking *Rickborn* and clear principles of agency theory, the Court effectively created a new rule that third parties cannot recover against a principal for an agent's actions without the existence of some contractual relationship between agent and principal. Finally, as the circuit court correctly distinguished, Respondents would not be permitted to stand in the shoes of the parties to the Agency Agreement and seek relief therefrom. (Record, p. 420). Their claims are based on apparent authority—that the actions of an agent are imputed to a principal—and the Court overlooked this distinction.

4. This Court repeatedly and erroneously construed opposing counsel's statements (both written and spoken) as facts, with absolutely no evidence in the record to substantiate the same.

It is well-established in South Carolina, and our courts have "repeatedly held that statements of fact appearing only in argument of counsel will not be considered." *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933); see also *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E. 2d 695, 700 (Ct. App. 1993). "[W]here there is no stipulation, a representation of fact by counsel in written briefs, memoranda, or made during oral argument may not be considered by the court where it is unsupported by the record." *Cobb*, 325 S.C. at 581, 482 S.E.2d at 593 fn.2 (citing *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct.App.1986)). In footnote 4 of its Opinion, the Court noted that the circuit court "specifically declined to leave the record open for the addition of new evidence" following the motion hearing. Op. No. 5387 (Adv. Sh. at 77 fn.4). This Court correctly excluded a contested hearsay affidavit on this ground, but erroneously considered additional evidence that was submitted to the circuit court after the hearing and cited by Appellants in their brief. (Record, pp. 468-503) (documents submitted by Appellants after record was closed). Specifically, the Court referenced the

2007 Agency Agreement between Assure Alliance and Appellant. Without considering documents submitted after the record was closed, the Court would not have evidence to establish a relationship between Assure Alliance and Southern Risk, other than by argument of Appellants' counsel. For this reason, the 2007 Agency Agreement should not have been considered.

The Court held "Southern Risk, Dantice and Willis accepted and acted upon the 2010 Agency Agreement." Op. No. 5387 (Adv. Sh. at 80). There is nothing in the record to prove this fact as stated by the Court. In fact, the Appellants' responsive pleadings *denied* that Willis was their agent. (Record p. 197 at ¶13) (denying Willis was an agent of the Insurers or acted with their permission in regard to the acts alleged). Further, Dantice's attorney told the trial court that his client had no knowledge of an arbitration agreement. (*Id.* p. 433) ("There is no written agency agreement that my client Jesse Dantese [sic] and Southern Risk have entered into with Liberty Mutual.").

The Court further held "Willis ... had no authority to sell insurance on behalf of the Insurers in the absence of the 2010 Agency Agreement the Insurers entered into with her employer, Southern Risk." Op. No. 5387 (Adv. Sh. at 85). There is nothing in the record to prove this. The Court failed to recognize that Respondents' lawsuits are not based on the agency agreement but are based instead on common law agent/principal duties. It is also important for the Court to consider that had the 2010 Agreement never been produced by Appellants, Respondents' claims would still be valid. This is because the Respondents base their suits on common law and statutory duties owed by the insurance company and agent to the general public, and their claims have nothing to do with the insurance company and agent's agency agreement.

In Footnote 8, the Court holds the agency agreement involves interstate commerce. Op. No. 5387 (Adv. Sh. at 79-80 fn.8). In so holding, the Court even analyzed where insurance premiums and commissions would have been sent, without any evidence in the record to support such analysis. *Id.* ("some or all of the insurance premiums ... as well as any resulting commissions ... would have been sent from outside of South Carolina."). But Appellants presented no evidence other than attorney comments made during the motion hearing and in Appellants' brief that determines whether or not the agreement involves interstate commerce.

Finally, in ruling on the additional sustaining grounds regarding failure to produce the agreement in discovery, this Court found the Appellants raised "legitimate objections to discovery in the instant case and did not produce any items." *Id.* (Adv. Sh. at 94). This language is taken directly from Appellants' brief. *See* (Final Amended Reply Brief of Appellants at p. 21); *see also* (Final Brief p. 20) (stating Appellants' objections to discovery were "legitimate, legally supported, reasonable and not unusual."). The Court had no legal basis to rule in Appellants' favor on this point because Appellants did not include *anything* on this point in the record – this Court does not know what objections they raised, the discovery responses are not in the Record on Appeal. *See* Rule 210(h), SCACR (holding the court may not consider a fact which does not appear in the record on appeal); *see also Ravan v. Greenville Cty.*, 315 S.C. 447, 460, 434 S.E.2d 296, 304 (Ct. App. 1993) ("the matters raised by the landowners are completely outside the record and may not form the basis for a reversal").

5. The Court erred in finding Appellants' actions were foreseeable to a reasonable consumer in the context of normal business dealings, incorrectly applying *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007).

The Court held "the parties to the 2010 Agency Agreement did contemplate that ordinary claims directly related to their agency relationship would be submitted to arbitration pursuant to the agreement governing that relationship." Op. No. 5387 (Advance Sheet at 88). An insurance agent's stealing and fraud is not "ordinary," and it is not the type of conduct contemplated by the parties to the Agency Agreement.

Additionally, in reaching its decision regarding the outrageous conduct claim, the Court presumes the parties are seeking to recover under a negligent supervision cause of action. None of the Respondents assert a cause of action for negligent supervision, however, and instead seek to recover for causes of action directly against the Appellants as principals of Willis, their agent.

6. In addressing waiver, the Court overlooked important factors which could have been used to sustain the circuit court's holding.

First, the Court mentions the amount of litigation that had been filed prior to the filing of the Appellants' Motion to Compel, but the Court overlooks the fact that the Appellants affirmatively sued two Respondents (the Garys) in federal court and then again sued Respondent Williams in this case, bringing her into this action by way of cross-claim. At no time during either action did the other side allege an arbitration agreement existed. This Court failed to acknowledge that there was evidence on which the trial court could base his decision on waiver. In doing so, this Court's decision violates the standard of review. *See Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009) ("The determination of whether a claim is subject to arbitration is subject to

de novo review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the factual findings.").

Additionally, in analyzing the prejudice factor under the waiver claim, the Court overlooked the important fact that the only agreement actually signed by Jess Dantice as a representative of Southern Risk was an agreement that did not contain an arbitration clause. (Record p. 503). This agreement was submitted after the hearing on the Appellants' motion to compel. (*Id.*). By withholding the only agreement that was actually signed and executed – an agreement that coincidentally did not contain an arbitration clause – the Appellants improperly handicapped Respondents' ability to defend the issue in this Court. At the hearing before the trial court while the record was still open, if Respondents had known that there was a signed agency agreement between the Insurance company and Southern Risk *which did not* contain an arbitration clause, they would have been able to argue that the signed agreement should be enforced and not the unsigned agreement; the trial court could have validly ruled for the Respondents on that basis to deny arbitration. This issue regarding the signed agreement *with no arbitration clause* was raised in Respondents' brief and at oral argument but overlooked by the Court.

7. The decision confuses the Insureds/Respondents' allegations with those filed by the Agents/Respondents in addressing the issue of the relationship between the 2010 Agency Agreement and the instant claims. The decision erroneously concludes all claims sound in negligent supervision, but the pleadings establish otherwise.

Respondents Wilson and Shirley are insurance agents who seek to recover against the Appellant Insurance Companies for violation of the Unfair Trade Practices Act, Civil Conspiracy, and Tortious Interference with Contractual Relations. Wilson's Amended

Complaint alleges that Laura Willis acted "with the express or implied permission of the other Defendants," (Record p. 120 at ¶13), that the Insurers, by and through their agent Willis, "made numerous misrepresentations to the general public and have gained an unfair and illegal business advantage in doing so," (Record, p. 123 at ¶18; pp. 123-23 at ¶23), that the Insurers individually and through their agent "conspired together and worked together and coordinated their efforts with a common design and plan to restrain trade by putting the Plaintiff ... out of business and in the process make huge sums of money for the Defendants," (Record, p. 124 at ¶27), and that the Insurers (along with the other Defendants) "repeatedly and intentionally procured the breach and/or termination of [Plaintiff's] contracts by using false statements and illegal and improper acts with no legal justification for doing so, resulting in the virtual destruction of the Plaintiff's business and loss of business profits." (Record, p. 125 at ¶31).

The Court held "all of the duties the Insurers allegedly breached directly arose out of and touched upon the provisions of the agreement." Op. No. 5387 (Adv. Sh. at 85). In so holding, the Court failed to distinguish between the Agent Respondents' claims and the Insured Respondents' claims. The Court held "the main crux of the Insureds' and Agents' claims was that they [the Insurance Companies] failed in their duties to investigate, train and supervise and audit Willis." *Id.* Yes, negligent supervision is part of the claim, but the pleadings also allege active participation in a conspiracy. *See* (Record p. 124) (Am. Complaint of Wilson) (alleging the Insurers acted in conjunction and conspiracy with Willis to increase business by fraudulent claims practices). All of the Respondents' claims were based on duties owed to all persons generally and not specifically on the duties in the agency contract.

8. In ruling on the Statute of Frauds, the Court overturned the circuit court, holding that the contract was capable of performance within one year and overlooked the significance of the varying dates on the agreements at issue.

The Court held "performance of the 2010 Agency Agreement was possible within a one-year period because the agreement was for an indefinite term and either party could terminate it at will—with or without cause—by giving as little as ninety days' notice." Op. No. 5387 (Adv. Sh. at 82). This holding was erroneous because the agreement was signed by the Appellants in 2010 but presented to Southern Risk for signature in 2012, evidencing that the contract was at least expected to span over a period of two years. The Court had no evidence in the record concerning what the parties intended by having an effective date in 2010 but a signature date for at least one of the parties in 2012, and the Court overlooked the importance of the backdating of the agreement itself. No South Carolina court has addressed the implications of backdating in light of the Statute of Frauds. *But see Parker v. Byrd*, 309 S.C. 189, 191, 420 S.E.2d 850, 851 (1992) ("The term 'backdated' is used to identify Byrd's proposal that the transaction be effective at a date earlier than the date the document was signed. No opinion is requested or expressed as to the propriety of such a provision.").

9. Regarding the first alternative sustaining ground, the Court erred in its finding that the exemption from arbitration found in Section 15-48-10(b)(4) is not applicable.

The Court held the causes of action against the Appellant Insurance Companies "are not the claims of 'any insured or beneficiary under any insurance policy.'" Op. No. 5387 (Adv. Sh. at 95). There are no facts in the record by which the Court can reach this conclusion, and the Court ignores the fact that other than Respondents Wilson and Shirley, none of Respondents have legal standing to sue the Insurers without being an insured. The Appellants admitted in their various answers that the Insured Respondents

were purchasers of insurance policies and referred to them as "Insureds" throughout their pleadings and briefs. In fact, in their Answer to the Complaints of Richard Wilson, the Appellants refer to the "terms and conditions of [the] insurance policies" as an affirmative defense. (Record, p. 201). This Court paradoxically refers to the Respondents over forty times as "Insureds," yet holds the Respondents' causes of action are "not the claim of any insured or beneficiary under any insurance policy." Op. No. 5387 (Adv. Sh. at 95).

Additionally, the Court overlooked and/or failed to address the fact that Section 15-48-10(b) exempts from arbitration "any claim arising out of personal injury." The claims of Respondent Laurie Williams arise directly out of her personal injury after she was struck by a vehicle driven by Respondent Cynthia Gary. But for the personal injury of Respondent Williams and her attempt to recover liability insurance from the Appellants for her injuries, she would not be involved in this litigation. The Court overlooked this fact entirely, and counsel would submit by this omission, the Court extends arbitration to cases arising out of personal injury if in such cases there exists a dispute regarding insurance coverage.

10. On the same date the Court of Appeals issued its opinion, the Court issued another opinion also dealing with the issue of enforcing an arbitration provision on a non-signatory which is contrary to the holding in the case.

In *Thompson v. Pruitt Corporation*, Op. No. 5384 (S.C. Ct. App. filed March 2, 2016) (Shearouse Adv. Sh. No. 9 at 34-49), this Court correctly recognized that the first step in the third-party beneficiary analysis is determining whether a valid contract that the moving party is trying to enforce exists. Op. No. 5384 (Adv. Sh. at 44) (*citing Dickerson v. Longoria*, 995 A.2d 721, 742 (Md. 2010) ("Before one can enforce a contract,

however, whether as a party to the contract or as a third-party beneficiary, there must be a contract to enforce."). In the instant case, the Court failed to look to the four corners of the alleged contracts containing the arbitration clause because if it had done so, the Court would have discussed that no evidence in the record supported the inconsistent dates in the contracts, which spanned over a period of two years.

Also in the *Thompson* case, the Court stated "a third-party beneficiary is a party that the contracting parties intend to directly benefit." Op. No. 5382 (Advance Sheet at 44) (citing *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005)). In the present case the Court overlooked this important analysis and case law. Here, there is no evidence in the record that the contracting parties intended to benefit Respondents in any way.

Finally, in *Thompson* the Court noted "a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement." Op. No. 5382 (Advance Sheet at 44). Here, there is no evidence that Respondents were in any way attempting to enforce an agency agreement between the insurance company and the selling agent, especially considering that they were not even aware that an agreement existed until the motion to compel arbitration was filed by Appellants.

Conclusion

Respondents request this Court grant this petition, withdraw its decision, and issue a decision affirming the circuit court for correctly denying Appellants' motion to compel arbitration.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

HITE AND STONE



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Abbeville, SC
March 29, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

RECEIVED
MAR 30 2016
SC Court of Appeals

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 Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co.,.....Defendants,

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are.....Appellants,

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

PROOF OF SERVICE

I, the undersigned attorney with the law offices of Hite and Stone, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

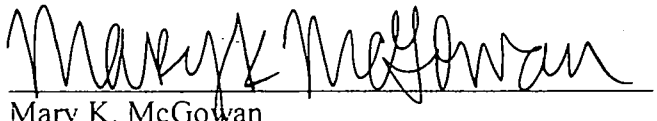
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Mary K. McGowan

March 30, 2016

Hite & Stone
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RECEIVED
MAR 30 2016
SC Court of Appeals

March 30, 2016

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street, 5th Floor
Columbia, SC 29201

RE: Richard W. Wilson v. Laura B. Willis, and Jesse A. Dantice, et al.
Appellate Case No. 2014-00946

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the *Petition for Rehearing* in the referenced case. I have also enclosed a proof of service of this document on counsel of record and a $25.00 check for filing this petition. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,

Anne Marie Hempy
Attorney for Respondents

Enclosures

cc: C. Mitchell Brown, Esquire
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79100

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

RECEIVED
MAR 30 2016
SC Court of Appeals

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-01-00306
Appellate Case No. 2014-000946

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 Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., and Laurie Williams,.....Defendants,

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are.....Appellants,

and

Of whom Laurie Williams is a .....Respondent.

RESPONDENT LAURIE WILLIAMS' PETITION FOR REHEARING

This petition is filed pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. Rule 221 governs petitions for rehearing, and Rule 240 governs motions and petitions generally.

Respondent Laurie Williams moves this Honorable Court to reconsider its opinion dated March 2, 2016. Op. No. 5387 (Shearouse Adv. Sh. No. 9 at 73). The Court granted Respondent Laurie Williams' Motion for Extension, and extended the time to file until April 1, 2016. This petition for rehearing is therefore timely under Rule 221(a) of the South Carolina Appellate Court Rules.

Respondent Laurie Williams resubmits the arguments from her Final Brief on the merits and additionally submits that the court may have overlooked or misapprehended the following points in its decision:

1. The Court overlooked or misapprehended the facts when it found Respondent Williams' claim is not one of an "insured or beneficiary under any insurance policy" that would exempt her action from arbitration pursuant to subsection 15-48-10(b)(4).

Respondent Laurie Williams (Ms. Williams) would not be a party to this matter but for the Insurers filing suit against her twice. On October 30, 2012, one of the Insurers filed suit, making no mention of arbitration, against Wayne Gary and Cynthia Gary (the Garys) and Ms. Williams in the United States District Court of South Carolina. (R. pp. 22-77). Only after Ms. Williams and the Garys answered and counterclaimed, did the Insurer stipulate to dismiss the federal court action. (R. pp. 98-103).

Insurers then sued Ms. Williams a second time when they brought a cross-claim against her in their answer to the Garys' suit against Insurers. (R. pp. 205-313). Again, Insurers made no mention of an

arbitration clause. (R. pp. 216-226, ¶¶ 45-112, pp. 227-228, ¶¶ a – h). From this defensive posture, Ms. Williams answered and filed a cross-claim as an affirmative defense. (R. pp. 710-722).

The Court found Respondent Williams' claim was not one of "'any insured or beneficiary under any insurance policy' that would exempt this action from arbitration pursuant to subsection 15-48-10(b)(4)." South Carolina recognizes "a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable," but specifically excludes "[a]ny claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract." S.C. Code Ann. § 15-48-10(b)(4).

Ms. Williams' claims arise out of personal injury, and she is a beneficiary under an insurance policy. Ms. Williams sustained serious injuries after Cynthia Gary, driving her sports utility vehicle, struck Ms. Williams while she walked along a rural road on July 26, 2012. Ms. Williams subsequently filed a negligence action. (R. pp. 723-726).

But for the insurance policy, Ms. Williams would not be before this Court. The Court found the Insureds had no knowledge of the alleged Agency Agreements when they filed suit, but further found the 2010 Agency Agreement is the contract "at issue." Therefore, since the Agency Agreement is not an insurance policy, the Insureds' claims are not the claims of "any insured or beneficiary under any insurance policy" that

would exempt this action from arbitration pursuant to subsection 15-48-10(b)(4).

In essence, the Court found the alleged 2010 Agency Agreement was the basis for the Insureds' causes of action even though the Insureds didn't know it existed until many months after filing suit. While the Court may correctly state the alleged 2010 Agency Agreement is not an insurance policy, it is incorrect that it is the contract on which the Insureds based their causes of action.

The *Walden* case is distinguishable. In *Walden*, the Plaintiff sued a car dealership based on its failure to to purchase credit life insurance in connection with a car lease. *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 207, 731 S.E.2d 324, 325 (Ct. App. 2012). The Court found the lease agreement was not an insurance policy, and therefore not exempt from arbitration. *Id.* at 210; 731 S.E.2d at 327.

In the present matter, the Insureds purchased insurance policies from Insurers, and the Insurers admitted in their various answers that the Insureds were purchasers of insurance policies. Throughout their pleadings, briefs, and memorandum, Appellants call them Insureds. However, the Court ignored this undisputed fact. Unlike the car lease "that only [had] a tangential relationship to an insurance policy" in *Walden*, the insurance policies in the present matter are the source for the Insureds' causes of action. *Walden*, 399 at 210, 731 S.E.2d at 326.

2. The Court failed to recognize facts in the record that contradict its holding that the Insurers did not waive their right to compel arbitration, particularly ignoring that Ms. Williams has engaged in significant discovery and been significantly prejudiced.

In determining whether a party has waived its right to compel arbitration, our courts have looked to the following factors: 1) the length of time between commencement of the action and the filing of the motion to compel, 2) if the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and 3) the prejudice on the non-moving party by the moving party's delay in seeking arbitration. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

Regarding the first factor, the Court found "the complicated nature of this action rendered" the time lapse, one year after the Insurers filed their first suit against Ms. Williams, "even more reasonable under the circumstances." Op. No. 5387 (Shearouse Adv. Sh. No. 9 at 92). This is internally inconsistent with the court's finding earlier in its opinion that "such tort claims are rather commonplace." Op. No. 5387 (Shearouse Adv. Sh. No. 9 at 88).

In analyzing the second factor, the Court ignored that Ms. Williams, a potential beneficiary of an insurance policy, has engaged in significant discovery, and is in fact ready for trial, in her companion negligence case, but cannot move forward because of this appeal. (R. p. 676; R. pp. 723-726).

Looking at the third factor, the Court ignored the significant prejudice to Ms. Williams when it held that the Insurer's actions do "not

rise to the level of prejudice necessary to waive the right right to compel arbitration against...Williams in particular." Almost four years have passed since Ms. Williams suffered serious injuries that required surgeries and a lengthy hospital stay, but the Court inexplicably implies that Ms. Williams is somehow the least prejudiced.

3. Respondent Williams adopts and incorporates into this Petition the Respondents' arguments, in their entirety, presented in the Petition for Rehearing filed by Hite and Stone. Rule 208(b)(6), SCACR. This adoption includes the law and documents to which Respondents cite.

CONCLUSION

Respondent Laurie Williams respectfully requests the Court reconsider its opinion and affirm the holding of the lower court. The Motions to Compel Arbitration were appropriately denied by the trial court and the appeal in this matter should be dismissed with costs.

Respectfully Submitted,
HAWTHORNE MERRILL LAW, LLC

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March 29, 2016
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 30 2016
SC 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. 2014-000946

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 Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., and Laurie Williams,.....Defendants,

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are.....Appellants,

and

Of whom Laurie Williams is a .....Respondent.

CERTIFICATE OF SERVICE

I, the undersigned attorney, certify I have served all counsel of record with a copy of the pleading(s) listed below by mailing same by United States Mail, postage prepaid, to the following:

Pleadings:

Respondent Laurie Williams' Petition for Rehearing
Certificate of Service

Counsel Served:

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Respectfully Submitted,
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March 29, 2016
Greenwood, South Carolina



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March 29, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street, 5th Floor
Columbia, SC 29201

RECEIVED
MAR 30 2016
SC Court of Appeals

RE: Richard W. Wilson v. Laura B. Willis
Civil Action No. 2012-CP-01-306
Appellate Case No. 2014-000946

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Respondent Laurie Williams' Petition for Rehearing. I have also enclosed a certificate of service upon counsel of record, and a check of $25.00 for the motion filing fee. Please return the additional filed copy to me via our courier.

By copy of this letter to counsel of record, I am serving them with same. Thank you for your attention to this matter. If you need anything further, please do not hesitate to contact me.

Sincerely,

HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill

JMH/
Enclosures

cc: Laurie Williams
Thomas E. Hite, Jr., Esquire
Anne Marie Hempy, Esquire
C. Mitchell Brown, Esquire
William C. Wood, Esquire
Miles E. Coleman, Esquire
Robert C. Calamari, Esquire
Allen Mattison Bogan, Esquire

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

RECEIVED
APR 20 2016
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, ... Respondent.

APPELLANTS' RETURN IN OPPOSITION TO PETITIONS FOR REHEARING

This Court should deny the petitions for rehearing.[1] The Court's decision should stand as written. *See Wilson v. Willis*, Op. No. 5387 (S.C. Ct. App. filed March 2, 2016) (Shearouse Adv. Sh. No. 9 at 73-94) ("Opinion" and cited as "Op.").

The Respondents ask this Court to ignore the allegations of the operative Complaints in order to avoid arbitration. Respondents, as plaintiffs, are the masters of their Complaints, but they have chosen to put claims before South Carolina's courts that are squarely within the arbitration provisions based on their theory of liability. Without the agency relationship, the alleged harms Respondents complain of could not have allegedly arisen. Therefore, the Court correctly found the claims subject to the arbitration provision in the agency agreements based on the benefits the Respondents seek pursuant to those contracts.

Summary

This Court has not overlooked or misapprehended any points of law or point in the record. Instead, Respondents wish to distance themselves from their own pleadings and attempt to reargue many of the same grounds considered and previously rejected by this Court. Respondents also raise some new arguments for the first time on rehearing.

A motion to compel arbitration is necessarily dependent upon the claims raised in the Complaint. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012) ("To decide whether an arbitration agreement encompasses a

[1] Undersigned files one response to the two Petitions for Rehearing. Roman numerals V and VI address the two enumerated grounds raised by Respondent Laurie Williams, but this combined Return in Opposition supports the denial of both Petitions in all respects.

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."). At issue in the underlying suits is whether the Insurers failed to adequately train and supervise their agents, thereby allegedly allowing the agents to wrongfully fail to procure insurance policies, or unlawfully accepted monies from Respondents without actually providing policies. The entire suit is premised on the essential claim that the insurance agents, while acting for Insurers, caused harm to Respondents in deceiving them into believing insurance coverage existed. The Court must accept these allegations, as it did in its March 2, 2016 Opinion, as true. *See, e.g., Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 113 (2d Cir. 2012) (noting that in examining a motion to compel arbitration "[the Court] accept[s] as true . . . factual allegations in the plaintiffs' complaint that relate to the underlying dispute between the parties"); *cf. Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (noting that the court "must accept the complaint's allegations as true" when considering a Rule 12(b)(6) motion to dismiss). The Petitions for Rehearing should be rejected.

Law/Analysis

I. This Court's Opinion changes nothing about South Carolina law and is dependent upon the pleadings and allegations before this Court.

The opinion did nothing to change South Carolina law. Non-signatories can and are compelled to arbitration when they seek to benefit from an agreement, such as the one here, that has an arbitration provision. *See Thompson v. Pruitt Corp.*, Op. No. 5384 (S.C. Ct. App. filed March 2, 2016) (Shearouse Adv. Sh. No. 9 at 34-39); *Pearson*, 400 S.C. at 295-96, 733 S.E.2d at 604-05 (Ct. App. 2012). Therefore, Respondents' contention that this Court extended the "arbitration umbrella" further than any previous South Carolina

decision is without merit. This Court applied existing law in concluding that the arbitration agreement at issue in this matter could be enforced against the Respondents.

Furthermore, the opinion is not far-reaching, as it depends necessarily on the facts and record of ***this*** case. Here, the Respondents seek to hold the Insurers directly responsible for the alleged acts of the insurance agents. That relationship is governed by an agreement, and Respondents seek relief based on it. Nothing about the decision expands the law. Non-signatories are compelled to arbitration in this manner, and arbitration is viewed as an acceptable means of adjudicating a dispute. Moreover, it is well established that a party can waive its right to a jury trial by contract. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002). Our courts have long held the FAA applies when a transaction involves interstate commerce, and the Respondents do no dispute these matters touch upon interstate commerce. Op. at 79-80 n.8. Hence, the decision should stand.

II. The Court's decision to compel the claims to arbitration is properly founded upon common law estoppel.

"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." Op. at 85 (quoting *Person v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012)). "Equitable estoppel precludes a party from asserting rights 'he otherwise would have had against another' when his own conduct renders assertion of those rights contrary to equity." *Id.* "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." *Id.*

The Opinion is also consistent with *Thompson v. Pruitt Corporation*, Op. No. 5384 (S.C. Ct. App. filed March 2, 2016) (Shearouse Adv. Sh. No. 9 at 34-39). As in *Thompson*, the Court here determined the contract was valid. The Court likewise found that Respondents intended to benefit from the agency agreements. Thus, the decisions issued the same day are entirely consistent.

The Court's Opinion in this case precisely captured the law as it exists and applied it to the allegations raised by Respondents and the relief (*i.e.*, benefits) sought in the complaints. The Court properly found that the 2010 Agency Agreement establishing the Insurers' relationship with, and the rights and obligations toward, Southern Risk, Jesse Dantice, and Laura Willis was a valid, binding contract relied upon by the agents. *See* Op. 79-81. Even if that agreement were not operative, there still existed a prior, signed agency agreement that was in force during the time of Willis' alleged wrongdoing and which also contained arbitration provisions. *Id.* at 80 n. 9.

A. The agents agreed to arbitrate disputes with the Insurers.

The Record contains ample support that the arbitration agreements existed. In each of the 14 motions to compel arbitration, the Insurers relied on the agency agreements relevant to that particular plaintiff's claims.[2] For example, in lawsuits where the alleged wrongdoing occurred in or before early 2010, the Insurers' motion to compel

[2] Respondents, without support, contend the Opinion relies upon statements of counsel. This is not accurate and nowhere in the Opinion does the Court cite to counsel for Insurers as evidence. Thus, the ground at No. 4 at p. 10 of the Respondents' Petition is without merit. The arbitration agreements are in the Record. The Court considered the agreements. The agreements are the basis for the Court's decision. Importantly, Dantice and Willis do not dispute selling insurance on behalf of Insurers. Op. at 80.

relied on both the 2007 agency agreements and the 2010 agency agreement. *See, e.g.*, Motion to Compel Arbitration in *Wilson v. Willis* (R. 559); Motion to Compel Arbitration in *Lawton v. Willis* (R. 591-92); *see also* Hearing Transcript at 7, 15, and 32 (relying on and discussing a 2007 agency agreement) (R. 405, 413, 429, 439-49).[3] Similarly, in instances where Safeco, but not Montgomery, was named as a defendant, the motion relied on the 2007 and 2010 agency agreements between Safeco and Southern Risk, but not on agreements between Montgomery and Southern Risk. *See, e.g.*, Motion to Compel Arbitration in *Wofford v. Willis* (R. 570-71). Hence, the Insurers' reliance on multiple agency agreements is significant because, as explained on appeal, even assuming *arguendo* that the unsigned 2010 Agency Agreement is not binding, the prior binding agreements also compel arbitration. *See* App.'s Brief at 11-12.

1. The pre-2010 agency agreements are binding on Southern Risk, Dantice, and Willis.

As explained above, the Insurers' arguments seeking to compel arbitration relied on multiple agency agreements in force between 2003 and 2012. *See* App.'s Brief at 5-7, 11-12. The Respondents, however, wrongly argue that these agreements are ineffective because none of these prior agreements are signed by Southern Risk and the Insurers have failed to establish any relationship between Assure Alliance and Southern Risk. *See* Resp. Petit. at 7. This is incorrect.

The absence of Dantice's signature on the 2010 Agency Agreement is inconsequential here. In any event, prior agency agreements with arbitration provisions were binding on Southern Risk, even if signed by someone under whom Dantice and

[3] When the alleged wrongdoing complained of in plaintiffs' pleadings arose in 2012, the motion to compel cited the 2010 Agency Agreement. *See, e.g.*, Motion to Compel Arbitration in *Spires v. Willis* (R. 580-82).

Southern Risk were operating as opposed to by Dantice himself. *See, e.g.*, Hearing Transcript at 15-16, 32 (R. 413-14, 429); App.'s Brief at 11-12. In the absence of those agreements, there would be no relationship and Southern Risk, Dantice, and Willis would have been unable to sell the Insurers' products. But for those agreements, there would be no basis upon which Respondents could claim the Insurers had an obligation to train, supervise, audit, and investigate Willis. Op. at 84.

Further, the Record shows Southern Risk, Dantice, and Willis acted upon the 2010 Agreement and sold insurance policies on behalf of Insurers—a fact not disputed. Hence, these agreements provided the sole source for the alleged sale of insurance. South Carolina law does not require both parties to a contract to sign it for it to be effective. *Pedder, Inc. v. Rikard*, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975) (stating to give validity to a contract, it is not always necessary that it be signed by both parties, but rather it may be sufficient if one party signed the contract and the other party accepted, held, and acted upon it).

2. The apparent retroactive effective date of the 2010 Agency Agreement has no effect on its validity and enforceability.

The Respondents argue that the 2010 Agency Agreement is dated for signature two years after its effective date. Resp. Petit. at 8. However, South Carolina law establishes that contracts may be made retroactively effective. *See Dixon v. W. Assur. Co.*, 251 S.C. 511, 521, 164 S.E.2d 214, 219 (1968) ("It is a general rule that the parties to an insurance contract may, by the terms of their contract, make it effective as of the time of the issuance, as of an earlier time, or as of a later time.") (citation omitted). Hence, the Respondents' argument should be rejected.

B. The Statute of Frauds does not bar application of the arbitration provision in the agency agreements.

The Respondents continue to argue that a contract with an indefinite term cannot be performed within one year's time, and thus the statute of frauds required that the agreement be signed by Southern Risk. The Respondent's argument is contrary to South Carolina law, which clearly states that an indefinite contract terminable at will does not fall within the statute of frauds. *See Weber v. Perry*, 201 S.C. 8, 21 S.E.2d 193 (1942) ("A permanent employment contract is not within the Statute of Frauds, for it is deemed possible of performance within one year.") (citations omitted); *Cline v. Southern R. Co.*, 110 S.C. 534, 554, 96 S.E. 532, 538 (1918) ("The period of its performance was left uncertain. . . . The contract pleaded does not fall within the statute."); *see also Center State Farms v. Campbell Soup Co.*, 58 F.3d 1030, 1032 (4th Cir. 1995) ("The contract claimed by Center State Farms was indefinite in time and was to continue so long as Center State Farms performed satisfactorily. Under South Carolina law, such an arrangement is terminable at will, subject to reasonable notice. [] A contract terminable at will does not fall under South Carolina's statute of frauds."). The critical question is whether performance is ***possible*** within a year, and even where "performance within a year is highly improbable or not expected by the parties," it "does not bring a contract within the scope" of the statute of frauds. *Springbob v. Univ. of S.C.*, 407 S.C. 490, 496, 757 S.E.2d 384, 387 (2014). Accordingly, because the 2010 agency agreement could have been performed within a year, it does not fall within the statute of frauds.

III. The Court did not overlook the alleged duties owed by the insurance agents as the Court correctly viewed the allegations of the Complaints in determining whether the claims fell within the scope of the arbitration provision in the agency agreements.

The Opinion correctly holds that Respondents' allegations against the Insurers are premised on the Insurers' alleged rights or duties that would not exist but for the Agency Agreements. *See* Op. at 84-85. In response, the Respondents now, for the first time on rehearing, argue their claims are premised on apparent authority of the agents. An argument cannot be raised for the first time on rehearing. *See Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." (quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999))).

Previously, the Respondents stated that they "ground[ed] their Complaints *exclusively* on South Carolina Code § 38-43-10, *et. seq.*, and § 38-51-10 to establish the Insurers' liability for the acts of agents Laura Willis and Jesse Dantice as producers of insurance." Resp. Br. at 17 (emphasis added). This was not correct. Not one of the Respondents' complaints cites these statutes or makes any claim or suggestion that the Insurers are vicariously liable for Willis' tortious acts. Rather, the complaints clearly allege that the Insurers are liable for their *own* alleged failure to supervise, train, investigate, audit, etc. *See* App.'s Brief at 13-17. These are alleged obligations, rights, and duties that only exist because of the agency agreements. Now that the Court has rejected such an argument, Respondents seek to paint their claims in yet another light (*i.e.*, apparent agency). This new effort to avoid arbitration should also be rejected.

The Respondents' also previously argued that their claims were dependent upon the definition of "agent" supposedly found in S.C. Code Ann. § 38-51-10. *See* Resp.

Brief at 17. Specifically, the Respondents noted that "Willis and Dantice were producers of insurance" pursuant to section 38-43-10, but then proceeded to argue that "pursuant to § 38-51-10(b) Willis and Dantice were agents of the Insurers." *Id.* The quoted material found in Respondent's brief, however, no longer appears in section 38-51-10 or anywhere in the Code, and thus Willis' status as an "agent" is not established by statute. After realizing this, Respondents now seek to change direction yet again on rehearing to avoid what is pled in their Complaints.

Further, Respondents argued that under these supposed statutory definitions, the Insurers "are liable for the wrongful acts of their agents under the doctrine of *respondeat superior*." Resp. Brief at 17. None of the complaints assert any claim, theory, or cause of action based on vicarious liability or *respondeat superior*. Moreover, none of the Complaints claim or allege that the Insurers are responsible for ***Willis'*** wrongful acts. Rather, they allege the Insurers are liable for their ***own*** supposed failings to perform adequate background checks, properly train and supervise her, conduct computerized audits, and the like. These duties would only arise under the agency agreement.

Even assuming the Respondents had properly raised this new theory of apparent agency they now proffer, the Court has previously considered conduct similar to Willis' alleged conduct and has held the insurer was not vicariously liable for it. *See Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). In *Vereen*, an insurance agent procured an insurance policy "by lying on the application" and subsequently assisted the beneficiary in making "a fraudulent claim for benefits." *Id.* at 428, 412 S.E.2d at 429. The court held such conduct was outside the scope of the agent's authority, and thus rejected the plaintiff's claim that the doctrine of *respondeat superior*

made the insurer liable for the agent's acts. The court noted that the agent was not acting in furtherance of the insurer's business as evidenced by the fact that he lied about his conduct, falsified the application for insurance, never attempted to deliver the policy to the insured, and personally profited financially from his wrongdoing. *Id.* at 429, 412 S.E.2d at 429. Here, Willis is alleged to have engaged in the same type of wrongful acts as the agent in *Vereen*. Therefore, Insurers cannot be held liable for the acts Willis took outside the scope of her authority. Any duties owed to Respondents under South Carolina law would necessarily be based on the agency agreements.

Respondents also wrongly contend the Court overlooked (or overturned) *Malloy v. Thompson*, 409 S.C. 557, 762 S.E.2d 690 (2014). Respondents raised this case to the Court and the Court correctly rejected this assertion. *Malloy* was based on duties to all persons owed generally. As stated, the claims here are based on the Insurers' alleged failures in training and supervising the agents. Here, the duty owed, if it exists at all, is only one owed as a result of the agency agreements. It is not a duty at large. Therefore, as the Court correctly determined, *Malloy* is inapposite.

Finally, the Respondents argue they cannot be compelled to arbitration because they have not sought to enforce the provisions of the agency agreement to their benefit. Here, yet again, the Respondents ignore the difference between their claims against Willis and their claims against the Insurers. No one alleges that the Insurers' stole, misappropriated funds, or committed fraud or forgery, and the Respondents are not seeking to recover from the Insurers for those acts. Rather, as explained above, the Respondents are seeking to enforce contractual provisions relating to hiring, training, supervising, auditing, and the like. *See also* App.'s Brief at 20-21. They are relying on

contractual duties owed pursuant to the agency agreements to establish the existence of a duty, and are therefore necessarily seeking to benefit from the agreements. Because they rely on and seek to benefit from right and duties in the agency agreements, the Respondents cannot avoid those agreements' arbitration provisions.

IV. The Record establishes the arbitration agreements are valid and encompass the claims raised by Respondents.

A. The claims are within the scope of the broadly worded arbitration provision.

Based on existing precedent, the arbitration agreements at issue here are worded broadly enough to encompass the claims here and to compel those claims to arbitration. Op. at 82-83. Indeed, our courts have held that "[t]he phrase 'arising out of' should be broadly construed in a clause of inclusion." *Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs.*, 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997) (citation omitted); *see also Howard v. State Farm. Mut. Auto. Ins. Co.*, 316 S.C. 445, 450, 450 S.E.2d 582, 585 (1994) (requiring "clauses of inclusion to be broadly construed" and noting a "broad construction of 'arising from' includes 'causal relation to,' 'incident to,' 'flowing from,' or 'having connection with'") (citations omitted).

As rightly found by this Court, the claims against the Insurers undoubtedly arise out of the performance or nonperformance of rights and duties that would not exist but for the Agency Agreements. Accordingly, these claims fall squarely within the scope of the arbitration agreements.

B. The claims are not of the variety that rise to the level of outrage.

The complaints allege the Insurers are liable for their ***own*** alleged failure to supervise, train, investigate, and audit. No South Carolina case has held an insurer's

allegedly inadequate training, supervision, investigation, or auditing was conduct so outrageous and unforeseeable that it could not be subject to arbitration, and the trial court erred by holding otherwise. This Court correctly rejected the invitation to adopt such a novel position in this case. Respondents admit they seek to hold the Insurers directly liable. Resp. Petit. at 13. This is the very point seized upon by the Court in finding that the claims are commonplace and do not rise to the level of those unforeseen claims in *Aiken*.

Moreover, in *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013), the Supreme Court held a claim involving intentional infliction of emotional distress—the very definition of an "outrage" claim—can be subject to arbitration in an employment setting, which is the same relationship Respondents rely upon here for their claims. The Court should thus not rehear this case.

V. S.C. Code Ann. § 15-48-10(b)(4) does not prohibit arbitration of the claims before the Court.

S.C. Code Ann. § 15-48-10 does not prohibit the enforcement of the arbitration agreements in this case. This Court and the federal district court have interpreted this provision as invalidating arbitration agreements found *in insurance policies*. *See Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 582 (D.S.C. 2003) (holding that section 15-48-10(b)(4) "prohibits the enforcement of arbitration clauses *in insurance policies* governed by South Carolina law") (emphasis added); *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 210, 731 S.E.2d 324, 326 (Ct. App. 2012) (holding that section 15-48-10(b) "was instead intended to apply directly to an insurance contract"); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 401 (Ct. App.

2001) (noting that section 15-48-10(b) "expressly invalidates a provision contained *in an insurance policy*") (emphasis added).

Here, the arbitration agreement is not found in an insurance policy and thus section 15-48-10(b) does not apply. The claims are not personal injury claims arising under insurance policies. The focus of the Complaints is based on the conduct of the insurance agents. This Court has previously held that this statute does ***not*** apply to arbitration agreements found in documents other than insurance policies, even if the document has some tangential relationship to insurance. *See Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 209, 731 S.E.2d 324, 326 (Ct. App. 2012) ("The contract in dispute here is not an insurance contract, and the provision in the lease did not create an insurance policy or a duty to insure. Therefore, Mary's causes of action against Harrelson are not the claims of 'any insured or beneficiary under any insurance policy' that would exempt this action from arbitration."). The *Walden* court expressly held that this statute was ***not*** intended to apply to "agreements that only have a tangential relationship to an insurance policy, but was instead intended to apply directly to an insurance contract." *Id.* at 210, 731 S.E.2d at 326.

The arbitration agreements at issue in this case are not found in insurance policies. Therefore, the statutory exemption does not apply. Hence, this Court correctly rejected the argument offered by Respondents.

VI. Appellants did not waive their right to compel the claims to arbitration.

Insurers did not waive their right to compel arbitration. The arguments of both the Respondents and Ms. Williams are without support. The Court correctly applied

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

A. The passage of time and discovery do not justify a court finding the right to arbitration was waived.

Insurers waited only six or seven months after the complaints were filed (and in one case 11 months) before moving to compel arbitration. The Court correctly held this was consistent with similar cases compelling arbitration. *See Toler's Cove Homeowners Ass'n, Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (limited discovery and the passage of thirteen month did not waive arbitration); *Rich v. Walsh*, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (thirteen months before moving to compel arbitration with limited discovery not a waiver of the right to arbitration); *Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001) (eight months and participation in limited discovery and administrative matters did not waive the right to arbitration).

Further, discovery was not extensive in any regard. Written discovery *requests* had been served by the Respondents on the Insurers and vice versa, but depositions of the Insurers have not been taken and the Insurers have taken no depositions. Once the Insurers moved to compel arbitration, the Insurers alerted Respondents in writing that the Respondents need not respond to the Insurers' written discovery. Hence, the Court decision is in line with the above cited cases.

Finally, no prejudice resulted from the passage of seven months prior to Insurers moving to compel arbitration. Respondents now claim alleged prejudice because the only agreement signed by Dantice with Southern Risk does not have an arbitration provision. This overlooks all of the Record evidence and the language of the agreements,

in addition to the fact that Dantice does not deny selling insurance for Insurers. No prejudice exists on this record. The Court properly determined that the Respondents failed to show anything beyond "mere inconvenience," and that this, coupled with the complexity of this matter, weighed against finding sufficient prejudice.

B. There is no delay or prejudice relating to the motion to compel arbitration of Ms. Williams' counterclaims that creates waiver.

Ms. Williams incorrectly argues that the Insurers' supposed delay in moving to compel arbitration involves a greater length of time (12 months) in her case than in others. *See* Williams' Petit at 4. She reaches this year long time period by measuring the lapse in time between the date First National filed a subsequently-dismissed federal declaratory judgment suit[4] and the date the Insurers filed their motions to compel arbitration in the state court action giving rise to this appeal. As the Court noted, the relevant calculation is the lapse of time from when the complaint was filed in this lawsuit (February 22, 2013) to the date the Insurers filed the motion to compel arbitration (November 1, 2013)—a delay of only eight months. As explained above and as found by the Court, South Carolina courts have not previously held that such a short time period, especially in these kinds of circumstances, waives the right to compel arbitration.

In addition, Ms. Williams argues that the Insurers' motion to compel arbitration resulted in greater prejudice to her specifically than to others. This alleged prejudice is tied to her underlying suit which is stayed at present. This is not, however, the result of the Insurers' moving for arbitration. *See Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) (noting that waiver may be found if "the non-moving party was prejudiced by the delay in seeking arbitration"). Ms.

[4] This action was dismissed ***without prejudice*** pursuant to stipulation of dismissal.

Williams cites no case law in support of the proposition that when a motion to compel arbitration in one suit results in the stay of another suit, the movant has thereby waived his right to compel arbitration. While Ms. Williams undoubtedly desires an expeditious resolution to her negligence suit, its stay is not a result of the Insurers' delay, thus the stay in ***that*** suit is not the type of prejudice that results in waiver of the right to compel arbitration in ***this*** suit.

Conclusion

This Court should deny the Petitions for Rehearing. The Opinion is consistent with existing law, and the result is dictated by the claims raised in the Complaints and the benefits sought by the Respondents directly arising out of the operative agency agreements.

Respectfully submitted,

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Columbia, South Carolina
April 20, 2016

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

RECEIVED
APR 20 2016
SC Court of Appeals

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.

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:

Appellants' Joint Return in Opposition to Respondents' Petition for Rehearing

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Administrative Assistant

April 20, 2016

The South Carolina Court of Appeals

Richard Wilson, Michael J. Antoniak, Jr., Marsha L. Antoniak, Anita L. Belton, Prescott Darren Bosler, Johnny Calhoun, Sallie Calhoon, 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, Defendants,

Of whom Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America are the Appellants,

And

Of whom Laurie Williams is a Respondent.

Appellate Case No. 2014-000946

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Young J.

J.

J.

Columbia, South Carolina

cc:
C. Mitchell Brown, Esquire
Robert Curt Calamari, Esquire
William C. Wood, Jr., Esquire
Thomas E. Hite, Jr., Esquire
Miles Edward Coleman, Esquire
Jane Hawthorne Merrill, Esquire

FILED
6/24/16

The South Carolina Court of Appeals

Richard Wilson, Michael J. Antoniak, Jr., Marsha L. Antoniak, Anita L. Belton, Prescott Darren Bosler, Johnny Calhoun, Sallie Calhoon, 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, Defendants,

Of whom Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America are the Appellants,

And

Of whom Laurie Williams is a Respondent.

Appellate Case No. 2014-000946

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing filed by Respondents and Laurie Williams in her individual capacity are both denied.

Thomas C. Hoff J.

H. Bruce Williams J.

Paula C. Thomas J.

Columbia, South Carolina

cc:
C. Mitchell Brown, Esquire
Robert Curt Calamari, Esquire
William C. Wood, Jr., Esquire
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FILED
June 27, 2016 SCT