IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

JOSHUA SITZER and AMY WINGER, SCOTT and RHONDA BURNETT, and RYAN HENDRICKSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC. Defendants.	)	Case No.: 4:19-cv-00332-SRB

PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO HOMESERVICES DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDIGNS

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Introduction

Defendants HomeServices of America, Inc., BHH Affiliates, LLC, and HSF Affiliates, LLC (collectively "the HSA Defendants") filed a Motion to Compel Arbitration and Stay Proceedings (the "Motion"). The arbitration provision was in a contract that was signed by non-party ReeceNichols and by Plaintiffs Rhonda and Scott Burnett concerning the sale of their home.

The Court should deny the Motion for three independent reasons: (1) the HSA Defendants are not signatories to the listing contract that contained the arbitration provision and may not enforce it under Missouri law; (2) the arbitration provision does not encompass Plaintiffs' claims; and/or (3) the HSA Defendants waived through litigation conduct their right to compel arbitration. Each of these gateway issues is committed to this Court's determination.

Factual Statements

The Burnetts hired Reece & Nichols Realtors, Inc. d/b/a ReeceNichols Real Estate (ReeceNichols) as the listing agent for their home.[1] The Agreement identified the Burnetts (as Sellers) and ReeceNichols (as Broker) as the parties. *Id.* ReeceNichols is not a defendant in this lawsuit, and the Agreement between the Burnetts and ReeceNichols does not reference HomeServices or any other Defendant in this litigation. Indeed, the HSA Defendants admit: "[N]either the named Plaintiffs nor any purported class members has any contract or direct relationship with HomeServices relevant to the claims asserted in this case." Motion at 2.

The Agreement contains an arbitration provision between the Burnetts and ReeceNichols that states:

> Any controversy or claim between the **parties** to this Contract, its interpretation, enforcement or breach (which includes torts claims arising from fraud and fraud in the inducement), will be settled by binding arbitration pursuant to and administered by the rules of the American Arbitration Association (AAA), or such neutral party agreed to by the **parties**. This agreement to arbitrate will be construed and

[1] *See* Exhibit H to Declaration of Holly Smith (Ex. B to Doc. # 218) (hereinafter "the Agreement").

> interpreted under the Federal Arbitration Act, 9 U.S.C. Section 1, et seq. While either **party** will have all the rights and benefits of arbitration, **both parties** are giving up the right to litigate such claims and disputes in a court or jury trial. The results, determinations, findings, judgments and/or awards rendered through such arbitration will be final and binding on the **parties** hereto and may be specifically enforced by legal proceedings. Judgment on the award may be entered into any court having jurisdiction.
>
> **Neither party** will be entitled to join or consolidate disputes by or against others in any arbitration, or to include in any arbitration any dispute as a representative or member of a class, or to act in any arbitration or any dispute as a representative or member of a class, or to act in any arbitration in the interest of the general public or in any private attorney general capacity. For controversies and claims that do not exceed the applicable jurisdictional limit of small claims court, **either party** may bring such claims in small claims court in lieu of arbitration. Additional information and resources regarding the use of arbitration may be found at www.adr.org.

(emphasis removed and added elsewhere). *See* Agreement at ¶ 13. And just above the signature lines for ReeceNichols and the Burnetts appears the following in bold uppercase letters: "**THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE *PARTIES*.**" *Id*. at p. 7 (emphasis added).

After Plaintiffs filed the case in April 2019, the HSA Defendants materially engaged in the litigation for nearly a year, all while being aware of and intending to rely on the arbitration provision in the Agreement.

Argument

I. HomeServices Cannot Enforce the Arbitration Provision.

A. This Court Determines Whether a Non-Signatory May Enforce the Agreement

"A dispute like the one here—over whether the parties agreed to arbitrate—will be resolved by the district court [u]nless the parties clearly and unmistakably provide otherwise." *Express Scripts, Inc. v. Aegon Direct Mktg. Servs.*, 516 F.3d 695, 701 (8th Cir. 2008) (quotation omitted, alteration in original); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010).

The HSA Defendants argue that the Agreement's reference to the rules of the American Arbitration Association ("AAA") provides that "clear[] and unmistakabl[e]" intent to delegate this presumptively court-decided gateway issue to an arbitrator's determination. Motion at 8–11 (citing *Fallo v. High-Tech Inst.*, 559 F.3d 874 (8th Cir. 2009), and *Eckert/Wordell Architects, Inc. v. FJM Properties of Willmar, LLC*, 756 F.3d 1098 (8th Cir. 2014)). But the HSA Defendants overlook critical differences between the narrow, party-centric Agreement here and the broad arbitration language in *Fallo* and *Eckert*.[2]

"Courts have consistently drawn a distinction between arbitration clauses specifically identifying the parties to which it applies, and a broader form of arbitration clause which does not restrict the parties." *Upper Lakes Towing Co. v. ZF Padova SpA*, Case No. 2:08-CV-63, 2009 WL 4730762, at *2 (W.D. Mich. Dec. 4, 2009). The decision in *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122 (9th Cir. 2013), is instructive.

In *Kramer*, a class sued Toyota for faulty car design, and Toyota sought to enforce an arbitration clause in the contract between class members and their dealerships, to which Toyota was a non-signatory. That arbitration clause, which also referenced the AAA Rules, narrowly stated "that '[e]ither you or we may choose to have any dispute between you and us decided by arbitration.'" *Kramer*, 705 at 1127. The court explained that the contract showed "Plaintiffs' intent to arbitrate arbitrability with the Dealerships and no one else," and the Dealerships were not defendants in that case. *Id.* The court concluded there was an "absence of clear and unmistakable

[2] The language in *Fallo* broadly required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement, or breach thereof, no matter how pleaded or styled," 559 F.3d at 876, and in *Eckert* the provision expansively covered "[a]ny claim, dispute, or other matter in question arising out of or related to [the contract]," *Eckert*, 756 F.3d at 1099. This expansive language is not present here.

Also, *Fallo* and *Eckert* incorporated specific AAA rules to govern their dispute. *Fallo*, 559 F.3d at 876 (adopting AAA Commercial Rules); *Eckert*, 756 F.3d at 1099 (adopting AAA Construction Industry Arbitration Rules). Here, the ReeceNichols provision does not specify which AAA Rules it is incorporating; thus, the Burnetts can hardly have agreed to a specific delegation, especially considering the AAA "Active Rules" website contains over forty different sets of potential rules. Agreement at ¶ 13; www.adr.org/active-rules (last visited March 14, 2020).

evidence that Plaintiffs agreed to arbitrate arbitrability with nonsignatories" and held "the district court had the authority to decide whether the instant dispute is arbitrable." *Id.*[3]

The arbitration language in the ReeceNichols-Burnetts Agreement is similarly limited to the "parties," which term is repeatedly used in the boxed arbitration provision and also in the bolded, uppercase language above the signature lines which restricts enforcement rights to "THE PARTIES." Agreement at ¶ 13; p. 7. Indeed, the HSA Defendants concede the Agreement's arbitration language is limited to "'Any Controversy or Claim' ***Between The Parties***." Motion at 3 (emphasis added). Like *Kramer*, this case simply does not present "clear and unmistakable" evidence that the Burnetts agreed to arbitrate arbitrability with any party other than ReeceNichols. Therefore, the Court must decide whether non-signatories can enforce the arbitration provision.

B. The HSA Defendants, As Non-Signatories, Cannot Compel Arbitration.

This Court must analyze the arbitration agreement according to Missouri state law.[4] Under Missouri law, the only parties who have standing to enforce a contract are the signatories to the contract or any third-party beneficiaries of that contract. *Verni v. Cleveland Chiropractic Coll.*, 212 S.W.3d 150, 153 (Mo. 2007) (citing *Andes v. Albano*, 853 S.W.2d 936, 942 (Mo. 1993)); *see also Morgan v. Ferrellgas*, No. 19-CV-910-SRB, 2020 WL 201059, at *4 (W.D. Mo. Jan. 13, 2020) (refusing to enforce arbitration agreement vis-à-vis non-signatories). "Non-signatories can enforce an arbitration agreement only in narrow, limited circumstances," *Morgan*, 2020 WL 201059, *4 (citing *PRM Energy Sys., Inc. v. Primenergy, LLC*, 592 F.3d 830, 834 (8th Cir. 2010)).

[3] Several courts have reached similar conclusions in these circumstances. *See, e.g.*, *The Republic of Iraq v. BNP Paribas USA*, 472 F. App'x 11, 13 (2nd Cir. 2012) (finding that whether a non-signatory can enforce an arbitration agreement is for the court to determine); *The Muecke Co., Inc. v. CVS Caremark Corp*., No. CV V-10-78, 2012 WL 12535439, at *23 (S.D. Tex. Feb. 22, 2012) (same); *Soto v. Am. Honda Motor Co.*, 946 F. Supp. 2d 949, 954 (N.D. Cal. Oct. 3, 2012) (same); *Upper Lakes Towing*, 2009 WL 4730762, at *4 (same).

[4] *See Bank of America, N.A. v. UMB Financial Services, Inc.*, 618 F.3d 906, 912 (8th Cir. 2010) ("state contract law governs the ability of nonsignatories to enforce arbitration provisions").

One circumstance may occur "when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory." *Id.* (citing *Tucker v. Vincent*, 471 S.W.3d 787, 794 (Mo. App. 2015)). In other words, "a non-signatory may be able to compel arbitration against a signatory to an agreement when 'the very basis of the claim against the non-signatory was that it had breached duties and responsibilities purportedly assigned it by the agreement.'" *Abdiana Props., Inc. v. Bengston*, 575 S.W.3d 754, 762 (Mo. App. 2019) (quoting *Netco, Inc. v Dunn*, 194 S.W.3d 353, 361 (Mo. 2006)). This circumstance can apply when the claims are "founded and intertwined with the agreement at issue." *In re Wholesale Grocery Prod. Antitrust Litig.*, 707 F.3d 917, 922-23 (8th Cir. 2013).

But "[i]n Missouri, courts have rejected the 'inextricably intertwined' argument." *Scottrade, Inc. v. Variant, Inc.*, No. 13-CV-1710, 2015 WL 4605734, *6 (Mo. App. 2015) (citing *Netco*, 194 S.W.3d at 362-61) (refusing to allow non-signatory to compel arbitration). "No matter how intertwined given claims are or how derivative one claim is of another, the parties must have agreed to arbitrate in order for one to compel arbitration." *Jones v. Paradies*, 380 S.W.3d 13, 18 (Mo. App. 2012) (refusing to allow non-signatory to compel arbitration). Missouri courts apply this rule because "[t]to compel arbitration of non-signatory claims—even those 'inextricably intertwined' with signatory claims—is inconsistent with the overarching rule that arbitration is ultimately a matter of agreement between the parties." *Springfield Iron & Metal, LLC v. Westfall*, 349 S.W.3d 487, 490 (Mo. App. 2011) (citing *Netco*, 194 S.W.3d at 361-62).

Relying on these principles, the Missouri Supreme Court has twice refused to apply the "inextricably intertwined" test and declined to enforce arbitration agreements for the benefit of non-signatories. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 436 (Mo. 2003) ("A party cannot be required to arbitrate a dispute that it has not agreed to arbitrate."); *Netco*, 194

S.W.3d at 361-62 (same).

Netco is analogous. In that case, the non-signatory to the agreement attempted to invoke the arbitration provision even though the plaintiffs were "not claiming that [the defendants] are liable for failing to perform some term of the [] agreement but, instead, are arguing, as noted again, that [one defendant] served as co-conspirator to misappropriate their business." 194 S.W.3d at 361. Thus, like Plaintiffs here, the plaintiffs in *Netco* asserted conspiracy claims unrelated to the underlying agreement. Indeed, the HSA Defendants admit that no "purported class member has ***any contract*** or direct relationship with HomeServices ***relevant to the claims asserted*** in this case." Motion at 2 (emphasis added). Relying on *Netco* and *Dunn*, other Missouri courts routinely deny a non-signatory's effort to compel arbitration.[5]

Nonetheless, even if the Court considers the "inextricably intertwined" test—a test rejected by Missouri courts—HomeServices' Motion fails. In *In re Wholesale Grocery*, the Eighth Circuit refused to allow non-signatories to enforce their co-conspirators' arbitration agreement where the underlying contracts contained the provision, but the plaintiffs were pursuing antitrust claims against the defendants. The court found that antitrust claims rooted in the applicable statutes "exist independent" of the arbitration agreements and the parties' underlying contracts. 707 F.3d at 923 (internal citations omitted). In doing so, the Eighth Circuit distinguished *PRM Energy Systems, Inc. v. Primenergy, L.L.C.*, 592 F.3d 830 (8th Cir. 2010)—cited by the HSA Defendants—on the ground that the plaintiffs' claims in *PRM Energy* arose directly from violations of the terms of a contract containing an arbitration clause. 707 F.3d at 923.

Like *In re Wholesale Grocery*, Plaintiffs in this case bring statutory antitrust claims and do

[5] *Abdiana Properties, Inc. v. Bengston*, 575 S.W.3d 754 (Mo. App. 2019) (denying non-signatory's effort to enforce arbitration); *Granger v. Rent-A-Center, Inc.*, 503 S.W.3d 295 (Mo. App. 2016) (same); *Scottrade*, 2015 WL 4605734, *6 (same); *Baier v. Darden Restaurants*, 420 S.W.3d 733, 738 (Mo. App. 2014) (same); *Jay Wolfe Used Cars of Blue Springs, LLC v. Jackson*, 428 S.W.3d 683 (Mo. App. 2014) (same); *Jones*, 380 S.W.3d at 13 (same).

not assert any violations of the terms of the Agreement. The HSA Defendants will argue the inverse because the Agreement references commissions and Plaintiffs' claims concern commissions. But "it is not enough that the contract is factually significant to the plaintiff's claims or has a 'but-for' relationship with them." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 Fed Appx. 704, 709 (10th Cir. 2011). Rather, a contract containing an arbitration provision must "form the legal basis of those claims." *Id.*

Lenox is instructive. *Lenox* was an antitrust case where the plaintiffs sought damages arising out of a price-fixing scheme. The contract between the parties—the same contract containing the arbitration provision—articulated the prices that were the subject of the alleged conspiracy. The Tenth Circuit declined to enforce the arbitration agreement, finding that even though the underlying contract identified the prices, it did not "form the legal basis of the [antitrust] claims." *Id.* Like *Lenox*, Plaintiffs' antitrust claims here do not arise out of the Agreement merely because the Agreement reflects the ***impact*** of the antitrust conduct.[6]

Moreover, the Agreement cannot "form the legal basis" of Plaintiffs' claims where HomeServices "is a complete stranger to the [Agreement], did not sign [it], is not mentioned in [it], and performs no function whatsoever relating to [its] operation." *PRM Energy Systems, Inc. v. Primenergy, LLC*, 592 F3d 830, 836 (8th Cir. 2010) (internal quotation omitted).[7] It is undisputed that HomeServices:

- did not sign the Agreement;
- does not have a direct corporate relationship with ReeceNichols because it is not the parent company of ReeceNichols. Instead, ReeceNichols is the subsidiary of a subsidiary of HomeServices—two steps removed from HomeServices;

[6] Even the commission section of the Agreement (the only part relied on by HomeServices) refers specifically to ReeceNichols by name—presumably to the exclusion of all other entities, including HomeServices. ("SELLER agrees to pay Reece & Nichols a commission . . ."). Agreement at ¶ 2(a).

[7] *PRM Energy* affirmed the district court's decision to compel arbitration, but it is distinguishable. In that case, the claims at issue were for tortious interference with, and inducement to breach, the agreement containing the arbitration provision; thus, the claims required the court to construe and apply the agreement. *PRM Energy*, 592 F.3d at 832.

- is not mentioned or referenced in the Agreement in any way, including as a beneficiary of the Agreement or as a member of the ReeceNichols corporate family;
- has no obligations under the Agreement; and
- performed no functions related to the Agreement.

Indeed, HomeServices legally ***could not*** have performed any functions under the Agreement because it does not conduct brokerage or agent services. Motion at 7; Declaration of Dana Strandmo at ¶ 4. Simply put, Plaintiffs' claims are not "founded and intertwined with" the Agreement.[8]

Additionally, that the HSA Defendants and ReeceNichols are members of the same corporate family is not a sufficient basis to compel arbitration. In *Jay Wolfe*, the plaintiffs signed two different agreements with two different corporate entities—both entities identified as Jay Wolfe, but one was an LLC and one a D/B/A. One of the agreements contained an arbitration provision; the other did not, and the plaintiffs sued only the entity that signed the agreement without the arbitration clause. The non-signatory tried to enforce the arbitration agreement arguing, in part, that the close corporate relationship demanded it and that the two agreements were intertwined. The court rejected the motion to compel. 428 S.W.3d at 690-91. Thus, even though the HSA Defendants and ReeceNichols may be in the same corporate family, Missouri law does not allow courts to ignore the corporate distinctions in order to compel arbitration.[9]

Finally, the plain language of the arbitration provision limits its application. The provision

[8] The relationship expressed in the Agreement reinforces this point. Courts find that non-signatories may enforce arbitration provisions where the relationship "involves an ongoing relationship where signatory [] promises could only be fulfilled by the future conduct" of the non-signatories. *CD Partners*, 424 F.3d at 800. In other words, courts are less inclined to allow non-signatories to enforce arbitration agreements in "a one-shot transaction in which the [signatory's] obligations are specific and are, essentially, performed in full at the closing, or soon thereafter." *Id.* (internal quotation omitted). But that is precisely what the Agreement is—a discrete contract for a finite amount of time for a limited service, and one that does not contemplate any future conduct or performance by HomeServices. *See* Agreement at p. 1 (limiting duration of contract); p. 1-2 (listing broker's limited duties and responsibilities).

[9] Other courts have refused to enforce an arbitration provision for a non-signatory parent corporation. *See Belnap v. Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017); *Taylor v. Advanced Call Ctr. Techs., LLC*, No. 17-1805, 2017 WL 6988652, at *3 (N.D. Ill. Dec. 20, 2017); *Springfield Iron & Metal, LLC*, 349 S.W.3d at 490.

applies only to "[a]ny controversy or claim ***between the parties to this Contract***, its interpretation, enforcement or breach (which includes tort claims arising from fraud and fraud in the inducement) . . ." Agreement at ¶ 13 (emphasis added). The conclusion of the Agreement further emphasizes this, as it states in bolded, uppercase lettering that the arbitration provision "**MAY BE ENFORCED BY *THE PARTIES***." Agreement at p. 7 (emphasis added). The HSA Defendants admit that they are not parties to ***any*** contract with the Burnetts or any other class member. Thus, the provision (1) limits who is bound by it and can enforce it, and (2) does not identify or include any categories of non-signatories—an important factor in other cases. *See Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1356 (11th Cir. 2017) (refusing to allow non-signatory to compel arbitration where the agreement was limited to "disputes arising between the [parties]"); *cf. CD Partners, LLC v. Grizzle*, 424 F.3d 795, 797 (8th Cir. 2005) (allowing non-signatory to enforce arbitration provision, but only where the provision referenced other third parties and the non-signatory was included within the category of third parties).

C. The Arbitration Provision Does Not Encompass Plaintiffs' Antitrust Claims

Unlike arbitration provisions that apply to any claim "arising out of" or "relating to" the *agreement*, the provision here limits its application only to claims "between the parties" concerning the "interpretation, enforcement or breach" of the Agreement. Agreement at ¶ 13. The provision further specifies the outer bounds of the claims that fall within its scope by specifying that it "includes tort claims arising from fraud and fraud in the inducement." *Id.* Plaintiffs, however, do not seek to interpret, enforce, or remedy a breach of the Agreement. The provision's limiting language confines the arbitration provision's reach to the enumerated topics, especially where it does not contain expansive "arising out of" or "relating to" language that is found in other

arbitration provisions.[10] Thus, even if the HSA Defendants could enforce the arbitration provision, which they cannot, Plaintiffs' claims are beyond that provision's purview. To hold otherwise would allow the HSA Defendants to improperly expand the scope of the arbitration provision. *Triarch Indus., Inc., v. Crabtree*, 158 S.W.3d 772, 776 (Mo. 2005) (ambiguous arbitration provisions must be construed against the drafter).

II. The HSA Defendants Waived Arbitration Through Litigation Conduct.

A third and independent basis for denying the Motion is that the HSA Defendants waived arbitration through their litigation conduct.[11]

A. The Court Determines Litigation-Conduct Waiver.

In contending that an arbitrator must determine "[a]ny possible argument on waiver or delay," the HSA Defendants cite a single case: *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). Motion at 11 (citing *Howsam*, 537 U.S. at 84).[12] The Eighth Circuit has not directly addressed *Howsam* and its impact on litigation-conduct waiver, but every Circuit Court that has considered the issue has held that waiver by participation in litigation is for judicial

[10] Courts frequently rely on this expansive language to broadly enforce arbitration agreements, but it is not present here. *Cf. PRM Energy*, 592 F.3d at 836-37 (discussing expansive interpretation given to "arising out" clauses); *Eckert*, 756 F.3d at 1099 (provision encompassed all disputes "arising out of or related to" the contract—it did not limits scope to disputes about the contract).

[11] *See In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices, & Prod. Liab. Litig.*, 828 F. Supp. 2d 1150, 1162 (C.D. Cal. Dec. 13, 2011) (even if non-signatories could enforce the arbitration agreement, defendant could not compel arbitration because defendant waived right to seek arbitration).

[12] To the extent the HSA Defendants contend the Agreement's reference to the Rules of the AAA show that even litigation-conduct waiver has been delegated to the arbitration for decision, the cases discussed below reject that argument. *See, e.g.*, *Martin v. Yasuda*, 829 F.3d 1118, 1120, 1123 (9th Cir. 2016) (noting the arbitration agreement referred to being conducted under the Rules of the AAA and holding that "courts generally decide whether a party has waived his right to arbitration by litigation conduct," and that presumption may only be overcome when the parties "place clear and unmistakable language to that effect in the agreement" and the parties "did not do so here").

determination.[13] The Court should adopt the majority view for three reasons.[14]

First, *Howsam* referred to waiver in the context of failing to comply with a condition precedent of a contract; the Court did not discuss or apply waiver in the context of participation in litigation. *See, e.g., Ehleiter*, 482 F.3d at 219 (*Howsam* "was referring only to waiver, delay, or like defenses arising from noncompliance with contractual conditions … not to claims of waiver based on active litigation").

Second, *Howsam* found that "parties to an arbitration contract would normally expect a forum-based decisionmaker [an arbitrator] to decide forum-specific procedural gateway matters." 537 U.S. at 86. "Applying that rationale . . . the parties to a pending litigation would expect the forum-based decision maker, that is, the judge to decide whether a litigation-based waiver had occurred."[15] Further, the court is "comparatively more expert" to interpret the participation and stage of litigation when a party seeks to compel arbitration. *Ehleiter*, 482 F.3d at 218.[16]

Third, referring the threshold question of waiver to an arbitrator would violate the FAA's central purpose of efficient dispute resolution. *See Marie*, 402 F.3d at 14 ("allowing courts to decide waiver issues . . . due to litigation related activity [] furthers a key purpose of the FAA").

The Court should adopt the majority view and determine "that the Supreme Court in

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[13] *See e.g., Vine v. PLS Fin. Servs., Inc.*, 689 Fed. Appx. 800, 803 (5th Cir. 2017) ("[u]nlike other types of waiver, litigation-conduct waiver implicates courts' authority to control *judicial* procedures or to resolve issues . . . arising from *judicial conduct*"); *Martin v. Yasuda*, 829 F.3d 1118, 1123 (9th Cir. 2016) (same); *Grigsby & Assoc., Inc. v. M Sec. Inv.*, 664 F.3d 1350, 1353 (11th Cir. 2011) (same); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217-18 (3rd Cir. 2007) ("the Supreme Court did not intend its pronouncements in *Howsam* . . . to upset the traditional rule that courts, not arbitrators, should decide the question of whether a party has waived its right to arbitrate by actively litigation the case in court"); *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 14 (1st Cir. 2005).

[14] Plaintiffs also incorporate the previous section concerning who decides arbitrability; the same analysis applies here.

[15] Thomas J. Lilly, Jr., PARTICIPATION IN LITIGATION AS A WAIVER OF THE CONTRACTUAL RIGHT TO ARBITRATE: TOWARD A UNIFIED THEORY, 92 Neb. L. Rev. 86, 114 (2013). *See also Ehleiter*, 482 F.3d at 219.

[16] "[A] court, not an arbitrator, is better suited to address questions of wavier based on litigation-related activity" and "should remain free to control the course of proceedings before it and correct abuses of those proceedings." *Good Samaritan Coffee Co. v. LaRue Distrib., Inc.*, 275 Neb. 674, 684 (Neb. 2008).

Howsam . . . did not intend to disturb the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court." *Marie*, 402 F.3d at 14.

B. The HSA Defendants Waived Arbitration.

"Parties can waive their contractual right to arbitration even if their agreement to arbitrate is valid and enforceable." *Erdman Co. v. Phoenix Land & Acq., LLC*, 650 F.3d 1115, 1117 (8th Cir. 2011). A party waives its right to arbitration when the party: "(1) knew of its existing right to arbitration; (2) acted inconsistently with such right; and (3) prejudiced the other party by its inconsistent actions." *Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.*, 589 F.3d 917, 920 (8th Cir. 2009) (citation omitted).

i. The HSA Defendants Knew About the Arbitration Provision.

It is undisputed that the HSA Defendants had possession of the arbitration provision early in the litigation; the company admits it. *See* Motion at 6. That possession imputes knowledge to the HSA Defendants for the purposes of waiver. *See Messina v. North Central Distributing, Inc.*, 821 F.3d 1047, 1050 (8th Cir. 2016) (a party has knowledge of an arbitration agreement if that party has possession of such arbitration agreement).

ii. The HSA Defendants Acted Inconsistently with the Arbitration Provision.

The HSA Defendants acted inconsistently with their assertion of arbitration. "To safeguard its right to arbitration, a party must do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration." *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1118 (8th Cir. 2011). "A party acts inconsistently with its right to arbitrate if the party substantially invokes the litigation machinery before asserting its arbitration right." *Hooper*, 589 F.3d at 921 (quoting *Lewallen v. Green Tree*

Serv., LLC, 487 F.3d 1085, 1090 (8th Cir. 2007)).[17] "[F]ailure . . . to move promptly for arbitration is powerful evidence that [it] made [its] election against arbitration." *Hooper*, 589 F.3d at 924. Here, HomeServices waited nearly a year (305 days) from the filing of this action to file its Motion. During that time, the HSA Defendants:

- filed a joint motion to transfer venue;
- filed a joint motion to dismiss Plaintiffs' First Amended Complaint;
- filed an Answer;
- negotiated and signed on to a Protective Order and ESI Protocol;
- signed on to two agreed-upon scheduling orders setting deadlines for the litigation;
- traveled to and participated in an in-person scheduling conference with the Court;
- participated in multiple telephone conferences with the Court;
- submitted initial disclosures under Fed. R. Civ. P. 26;
- submitted a Corporate Disclosure Statement under Local Rule 7.1;
- responded to document requests and interrogatories;
- engaged in multiple meet and confers with Plaintiffs' counsel concerning the HSA Defendants' discovery responses;
- engaged in multiple meet and confers with Plaintiffs' counsel regarding *Plaintiffs'* discovery responses;
- produced documents; and
- engaged in two telephone conferences with the parties' mediator.

Under Eighth Circuit precedent, this conduct is inconsistent with arbitration and constitutes waiver. *See Messina v. N. Central Distrib., Inc.*, 821 F.3d 1047, 1051 (8th Cir. 2016) (defendant waived arbitration after waiting eight months to file motion to compel); *Southeastern Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963, 969 (8th Cir. 2009) (defendant waived arbitration by moving for judgment on the pleadings and responding to discovery requests); *Kelly v. Golden*, 352 F.3d 344, 349-50 (8th Cir. 2003) (defendant waived arbitration by litigating the merits of the lawsuit for over a year and did not seek arbitration until

[17] In *Eckert*, a case relied on by the HSA Defendants, the opposite occurred: the party did not challenge the arbitrability of the dispute until ***after*** it litigated the matter in the arbitral forum for over a year. 756 F.3d at 1099.

after the court ruled against the defendant on various motions in the case).[18]

iii. Plaintiffs Will be Prejudiced if Forced to Arbitrate.

"A party is so prejudiced when the parties use discovery not available in arbitration, when they litigate substantial issues on the merits, or when compelling arbitration would require a duplication of efforts." *Southeastern Stud*, 588 F.3d at 969; *see also Messina*, 821 F.3d at 1051 (quoting *Kelly*, 352 F.3d at 349). Plaintiffs are prejudiced because they have served and pursued discovery related to the HSA Defendants; responded to two significant motions; and expended considerable time and resources in participating in numerous "meet and confer" telephone conferences with the HSA Defendants regarding class discovery issues.

The prejudice is particularly strong where the HSA Defendants are clearly seeking a "do over" in a new forum—a result that courts reject. *See Messina*, 821 F.3d at 1051 ("Yosemite only moved to compel arbitration after it lost the motion to transfer venue. The timing of Yosemite's actions demonstrates that it 'wanted to play heads I win, tails you lose,' which 'is the worst possible reason' for failing to move for arbitration sooner than it did.").[19] Indeed, this is the HSA Defendants' ***third*** attempt to stop litigation in this forum: first they sought to transfer the case to the Northern District of Illinois, and then second, when their transfer maneuver failed, they sought to dispose of the case on the merits through their motion to dismiss. This Motion should be strike three.

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[18]The HSA Defendants did not "preserve" their ability to seek arbitration by referring in their Motion to Dismiss and in their Answer to the possibility of later doing so. *See Hooper*, 589 F.3d at 923 (a party cannot rely on a statement in a motion to dismiss that it might seek arbitration if the motion to dismiss is denied because "[a] reservation of rights is not an assertion of rights"); *see also In re Mirant Corp.*, 613 F.3d 584, 591 (5th Cir. 2010).

[19] *See also Hooper*, 589 F.3d at 923 (compelling arbitration after ruling on motion to dismiss would require the parties to duplicate efforts and reargue issues that have been ruled on by the district court); *Lewallen*, 487 F.3d at 1092 ("arbitration provision . . . does not go so far as to 'allow or encourage parties to proceed . . . sequentially in multiple forums'"); *Kelly*, 352 F.3d at 350 (same); *see also*; *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) (allowing party to weigh its options is "the worst possible reason for delay").

Plaintiffs have actively litigated this case against the HSA Defendants for nearly a year, yet only now do they seek to compel arbitration. The Court should rebuff their effort.

III. Even If Arbitration Is Compelled, No Stay Should Be Granted

The Court should deny the HSA Defendants' argument for an extraordinary stay of all discovery against them because the other Plaintiffs have never dealt with the HSA Defendants and have claims they are entitled to pursue against them. Indeed, the requested stay runs counter to *In re Wholesale Grocery*, 707 F.3d 917. In that case, the plaintiffs were five retail grocery stores (Retailers) who were attempting to bring class-action antitrust claims against one of two wholesale grocers — whichever one the Retailer did ***not*** have a contract with. 707 F.3d at 919. Their contracts with the other Wholesaler did have an arbitration clause, and the Wholesalers sought to compel the claims into arbitration. The Eighth Circuit rejected that result and held that the retailers could maintain their antitrust claims in federal court against the other wholesaler defendant with which they did not do business and did not have a contract with an arbitration clause.

Applying this precedent to this case, Mr. Sitzer, Ms. Winger and Mr. Hendrickson, on behalf of all class members who had no dealings with HomeServices, may prosecute their claims against the HSA Defendants. A categorical stay of all claims against the HSA Defendants would unduly prejudice these other Plaintiffs, precluding them from obtaining discovery and pursuing their claims in litigation merely because certain other Plaintiffs have claims that the HSA Defendants claim are subject to arbitration. The results in other multi-defendant antitrust conspiracy cases are similar.[20] The Court should deny a total stay of the litigation against the HSA

[20] The HSA Defendants generally rely on single-defendant cases with little bearing on this multi-defendant antitrust conspiracy involving thousands of class members who never dealt with the HSA Defendants. Motion at 13-15. In contrast, *CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc.*, 381 F.3d 131 (3d Cir. 2004); *McLellan v. Fitbit, Inc.*, No. 16-CV-36, 2017 WL 4551484 (N.D. Cal. Oct. 11, 2017), and *In re Online Travel*, 953 F. Supp. 2d 713 (N.D. Tex. June 14, 2013) (which the HSA Defendants cite, Motion at 13), and *Nitsch v. DreamWorks Animation SKG Inc.*, 100 F. Supp. 3d 851, 853–54 (N.D. Cal. Apr. 24, 2015), are cases involving multiple defendant antitrust conspiracies where a plaintiff had a contract and an arbitration agreement with a single defendant. In those cases, the court ordered

Defendants.

Conclusion

For the reasons set forth herein, the Court should deny the Motion to Compel Arbitration [Doc. # 217].

Dated: March 30, 2020

Respectfully submitted by:

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arbitration for the plaintiff's claims against ***just that*** defendant, and those defendants remained part of the litigation and subject to discovery from other class representatives who did not have contracts and arbitration agreements with them.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March 2020, a copy of the foregoing was filed on the Court's electronic filing system which sends notification of the same to all counsel of record.

/s/ Matthew L. Dameron
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