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**Rand Spivey LLP  
202 First Street  
Northport, Columbia**

February 25, 2020

Martin Chan  
Allen & Proctor LLP  
Three Emerson Center,  
Northport, Columbia.

Re: *Western Insurance Company v. SecureTrade, Inc.*

Dear Mr. Chan:

On behalf of Western Insurance Company (Western), we hereby decline SecureTrade, Inc.'s (SecureTrade) request that Western voluntarily submit to the fraud claim in the above-referenced action to arbitration. This letter describes and explains: (1) why any motion by SecureTrade to compel arbitration would be denied; and (2) why SecureTrade's argument is unsound.

As described in the complaint, Western and SecureTrade are parties to a Contractual Liability Insurance Policy (Insurance Policy). The Insurance policy is a commercial insurance product that covers the contractual obligations of the insured (SecureTrade) to consumers on extended warranties. SecureTrade and Western's Insurance Policy includes the parties as the sole signatories and does not contain an arbitration clause. *See Complaint Allegation 9.* Assurance North America Brokers and Administrators, Inc. (Assurance) is an affiliate of Western. Assurance procured the Insurance Policy for SEcureTrade pursuant to a contract referred to as the Agreement; Assurance and SecureTrade are the sole signatories and the agreement contains an arbitration clause. SecureTrade falsely represented to Western that SecureTrade: (1) complied with its claims handling obligations under the Insurance Policy; (2) reasonable determined that more than \$17,000 consumers had presented valid claims for product failure or damage totaling more than \$36 million; and (3) certified in good faith that Western was responsible for satisfying the claims. SecureTrade knew that its representations were false when it made them and intended that Western rely on the representations. *See Complaint Allegation 18-21.*

Western will not voluntarily submit its fraud claim to Arbitration for the following reasons:

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### 1. Any motion by SecureTrade to Compel Arbitration Would be Denied

In *Tuscany Builders, et al. v. Norman Properties, et al.* (Columbia Superior Court, 2011), the court held that the defendants may compel nonsignatory plaintiffs to arbitrate the claims they raise in their complaint. The court reversed the judgment of the Court of Appeals and remanded the matter to that court to remand it, in turn to the trial court to grant the motion to compel arbitration pursuant to the arbitration clause in the real estate purchase and sale contract. In *Tuscany Builders*, the court reviewed two questions: (1) may a party who is *not* a signatory to a contract with an arbitration clause compel a party who *is* a signatory to arbitrate under the Columbia Arbitration Act via the doctrine of equitable estoppel; and (2) may a party who is *not* a signatory to the a contract with an arbitration clause compel another party who is *not* a signatory to arbitrate under the Columbia Arbitration Act via the doctrine of equitable estoppel.

In response to question one, the court held that a nonsignatory may compel a signatory to arbitrate when the claims the nonsignatory is seeking to arbitrate are intertwined with the contract containing the arbitration clause. Here, this question is irrelevant to the issue at hand because Western is not the part seeking to arbitrate and the claims are not intertwined because the arbitration arises under the Agreement that Western is not a part of. Therefore, SecureTrades' moetion to compel arbitration here would be denied.

In response to the second question, the court has held that the sister-state courts have been hesitant to allow a party who is *not* a signatory to a contract with an arbitration clause to compel a party who is **not** a signatory to arbitrate under the doctrine of equitable estoppel. *Tuscany Builders*. SecureTrade may argue that It is foreseeable and therefore reasonable that a party who has chosen to become a signatory to a contract with an arbitration clause might be compelled to arbitrate not only with other signatories but also with nonsignatories; however, only the Agreement includes an arbitration clause, the Insurance Policy between Wester and SecureTrade does not. Therefore, it is unreasonable for Western, who is part of a contract that does *not* include an arbitrary clause to reasonably expect to be compelled to arbitrate with other nonsignatories, like SecureTrade.

To further respond to the second question, courts have concluded that a nonsignatory may compel another nonsignatory to arbitrate only when the other nonsignatory has sought or obtained a direct benefit from the contract containing the arbitration clause. *Tuscany Builders*. This is only available when the nonsignatory attempts to recover, or actually recovers, for breach of the contract (ie. third-party beneficiary.) *Id.* SecureTrade's argument regarding direct benefit will fail because it is not at all foreseeable or reasonable that a party who has *not chosen to become a signatory to any contract with an arbitration clause might be compelled to*

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*arbitrate with anyone.* It is not foreseeable to Western that it would be compelled to arbitrate with SecureTrade.

Based on the above mentioned reasons, any motion that SecureTrade attempts to bring to compel arbitration would be denied by the court because it is not foreseeable that Western would have to arbitrate with SecureTrade, and because Western is not the party seeking to arbitrate; the claims are not intertwined enough between the Agreement with an arbitration clause and the Insurance Policy without the arbitration clause.

## **2. SecureTrades argument is Unsound.**

Your letter stated that the Columbia Arbitration Act's strong policy operates to compel arbitration. However, although the Columbia Arbitration Act reflects strong policy in favor of arbitration, generally speaking, arbitration is nevertheless a matter of contract and a party cannot be compelled to arbitrate any dispute that he or she has not agreed to arbitrate. *Tuscany Builders*. Western has not agreed to arbitrate with SecureTrade and is currently refusing to voluntarily enter into arbitration with SecureTrade.

As a result, SecureTrades' arguments are unsound for two reasons:

- a) Western and Assurance do not have a preexisting relationship that allows SecureTrade, a signatory, to compel a non-signatory to arbitration. The Agreement entered into by SecureTrade and Assurance, and Western's Insurance Policy issued to SecureTrade are not intertwined. This Insurance Policy is merely a commercial insurance product that covers the contractual obligations of the SecureTrade to consumers on extended warranties.
- b) Western has not obtained or seek to obtain a direct benefit from a signatory to a contract containing an arbitration clause. In *Tuscany Builders*, the court held that whether a nonsignatory has sought or determined a direct benefit from the contract should turn ultimately on what the nonsignatory *has done*, i.e., effectively suing on the contract, rather than what the nonsignatory *may be*, i.e. factually or legally related to one of the signatories. In our case, Western, as the nonsignatory has filed a complaint for fraud based on the Insurance Policy and not the Agreement between Assurance and SecureTrade. Western has not sued based on a breach of contract claim as Assurance has done, and as *Tuscany Builders* have held, the direct benefit may not turn on whether SecureTrade is factually or legally related (legally here, based on the Insurance Policy) to Western.

Western is declining to voluntarily submit its fraud claim to arbitration for the foregoing reasons. If SecureTrade is informing the court of our rejection, please notify Western as you file a motion

to compel.

Sincerely Yours,

(your signature)

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Jessie Parker

Question #6 Final Word Count = 1207

**END OF EXAM**