

IN THE SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO. DA 16-0334

ROY KAUFMAN and GEORGE KAUFMAN,
PARTNERS, KAUFMAN BROTHERS

Plaintiff and Appellees,

v.

BEARD INSURANCE AGENCY, INC.,
and KENNETH M. BEARD

Defendants and Appellants.

OPENING BRIEF OF DEFENDANTS/APPELLANTS

On Appeal from the Thirteenth Judicial District Court,
Yellowstone County, Montana
District Court Cause No. DV 15-0852
Hon. Rod Souza, Presiding

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Abbreviations

App. = Appendix
DC Dkt = District Court Docket

I. STATEMENT OF ISSUES PRESENTED

The District Court erred in not compelling arbitration according to federal law, and the Kaufmans' claim for indemnity fails as the undisputed value of their harvested wheat crop, \$148,249, exceeds the Federal Multiple Peril indemnity guarantee of \$101,503. Specifically at issue here is where the District Court erred in not holding:

1. The Federal Crop Insurance Act, specifically 7 U.S.C. § 1506(l), preempts Montana law barring arbitration provisions in insurance contracts.
2. Arbitration of the Kaufmans' claims under the Federal Crop Insurance arbitration provision is required under federal law.

II. STATEMENT OF THE CASE

Plaintiff/Appellees Roy and George Kaufman and their general partnership, the Kaufman Brothers, (collectively the "Kaufmans") brought this action against Rain & Hail's agent, Beard Insurance Agency, Inc. and Ken Beard personally (collectively "Beard"), following Rain & Hail LLC's ("Rain & Hail") denial of a federally subsidized Multiple Peril Crop Insurance ("MCPI") indemnity payment claim where their harvest of \$148,249 exceeded their guarantee of \$101,503. The Kaufmans only named the Rain & Hail insurance agent, Beard, as the defendant and not Rain & Hail in seeking their claimed indemnity payment. Following Beards' Motion to Compel

Arbitration, the Kaufmans made an arbitration demand directly on Rain & Hail arising from the same denial of indemnity payment. The District Court denied Beards' Motion to Compel Arbitration and Beard appeals.

Specifically, the District Court erred as a matter of law in holding there “was the absence of clear Congressional intent to preempt in the [Federal Crop Insurance Act],” not citing the explicit preemption of 7 U.S.C. § 1506(l) which provides: “[s]tate and local laws or rules shall not apply to contracts, agreements, or regulations of the [FCIC]” (DC Dkt. 15 at 7). As a result, the District Court also failed to analyze the inapplicability of the McCarran-Ferguson Act, 15 U.S.C. §1011-1015, *et.seq.*, in light of Congress' clear intent for preemption, with the Federal Crop Insurance Act, 7 U.S.C. §1501, *et.seq.*, dealing with the “business of insurance.” (*Id.*). Further, the court erred in not considering Rain & Hail's determination that no indemnity payment was owed to the Kaufmans, which forms the basis of their claims and requested relief of “indemnification . . . under the terms of the policy” sought against Beard, Rain & Hail's agent. (*Id.* at 11; App. 1 at 11). Such a disagreement over Rain & Hail's determination is required to be submitted to arbitration under the plain language of the Policy and the principles of agency and estoppel. *Infra.*

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III. STATEMENT OF THE FACTS

A. The Kaufmans' Claims

Plaintiff/Appellees the Kaufmans brought this claim against Rain & Hail agent Beard arising out of the Kaufmans' federally administrated, reinsured, and subsidized MPCCI policy for their Crop Year 2013 Golden Valley County wheat crop. *Complaint* (App. 1 at ¶¶ 1, 6-8). Central to their claim, the Kaufmans allege that Beard breached "the [t]erms of the [p]olicy, [r]egulation and Federal [r]equirements of the Federal Crop Insurance Corporation." (*Id.* at 9). They seek recovery from Beard in his capacity as Rain & Hail's agent of "the amount of \$247,178.00 under the terms of the policy." (App. 1 at 9, 10). The Kaufmans do not dispute their harvest of \$148,249 in wheat is less than the revenue guarantee of \$101,503, but maintain that they are owed an indemnity payment under the policy. (*Id.* at 11).

The Kaufmans also included a range of misrepresentation-sounding state law claims arising out of the procurement of MPCCI through Beard (App. 1). Yet, the Kaufmans did not make a claim of negligent failure to procure against Beard. The factual basis of the Kaufmans allegations are that Beard, in his capacity as an agent for insurer Rain & Hail, was not able to accurately calculate the crops' federally established transitional yield based upon the incomplete information given to him by the Kaufmans; when the complete information was provided by the Kaufmans to

Beard, Rain & Hail determined no indemnity was owed. (App. 2 at 3-5).

The Kaufmans sought MPCCI coverage from Mr. Beard, a Rain & Hail MPCCI agent, for a new wheat crop in Golden Valley County for Crop Year 2013.(App. 1 at ¶ 1).The Kaufmans were well experienced with the MPCCI program had continuously obtained MPCCI through Mr. Beard since 2000 for crops in Carbon and Yellowstone County. (App. 2 at 3). Rain & Hail offers federal subsidized MPCCI through its network of agents; these policies are in turn reinsured by the Federal Crop Insurance Corporation (“FCIC”), administered through the Risk Management Agency (“RMA”). The Kaufmans’ request for additional coverage was for a new Golden Valley summerfallow spring wheat crop, located on property allegedly coming out of the Conservation Reserve Program (“CRP”). *See* 7 CFR § 1410.3. While enrolled in CRP the fields would have been out of production and not seeded to wheat or any other small grain crop. *Id.*

The federally subsidized MPCCI coverage is distinct from hail coverage as it is underwritten by the federal government, drastically reduces premiums for the insureds, and covers a range of perils from drought to natural disaster. *See Buchholz v. Rural Community Ins. Co.*, 402 F. Supp.2d 988, 992 (W.D. Wis. 2005). The Kaufmans were knowledgeable of MPCCI coverage as they had obtained it through Mr. Beard for 13 years and signed their “Multiple Peril Crop Insurance Application

and Reporting Form” for the Golden Valley crop on March 11, 2013. (App.2(A)). Pursuant to their request for additional MPCCI coverage, Mr. Beard submitted the Kaufmans’ application for coverage on the new property to Rain & Hail. (App. 2 at 4).

At the initial March 11, 2013 meeting where the Kaufmans requested the MPCCI insurance for the new Golden Valley crop, the Kaufmans provided Mr. Beard with incomplete and limited information regarding the property: it was 2,600 acres located in Golden Valley County. (App. 1(A); App. 2 at 3-4). Without the necessary legal descriptions from the Kaufmans, Mr. Beard entered the limited information into the Rain & Hail Coverage Analyzer proprietary computer software. (App. 2 at 4). Per the RMA, in Crop Year 2013 Golden Valley County was subdivided into three different base transitional yields for summerfallow spring wheat, determined by the property’s location within the county: 16 bushels per acre (“bu/ac”), 12 bu/ac, and 8 bu/ac. (App. 2(B)).

The transitional yields are set by the RMA in administering the FCIC. 7 CFR § 400.52(p). The FCIC/RMA promulgates maps which delineate the intra-county boundaries for transitional yields for that crop year, by crop, practice, and type. *Id.* Producers who are new or do not have an established yield history can avail themselves to these transitional yields while they establish their Actual Production

History (“APH”) through documenting and reporting their annual harvests. *Id.* The APH, which is customized to each insured farmer, replaces the transitional yield and provides a personalized basis for coverage. 7 CFR § 400.52(e). The APH requires four to ten years of documented yields to take effect. In the interim, a percentage of the transitional yield applies, as calculated through the federal regulations and materials. *Id.*

Without the Kaufmans providing the property’s legal descriptions, the Rain & Hail Coverage Analyzer automatically defaulted to the highest transitional yield available for summerfallow spring wheat in Golden Valley County, 16 bu/ac, and did not alert the parties to multiple subdivisions in the county. (App. 2 at 4). The Coverage Analyzer print-off included explicit disclaiming language:

This is an estimate and does not constitute a binding offer of insurance. Actual crop insurance premiums may differ based on final variables which include, but are not limited to: high risk acres, written agreements, supplemental rates, actual production history, options, acres planted, units, and Practice/Type/Variety.

(App.1(A))(emphasis added). Given that the Kaufmans did not provide the indispensable legal descriptions necessary for the actual transitional yield calculations, the Kaufmans returned to Beard’s office to complete the insurance application and submit the actual legal descriptions of the property. (App. 2 at 4). Based on these descriptions, Rain & Hail applied the actual RMA established

transitional yield, setting both their premium (\$16,098.00) and guaranteed revenue (\$101,503.00). The correct premium and guarantee were reflected on the Summary of Coverage sent to the Kaufmans in late June 2013. (App. 1(C)). Premiums are not payable until the fall, after harvest. RMA, *Crop Year 2013 Special Provisions, Wheat, Golden Valley County, Montana* (Jun. 26, 2012).

Based on the actual transitional yield established by the RMA, under the MPCCI policy it is undisputed the Kaufmans were guaranteed revenue of \$101,503. *Id.* In 2013, the Kaufmans harvested a wheat crop with a value of \$148,249, exceeding the revenue guarantee by \$46,746. *Heilig Ltr. to Towe* (Jan.30, 2015) (App.2(C)). The calculation of the Kaufmans' harvest yield is not in dispute, however, they continue to disagree with Rain & Hail's determination of no indemnity and claim they are owed "indemnification in the amount of \$248,178.00 under the terms of the policy" (App. 1 at 11). As such, the Kaufmans' claim for indemnity was denied by Rain & Hail, informing them that if they "disagree with this determination" they must initiate arbitration under Paragraph 20 of their policy. (App.2(C)). Instead, the Kaufmans brought this instant claim against the Rain & Hail Agent, Beard.

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B. Background on Federal Crop Insurance

The Federal Crop Insurance program is a New Deal era program which continues to be modernized and updated to serve the needs of the nation's farmers and its food supply. The Tenth Circuit Court of Appeals in *State of Kan. ex rel. Todd v. U.S.* detailed the background of the program through the early 1990s:

The Federal Crop Insurance Act was enacted in 1938 as part of President Franklin Delano Roosevelt's New Deal legislation to rescue and preserve agriculture in order to restore it to its previous position of strength in the national economy. Congress significantly expanded the federal crop insurance program in 1980, and the program remains today "one of a panoply of government programs designed to encourage, by subsidy if necessary, the nation's agricultural business." Its express purpose is "to promote the national welfare by improving the economic stability of agriculture through a system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance." 7 U.S.C. § 1502.

The FCIC, a wholly government-owned corporate body, is an agency within the Department of Agriculture designated by Congress to implement the crop insurance program. *Id.* § 1503. The FCIC has "such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the [FCIC] and all such incidental powers as are customary in corporations generally." *Id.* § 1506(j). The Secretary of Agriculture and the FCIC are authorized to issue regulations necessary to carry out the provisions of the Act. *Id.* § 1516(b).

* * *

In order to foster participation, additional premium subsidies were authorized by Congress, and the program was expanded in its geographical area and number of commodities covered by insurance. 7 U.S.C. § 1508. Congress further recognized that in order to achieve its goal of increased participation, the FCIC should make better use of the

experience and resources of private insurance companies. Congress wanted to avoid building another huge federal agency when the private sector could help, with the encouragement of federal reinsurance contracts. Congress directed the FCIC “to provide reinsurance, to the maximum extent practicable.” 7 U.S.C. § 1508(h). *See id.* § 1507(c). Today, more than 85% of the federal insurance for producers of agricultural commodities is through these reinsurance contracts.

995 F.2d 1505, 1507-1508 (10th Cir. 1993) (internal non-statutory citations omitted).

Since then, Congress and the RMA, in its administration of the FCIC and the Federal Crop Insurance program as a whole, has continued to update the Act and promulgate regulations consistent with the federal control and oversight of the program.¹

C. Arbitration Under Policy

All MPCCI policies have uniform Basic Provision policy forms, promulgated by the RMA/FCIC, which include mandatory arbitration of disputes arising under the policy. See 7 CFR §§ 457.8, 101. The Crop Year 2013 policy included the following arbitration requirement:

20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review.

(a) If you and we fail to agree on any determination made by us except those specified in section 20(d) or (e), the disagreement may be resolved through mediation in accordance with section 20(g). If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except

¹ See RMA, *History of the Crop Insurance Program*, <http://www.rma.usda.gov/aboutrma/what/history.html> (last accessed Aug. 23, 2016).

as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose.

* * *

(1) All disputes involving determinations made by us, except those specified in section 20(d) or (e), are subject to mediation or arbitration. However, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

(App. 2(E)); 7 CFR § 457.8. The purpose for compelling all insureds submit to arbitration under the Federal Arbitration Act (9 U.S.C. §1, *et.seq*)("FAA") is so the FCIC/RMA can keep close administration and oversight of the policy provision and regulations governing the program pursuant to 7 CFR part 400, subpart x.

All MPCCI policies have uniform Basic Provision policy forms, including the arbitration requirement, which are also promulgated as part of the generally applicable regulations of the RMA/FCIC. *See* 7 CFR §§ 457.8, 101. "Congress has expressed an unambiguous desire to encourage private insurers in this market. Pursuant to federal law, each and every one of these private insurance contracts has an arbitration provision." *See Nobles v. Rural Community Ins. Services*, 122 F.Supp.2d 1290, 1300 (M.D. Ala. 2000)(internal citations omitted). As the arbitration provision is a long-established part of federal law, each insured is charged with

knowledge of the provision. *Id.*

D. Preemption of State Law

When congress passed the Federal Crop Insurance Act, it made the preemption of conflicting state laws explicit and clear, necessary for uniform governance of the nation-wide program. 7 U.S.C. §1506(l) provides:

State and local laws or rules shall not apply to contracts, agreements, or regulations of the [FCIC] or the parties thereto to the extent that such contracts, agreements, or regulations provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts, agreements, or regulations.

The federal regulations explicitly preempt state court actions for claims “arising out of actions or inactions” of crop insurance “agents” under the federal policy or regulations. 7 CFR § 400.352. Absent the condition precedent of arbitration and RMA approval, state courts cannot award damages relating to error or omissions relating to the federal regulatory apparatus governing the MPCCI program. 7 CFR § 400.352 states:

State and local laws and regulations preempted.(a) No State or local governmental body or non-governmental body shall have the authority to promulgate rules or regulations, pass laws, or issue policies or decisions that directly or indirectly affect or govern agreements, contracts, or actions authorized by this part unless such authority is specifically authorized by this part or by the Corporation.

(b) The following is a non-inclusive list of examples of actions that State or local governmental entities or non-governmental entities are

specifically prohibited from taking against the Corporation or any party that is acting pursuant to this part. Such entities may not:

* * *

(4) Levy fines, judgments, punitive damages, compensatory damages, or judgments for attorney fees or other costs against companies, employees of companies **including agents** and loss adjustors, or Federal employees **arising out of actions or inactions** on the part of such individuals and entities authorized or required under the Federal Crop Insurance Act, **the regulations**, any contract or agreement authorized by **the Federal Crop Insurance Act or by regulations, or procedures issued by the Corporation** (Nothing herein precludes such damages being imposed against the company if a determination is obtained from FCIC that the company, its employee, agent or loss adjuster failed to comply with the terms of the policy or procedures issued by FCIC and such failure resulted in the insured receiving a payment in an amount that is less than the amount to which the insured was entitled).

(Emphasis added). The regulation precludes recovery from MPCCI “agent[s]. . . fail[ing] to comply with the terms of the policy or procedures issued by FCIC . . .” unless expressly authorized by the RMA through review of the arbitration decision. *Id.* Through the system of arbitration for factual findings and RMA pre-approval of any damage award, the federal government maintains tight control of its highly subsidized crop insurance program.

On the issue of the arbitration of state law claims, the RMA/FCIC has promulgated Final Agency Determinations (“FAD”) 240 (App. 3(A)) and FAD-251 (App. 4(A)), clarifying the scope of the preemptive damage limitations found in 7 C.F.R. §§ 400.176(b), 400.352, and 457.8. Under federal law, the FADs are “binding

on all participants in the Federal crop insurance program” and preclusive on the interpretation of the Crop Insurance Act and its regulations. 7 CFR § 400.765. On August 26, 2015, the RMA issued FAD-240, concerning the applicability of damage limitations on state law claims, such as misrepresentation, and the requirement of pre-approval of damages for these claims by the RMA following completion of arbitration.

The issues addressed in FAD-240 arise out a series of opinions from Tennessee state courts (*Plants, Inc. v. Fireman's Fund Ins. Co.*, 2012 WL 3291805 and 2012 WL 3326295 (Tenn. App. Aug. 13, 2012)), which held in part that state law misrepresentation claims against the MPCCI insurers and agents were not subject to the regulatory pre-authorization of damages and therefore were not subject to arbitration. The RMA rebuked the Tennessee court, determining that such state law claims required RMA pre-approval prior to proceeding on damages in state court. The requester, which the RMA agreed with, posited its interpretation of the regulations as:

The requester interprets 7 CFR § 400.176(b) (and the equivalent language in section 20(i) of the Basic Provisions to the extent that it contains a similar requirement) to preempt any state law claims for extracontractual damages that FCIC has not approved, since any requests for such damages must include an FCIC determination.

Alternatively, the requester interprets 7 CFR § 400.176(b) to require the

Plaintiff in a state court proceeding to obtain a determination from FCIC before any claim for compensatory damages or therein can be awarded, even when those extracontractual damages claims are based upon state law tort claims. In other words, **if a policyholder asserts a tort claim that relates in any way to a Federally reinsured crop insurance policy, such as misrepresentation regarding policy requirements, the policyholder must obtain an FCIC determination before he may recover any extracontractual damages.**

(Emphasis added). The RMA agreed and clarified that pre-approval by the FCIC was indeed necessary under the regulations prior to seeking damages in state court:

FCIC agrees with the requestor. Any claim, including a claim for extracontractual damages solely arising from a condition related to policies of insurance issued pursuant to the Federal Crop Insurance Act (Act), may only be awarded if a determination was obtained from FCIC in accordance with section 20(i) of the Basic Provisions and § 400.176(b).

FCIC also agrees that 7 CFR § 400.176(b), and the equivalent language in section 20(i) of the Basic Provisions preempts any state law claims that are in conflict. That means that to the extent that State law would allow a claim for extracontractual damages, such State law is preempted and extracontractual damages can only be awarded if FCIC makes a determination that the AIP, agent or loss adjuster failed to comply with the terms of the policy or procedures issued by the Corporation and such failure resulted in the insured receiving a payment in an amount that is less than the amount to which the insured was entitled.

To the extent that State courts have awarded extracontractual damages without first obtaining a determination from FCIC, such awards are not in accordance with the law.

Following FAD 240, the RMA issued FAD-251, which further requires state law claims to be subject to the damage pre-approval requirements of 7 CFR §

400.352. In pertinent part, FAD-251 specifies:

FCIC agrees with the requestor's interpretation to the extent that any claim, including a claim for extra-contractual damages, **that arises under or is related to a Federal crop insurance policy** issued pursuant to the Federal Crop Insurance Act (Act) may only be awarded if a determination is obtained from FCIC in accordance with section 20(i) of the Common Crop Insurance Policy Basic Provisions and §400.352.

(Emphasis added). The only court to have interpreted the newly promulgated binding guidance from the RMA has held "Plaintiffs must show damages that are unrelated [to] the insurance policy because federal law preempts state-law claims regarding issues that involve a policy or procedure interpretation." *Dixon v. Producers Agriculture Ins. Co.*, __ F.Supp.3d __, 2016 WL 4060690, *7 (M.D. Tenn. Jul. 28, 2016).²

E. Procedural Posture

On December 5, 2014, Rain & Hail denied the Kaufmans claim for indemnification for their Crop Year 2013 Golden Valley County wheat crop. (App. 2(D)) This was followed up by a January 30, 2015 letter clarifying the denial of indemnity payment (App. 2(E)). On July 15, 2015, the Kaufmans filed this instant action against Rain & Hail's agent, Beard, excluding Rain & Hail itself as a named

²Pertaining to the plaintiff's misrepresentation claim, the Court continued: "if Plaintiffs are seeking damages that give them the benefit of their bargain, namely, the difference between the actual value of the property received and the value the property they would have possessed had the misrepresentation been true, their state-law claims are preempted under federal law and subject to dismissal." *Id.* at *7.

defendant. (App. 1). On August 6, 2015, Beard filed his *Motion to Compel Arbitration and Stay Proceedings and Motion to Dismiss*. (DC Dkt. 4). After the Motion was fully briefed, Beard filed his *Notice of Supplemental Authority Re FAD-251* on December 29, 2016. (App. 4(A)). On January 26, 2016, days before a planned mediation, the Kaufmans made their arbitration demand on Rain & Hail, later filed with the District Court by Beard. (App. 5(A)). The District Court denied Beard's Motion, (DC Dkt. 15), Beard filed his Notice of Appeal on the Court's denial of his *Motion to Compel Arbitration and Stay Proceedings*. (DC Dkt. 18).

IV. STANDARD OF REVIEW

The Court reviews *de novo* a district court's order concerning a motion to compel arbitration. *Glob. Client Sols., LLC v. Ossello*, 2016 MT 50, ¶ 19, 382 Mont. 345, 367 P.3d 361. Facts are to be construed in a light most favorable to the non-moving party. *Id.*

V. SUMMARY OF ARGUMENT

Under binding and preemptive federal law, the MPCCI arbitration provision is enforceable over any contrary state law. The precondition of arbitration of any claim, including any state law misrepresentation claim, relating to the Federal Crop Insurance program must be completed and damages pre-approved by the federal agency before any damages can be awarded by a state court. The regulated recovery

procedure is a fair bargain for the taxpayer subsidized coverage. Beard, as an agent of Rain & Hail, can require arbitration as the Kaufmans' claims arise from Rain & Hail's determination that their harvest valued at \$148,249 exceeded their revenue guarantee of \$101,503 and therefore no indemnity payment was owed. Further, the Kaufmans are estopped from resisting arbitration as they seek to bind Beard to the terms of the policy requiring arbitration and demand duplicative arbitration on Rain & Hail directly.

VI. ARGUMENT

A. The Federal Crop Insurance Act Specifically Preempts Montana law barring Arbitration in Insurance Contracts.

Under clear congressional Mandate, the Federal Crop Insurance Act preempts any conflicting state law. As the Act deals with the insurance industry and its preemption is specific to that area, the McCarran-Ferguson Act does not apply and Montana law barring arbitration in insurance contracts is explicitly preempted. The arbitration provision contained within the MPCCI policy and federal regulations has been held enforceable time and again by state and federal courts across the country. *Bissette v. Rain & Hail, L.L.C.*, 2011 WL 3905059, at *2 (E.D.N.C. Sept. 2, 2011); *Kremer v. Rural Community Ins. Co.*, 788 N.W.2d 538, 554 (Neb. 2010); *Great Am. Ins. Co. v. Moye*, 733 F. Supp. 2d 1298, 1303 (M.D. Fla. 2010); *Nobles*, 303

F.Supp.2d at 1293-1301; *In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F.Supp.2d 992, 999 (D.Minn 2002); *Ledford Farms, Inc. v. Fireman's Fund Ins. Co.*, 184 F. Supp. 2d 1242, 1245 (S.D. Fla. 2001). Therefore, under the clear congressional mandate of 7 U.S.C. § 1506(l), the Kaufmans' state law claims over the determination of no indemnity owed must be submitted to arbitration under preemptive federal law.

i. The Federal Crop Insurance Arbitration Provision Preempts any conflicting state law.

Congress has multiple avenues to preempt state law under the Supremacy Clause of the Article VI of the United State Constitution. Federal preemption occurs where:

Congress expresses a clear intent to preempt in a federal statute; when there is a conflict between federal and state law; when compliance with both federal and state law is impossible; when there is an implicit barrier in the federal statute to state regulation; when Congress has comprehensively occupied an entire field and leaves no room for state law; or when state law is an obstacle to the objectives and purpose of Congress.

State of Kan. ex rel. Todd, 995 F.2d at 1509-1510 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986)).

The Tenth Circuit in *State of Kan. ex rel Todd* determined that Congress specifically intended to preempt state law as reflected in the Federal Crop Insurance Act. The Court affirmed the FCIC's position that:

the Federal Crop Insurance Act itself plainly preempts state law regarding federal crop insurance contracts in section 1506(k) of the Act. “State and local laws or rules shall not apply to contracts or agreements of the [FCIC] or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts or agreements.” 7 U.S.C. § 1506(k) [current 7 U.S.C. § 1506(l)].

Id. at 1510. The Tenth Circuit acknowledged that “in section 1506(k) of the Act [7 U.S.C. § 1506(l)], Congress clearly contemplated that the FCIC's reinsurance contracts should be able to provide that inconsistent state law would not be applicable to an insurance contract reinsured by the FCIC” *Id.* Further, the court determined that the FCIC’s administrative and regulatory preemption was “eminently reasonable” as “there is no indication that Congress would have disapproved of preemption.” *Id.* at 1510-11.

As a matter of settled federal law, the Federal Crop Insurance Act and the regulations promulgated under it by the FCIC/RMA preempt any conflicting state law. State law claims may still be brought in relation to the Federal Crop Insurance program, subject to the constraints of the agency pre-approval process and the federal regulations administering the program. FAD-99 (App. 3(B)); FAD-193 (App. 3(C)); FAD-240 (App. 3(A)); FAD-251 (App. 4(A)).

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- ii. The McCarran-Ferguson Act is Inapplicable to Federal Crop Insurance as the Federal Crop Insurance Act Expressly Regulates the “Business of Insurance.”

Congress’ intent to preempt conflicting state laws is clear from the Act and the federal statutes themselves, the “reverse preemption” of the McCarran-Ferguson Act does not undo that preemption and allow for state law regulation of the Federal Crop Insurance program. The McCarran-Ferguson Act was passed to allow states to maintain state control over the regulation of the local insurance industry in light of United States Supreme Court decisions “that threatened the continued supremacy of states to regulate ‘the activities of insurance companies in dealing with their policyholders.’” *Kremer*, 788 N.W.2d at 604.

Under the McCarran–Ferguson Act, federal courts have set out three elements for determining whether a state law controls over (reverse preempts) a federal statute: (1) The federal statute does not specifically relate to the business of insurance; (2) the state law was enacted for regulating the business of insurance; and (3) the federal statute operates to invalidate, impair, or supersede the state law.

Id. at 605. Only if the elements of this conjunctive test are satisfied will the reverse preemption of state law apply.

In *Kremer*, the Nebraska Supreme Court analyzed the issue currently before the Court: whether the mandatory arbitration clause of the Federal Crop Insurance policy and regulations were reverse preempted by Nebraska’s statutory prohibition on

arbitration clauses in insurance contracts. The *Kremer* court found the federal arbitration clause enforceable over the state's prohibition. *Id.* at 610. Because the McCarran- Ferguson Act leaves the regulation of insurance to the states, absent federal regulation which "specifically relates to the business of insurance" under 15 U.S.C. § 1012(b), the arbitration clause would be unenforceable under Nebraska law.

The court analyzed whether the Federal Crop Insurance Act and its regulations "specifically relates to the business of insurance" 15 U.S.C. § 1012(b) and therefore was not subject to the reverse preemption of the McCarran-Ferguson Act, finding the federal law ultimately maintained its supremacy over conflicting state laws and regulations. *Id.* at 608-10. The court held that the Federal Crop Insurance program "specifically relates to the business of insurance" and not subject to the reverse preemption of the McCarran Ferguson Act. *Id.* at 610.

The *Kremer* court determined that the regulations and mandatory arbitration provision conflicted Nebraska's statutory prohibition on enforcement of arbitration provision in insurance contracts. *Id.* As such, the FCIC's regulations and arbitration provision specifically preempted the conflicting state statute and the mandatory arbitration required under the policy and regulations was enforceable over the conflicting Nebraska statute. *Id.*

Like Nebraska in *Kremer*, Montana has a statute precluding arbitration in

insurance contracts, Mont. Code Ann. § 27-5-114(2)(c). As with Nebraska's statute, the prohibition of Mont. Code Ann. § 27-5-114(2)(c) conflicts with the FCIC's regulations and the policy, requiring mandatory arbitration of determinations made by the insurer, such as the application of transitional yields and whether an indemnity payment is owed. Therefore, the District Court erred in not holding that Montana's prohibition of arbitration is preempted under the explicit federal law and regulations, requiring arbitration of the Kaufmans' state law claims arising from the Federal Crop Insurance Policy and program.

iii. The Federal Crop Insurance Regulatory Regime Requires Arbitration of Policy-related State Law Claims.

Under the FCIC's binding federal regulatory authority, arbitration is required of the Kaufmans' state law claims. The federal regulations preempt state court actions for claims "arising out of actions or inactions" under the federal regulations. 7 CFR § 400.352. 7 CFR § 400.352 precludes state courts from awarding damages against MPCCI "agents . . . arising out of actions or inactions . . . required under the Federal Crop Insurance Act." Damages can only be awarded after the FCIC determines the "agent . . . failed to comply with the terms of the policy or procedures and such failure resulted in the insured receiving a payment in an amount that is less than the amount to which the insured was entitled." *Id.* Therefore, any damages claim in excess of the

entitlement under the policy must be first submitted to the RMA/FCIC for pre-approval before they can eventually be awarded in state court. FAD-99 (App.(3B)).

In its recent binding Final Agency Determinations, FAD 240 and 251, the RMA/FCIC removed any doubt that even state common law claims must be submitted to the agency damage pre-approval process before they can ultimately be recovered in a post-arbitration state court proceeding. (App. 3(A); 4(A)). FAD 240 provides:

Any claim, including a claim for extracontractual damages solely arising from a condition related to policies of insurance issued pursuant to the Federal Crop Insurance Act (Act), may only be awarded if a determination was obtained from FCIC in accordance with section 20(i) of the Basic Provisions and § 400.176(b).

FCIC also agrees that 7 CFR § 400.176(b), and the equivalent language in section 20(i) of the Basic Provisions preempts any state law claims that are in conflict.

(App. (3-A)). FAD 251 reiterated that state law claims were subject to the agency damage pre-approval process:

As previously provided in FAD-240, FCIC also agrees that 7 C.F.R. § 400.352 pre-empts any State law that would allow a claim for extra-contractual damages that conflicts with the provision in section 400.352 that any extra-contractual damages can only be awarded if FCIC makes a determination that the AIP, agent, or loss adjuster failed to comply with the terms of the policy or procedures issued by FCIC.

(App. 4(A)). Therefore, any state claims against an AIP (insurer) and its agent “that arise[] under or is related to a Federal crop insurance policy,” must be submitted to

the agency damage pre-approval process after the completion of arbitration and prior to the award of damages for in any subsequent state court proceeding. *Id.* In order to avoid the federal agency pre-approval process, the plaintiff has the burden of proving that state law claims are “unrelated [to] the insurance policy” *Dixon*, 2016 WL 4060690 at *7. In doing so, the plaintiffs must disavow the recovery of damages under the policy and not allege any breach of the “federal regulations, or the policy terms.” *Id.* at *8.

In application to the instant case, the Kaufmans’ claims fall within the RMA’s requirement of pre-approval, necessitating the condition precedent of arbitration on the factual issues. The Kaufmans have specifically alleged a “[b]reach of the [t]erms of the policy [and] regulation” and seek recovery of “the amount of \$247,178.00 under the terms of the policy.” (App. 1 at 9, 10). The Kaufmans do not dispute their harvest of \$148,249 in wheat is less than the revenue guaranty of \$101,503, but maintain that they are owed an indemnity payment under the policy. Referenced in FAD-240, in FAD-99 the RMA determined that only in judicial review of an arbitrator’s decision, following pre-approval by the FCIC, could compensatory and punitive damages be awarded. (App. 3(B)). The 7 CFR § 400.176(b) provision of “judicial review,” also reflected in Section 20(i) of the basic provisions promulgated in 7 C.F.R. § 457.8, requires a factual record developed by an arbitrator to be subject

to that review. FAD-193 provides that the “insured must complete the arbitration process before resolution of a dispute through judicial review.” FAD-193(App. 3(C)). The agency specified “[t]he reference to ‘judicial review only’ is to clarify that such damages can only be sought during an appeal to the courts, after an FCIC determination has been obtained, and cannot be awarded in arbitration.” *Id.*

The Kaufmans cannot skip the two mandatory requirements of arbitration for factual findings and FCIC review for allowance of compensatory damages. The Kaufmans’ state law claims seek “damages solely arising from a condition related to policies of insurance issued pursuant to the [FCIA].” 7 CFR § 400.352. With clear eyes, the Kaufmans knowingly applied for federal crop insurance, as reflected in their history of obtaining MPCCI through Mr. Beard since 2000 and their signature on the MPCCI applications. (App. 2(A)). They were aware of the limitations and constraints of the program, a fair exchange for the high taxpayer subsidies. Under 7 CFR § 400.352, interpreted by the binding authority of FAD-240 and 251, the Kaufmans’ claim must be proceed through arbitration and then FCIC pre-approval under binding and preemptive federal law.

B. Beard Can Require Arbitration of the Kaufmans’ Claims under Federal Law as the Claims arise from the Federal Crop Insurance Policy.

Mr. Beard is entitled to invoke the policy arbitration clause as he is an agent

for Rain & Hail and the Kaufman's claims against him arise out of the policy and Rain & Hail's determination that no indemnity was owed. The Kaufmans are claiming that very same "indemnification . . . under the terms of the policy" against Rain & Hail agent Beard here. (App. 1 at 11). Further, as the Kaufmans agreed to the conditions of the policy, including mandatory arbitration, they are estopped from resisting arbitration of their intertwined and interdependent claims against Beard. Only after review of the arbitrators reasoned findings can the RMA/FCIC approve or disapprove an award of damages under 7 CFR § 400.352. FAD-99 (App. 3(B)); FAD-193 (App. 3(C)).

i. Nonsignatories to an Arbitration Agreement can Require Arbitration under the Theories of Agency and Estoppel.

Federal courts have thoroughly analyzed the scenarios where a non-signatory can invoke an arbitration provision entered under the Federal Arbitration Act. Federal law applies to the "arbitrability" of a dispute under the Federal Arbitration Act. *Moses H. Cone Meml. Hosp. v. Mercury Constr. Corp.*, 460 US 1, 24 (1983) ("Federal law in the terms of the Arbitration Act governs that issue in either state or federal court.") "Arbitration is contractual by nature - 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)(quoting *United Steelworkers of*

America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).)

Thus, while there is a strong and “liberal federal policy favoring arbitration agreements,” such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract. **“It does not follow, however, that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.”**

Id. (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985))(emphasis added); *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir.1960); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir.1993).)

A non-signatory can invoke the arbitration requirement under the “ordinary principles of contract and agency.” *Id.* (quoting *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir.1980)). Material to the equation is whether the party resisting arbitration is a signatory to the agreement to arbitrate. *Amisil Holdings Ltd. v. Clarium Capital Management*, 622 F.Supp.2d 825, 831 (N.D. Cal. 2007) (citing *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 799 (8th Cir.2005) (“The test for determining whether a nonsignatory can force a signatory into arbitration is different from the test for determining whether a signatory can force a nonsignatory into arbitration.”)). “The rule is an outgrowth of the strong federal policy favoring arbitration.” *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1188 (9th

Cir. 1986).

As an initial matter, it is clear that the Kaufmans' claims against Beard implicate the crop insurance policy's arbitration provision. The Kaufmans are charged with knowledge of the arbitration provision as it is included in the contract as well as federal law. *Nobles*, 122 F.Supp.2d at 1300 ("It is well known that farmers contracting directly with RMA are charged with knowledge of the relevant insurance regulations and policy provisions. This holding has been extended to charge farmers with notice of the same provisions in RMA-reinsured policies sold by private insurance corporations.") (citing *Walpole v. Great Am. Ins. Companies*, 914 F.Supp. 1283, 1290 (D.S.C.1994); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).) With their years of experience with MPCCI and charged knowledge of federal law, the Kaufmans agreed to arbitrate their claims over any disagreement over a determination relating to their policy.

The determination by Rain & Hail that no MPCCI indemnity payment was owed because their harvest valued at \$148,249 exceeded their guaranty of \$101,503 is the core of the Kaufmans' claim. Where the insurer and the insured have a difference of opinion, such as whether an indemnity payment is owed, that is a determination which is subject to arbitration. *Hudson Insurance Company v. BVB Partners*, 2015 WL 6758540, *4 (Tex. App. 2015). Rain & Hail's letters denying indemnity

payments cited the arbitration provision of the policy, which required submission to arbitration a dispute where “you and we fail to agree on any determination made by us” *Id.*, Common Policy Provisions, § 20 (App. 2(E)).

In response, the Kaufmans filed this action against Beard in State Court. In material part, the Kaufmans’ *Complaint* alleged that Beard was acting in his capacity as an agent for Rain & Hail. (App. 1 at ¶ 5). The Kaufmans alleged that “[t]he premium of \$16,098.00 was paid to Defendants [Beard] [and] the Kaufmans bring this lawsuit against the agent either for breach of contract for failure to pay the indemnification they purchased” (*Id.* at ¶ 1). Specifically, the Kaufmans alleged that Beard breached “the [t]erms of the [p]olicy, [r]egulation and Federal [r]equirements of the Federal Crop Insurance Corporation.” (*Id.* at 9). The Kaufmans alleged “[a]s a result of these violations of the contract, the regulations, and the Crop Insurance Handbook, the Kaufmans have been damaged when they were denied full indemnification” (*Id.* at ¶ 43). Factually and legally, the core of the dispute is over whether the Kaufmans agree with Rain & Hail’s determination that no indemnity payment is owed and therefore it is subject to arbitration under §20 of the policy.

Dixon, 2016 WL 4060690 at *7-8.

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a. As an Agent for Rain & Hail, Beard can Require the Arbitration of Claims arising out of the Federal Crop Insurance Policy.

Under Ninth Circuit precedent, where claims are made against an agent, such as Beard, and those claims arise from the contract which include the arbitration provision, the agent can require arbitration. In *Amsil*, the federal district court distilled Ninth Circuit precedent on when the principles of agency allow for the agent to invoke the arbitration requirement of a contract. Construing the Ninth Circuit's holdings in *Letizia* and *Britton v. Co-op Banking Group*, 4 F.3d 742 (9th Cir.1993), the court held:

that agents of a signatory can compel the other signatory to arbitrate so long as (1) the wrongful acts of the agents for which they are sued relate to their behavior as agents or in their capacities as agents (*Letizia*) and (2) the claims against the agents arise out of or relate to the contract containing the arbitration clause (*Britton*) (consistent with the language of the arbitration clause).

Amisil Holdings Ltd., 622 F. Supp.2d at 832. The court recognized that the synthesized Ninth Circuit two-part test was consistent with precedent from the Eighth and Sixth Circuit Court of Appeals. *Id.*

The rationale for the rule was founded in the fact that entities work through their agents and employees and therefore arbitration provisions should apply to them, otherwise, a signatory to an arbitration provision could avoid arbitration by electing

to not name the signatory party. *Id.* at 833. To allow a signatory to avoid arbitration by simply naming the agent or employee, whose “relationship between the signatory and nonsignatory defendants is sufficiently close,” and not the principal would result in “evisceration of the underlying arbitration agreement.” *Id.* (quoting *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798 (8th Cir.2005).) Therefore, a plaintiff’s artful pleading, “circumvent[ing] the agreements by naming individuals as defendants instead of the entity Agents themselves,” cannot avoid the plaintiff’s agreement to arbitrate. *Id.* (quoting *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir.1993).)

In applying the synthesized Ninth Circuit test to the Kaufmans’ claims against Rain & Hail agent Beard, it is clear that Beard can compel arbitration of these claims. There is no dispute that the Kaufmans were signatories to the policy and therefore bound to the policy’s arbitration provision. (App. 1 at ¶ 1). Under the first prong, there is no dispute that Beard was acting as a Rain &Hail agent when he obtained the Rain & Hail MPCCI policy for the Kaufmans. (*Id.*). Under the second prong, the Kaufmans explicitly allege “**Breach of the Terms of the Policy**” against Beard. (*Id.* at 9.(emphasis in original)). There claims for “violation of the contract” seek from Beard payment of indemnity they believed they were entitled under the policy. (*Id.* at ¶ 43). As such, Beard is entitled to invoke the policy’s arbitration provision for

resolution of any disagreement over Rain & Hail's determination of no indemnity owing to the Kaufmans.

The policy behind allowing an agent to invoke its principal's arbitration rights under a contract is apparent here where it is plain that the Kaufmans have styled their Complaint against the agent alone to avoid arbitration against the principal. The Kaufmans' Complaint conflates Beard and Rain & Hail, such as stating that they paid their premium to Beard whereas it was paid to Rain & Hail. (*Id.* at ¶ 1). To allow arbitration to be avoided by naming the agent and not the principal would result in "evisceration of the underlying arbitration agreement" and undermine the strong federal policy in favor of arbitration. *Amisil Holdings Ltd.*, 622 F. Supp.2d at 833 (quoting *Roby*, 996 F.2d at 1360). Therefore, under the contractual principles of agency, Beard is entitled to require arbitration of the Kaufmans claims.

b. The Kaufmans are Estopped from Resisting the Arbitration as their Claims Arise from Federal Crop Insurance Policy.

In addition to the principles of agency, the equitable considerations of estoppel can provide a basis for non-signatories to an arbitration provision to compel arbitration. In the context of a non-signatory compelling arbitration, estoppel requiring arbitration can arise where in two situations:

First, equitable estoppel applies when the signatory to a written

agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate.

Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

Hawkins v. KPMG, LLP, 423 F.Supp.2d 1038, 1050 (N.D.Cal. 2006)(internal quotations omitted).

The policy behind this kind of equitable estoppel is that “[a] signatory to an agreement cannot ... have it both ways: it cannot on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but on the other hand, deny the arbitration provision's applicability because the defendant is a non-signatory.”

Amisil Holdings, 622 F.Supp.2d at 840 (quoting *Hawkins*, 423 F. Supp. 2d at 1050).

Further, where the “lawsuit against non-signatories is inherently bound up with claims against a signatory” the court should compel arbitration to give effect to the arbitration provision and promote judicial economy by reducing duplicative proceedings. *Hawkins*, F.Supp.2d at 1050.

Under either estoppel prong, the Kaufmans are precluded from resisting arbitration as required under their MPCCI policy. Under the first prong, as discussed

at length, the Kaufmans' claims arise under the MPCCI and allege a breach of that policy by Beard. While the Kaufmans may argue that there are additional claims which do not arise under the policy, their allegations relate to their transitional yields and claimed indemnity payment under the policy.

Under the second prong, the Kaufmans' claims against Rain & Hail and Beard are duplicative, arising out of the same determination regarding no indemnity owing, and must proceed through arbitration. It was not until after the Kaufmans filed this Montana State Court action that they made their arbitration demand against Rain & Hail on Rain & Hail, arising out of the same operative facts. (App. 5). The Kaufman's allegations against Rain & Hail and Beard are "interdependent and concerted misconduct" regarding the calculation of the Kaufmans transitional yield and basis for the Kaufmans' claimed indemnity payment. *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir.2002). Due to the interrelated nature of the Kaufmans claims against both Rain & Hail and Beard, duplicative proceedings in arbitration and state court would be an affront to judicial economy. Therefore, the Kaufmans must submit their quixotic claim against Rain & Hail agent Beard to the same arbitration proceeding containing their intertwined claims against Rain & Hail itself, all arising out of the same determination and operative facts.

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- ii. The Federal Regulatory Regime Presupposes Arbitration as a Condition Precedent to the Recovery of Damages against Agents, such as Beard.

In the overall context of the federal scheme creating and regulating the federal crop insurance program, the critical importance of arbitration of the Kaufmans claims is evident. Due to the highly subsidized nature of the program, the Kaufmans avenues of redress are limited and constrained by federal law. First, arbitration is initiated. The arbitrator is to make reasoned findings on the issues underlying the determinations subject to the claimants claims. (App.3(E)); 7 CFR § 457.8. If the parties dispute the interpretation of any regulation, that dispute must be submitted to the FCIC/RMA for a Final Agency Determination which is binding on all in the program. 7 CFR part 400, subpart x. Second, if the arbitrator finds in favor of the claimant, the claimant can bring a state court action for extra-contractual damages. Third, before the state court can award damages, the FCIC must review the arbitrators underlying findings and determine whether the insurer or agent breached the protocols of the regulations and such a violation resulted in an indemnification lower than what the claimant was entitled. 7 CFR § 400.352. If the FCIC/RMA approves the award of damages, only then can the amount of the extra-contractual damages be determined in state court.

Id.

The Kaufmans cannot carry their burden to show that their state law claims are

“unrelated [to] the insurance policy” and do not “involve the policy or procedure interpretation.” *Dixon*, 2016 WL 4060690 at *7. Unlike in *Dixon*, where arbitration and pre-approval were not required under FADs 240 and 251 because no breach of the policy was alleged or recovery under the policy sought, the Kaufmans have made claims for damages under the policy and arising out of a breach of the “federal regulations, or the policy terms” *Id.* at *8; (App. 1). As long as the claims relate to the Federal Crop Insurance program they are subject to this process, which is a fair bargain in exchange for taxpayer funding of their premiums. The alternative would have concurrent arbitration and state court proceedings on the same issues. If the procedure is not followed, any damage award in state court that was not pre-approved by the FCIC/RMA would be nullified and the parties would be back where they started. Therefore, arbitration of the dispute is the condition precedent to recovery of any damages by the Kaufmans.

VII. CONCLUSION

As the Kaufmans’ claims against Rain & Hail agent Beard relate to and arise out of the MPCCI program, policy, and regulations, Beard is entitled to require arbitration of the dispute. Under preemptive federal law, the Kaufmans’ state claims must be arbitrated and pre-approved by the RMA/FCIC before any claimed damages can be awarded in state court. This procedure is a fair bargain for the taxpayer

premium subsidies. The Court should reverse the District Court and order the Kaufmans to proceed through arbitration

Dated this 13th day of September, 2016.

HALVERSON, MAHLEN & WRIGHT, P.C.

By: 

JOHN L. WRIGHT

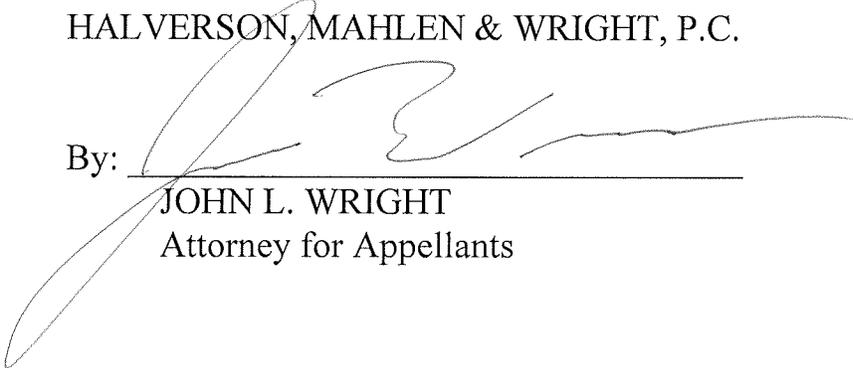
Attorney for Appellants

VIII. CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), M.R.App.P., I certify this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 12 is less than 10,000 words, not averaging more than 280 words per page, excluding the Certificate of Service and Certificate of Compliance.

Dated this 13th day of September, 2016.

HALVERSON, MAHLEN & WRIGHT, P.C.

By: 

JOHN L. WRIGHT
Attorney for Appellants

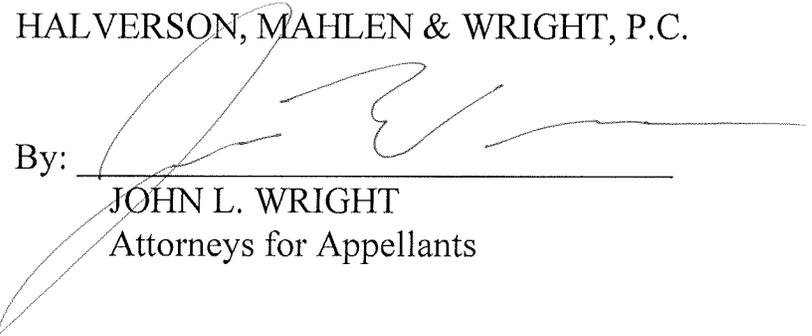
IX. CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing was delivered via U.S. Mail, postage prepaid to the parties listed below on the 13th day of September, 2016:

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