

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

B.G. BALMER & CO., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES FIDELITY AND	:	
GUARANTY COMPANY	:	NO. 98-734

MEMORANDUM AND ORDER

YOHN, J. October , 1998

B.G. Balmer & Co. (“Balmer”) filed this action seeking a declaratory judgment that it was not contractually obligated to arbitrate a dispute concerning Balmer’s performance of its duties as an independent agent of United States Fidelity and Guaranty Company (“USF&G”). The parties have agreed that there are no disputed issues of material fact and have submitted a Joint Stipulation of Undisputed Fact (“Stipulation”). Before this court are the parties’ cross-motions for summary judgment which seek to resolve whether their current dispute is within the scope of the arbitration provision in the Independent Agency Agreement (the “Agreement”), and if so, whether USF&G has waived its right to compel Balmer to arbitrate that dispute. After considering the parties’ cross-motions for summary judgment, Balmer’s supplement to its motion, and the response thereto, I conclude that the parties are obligated to arbitrate their dispute.

FACTUAL BACKGROUND

Balmer is an independent agent of USF&G. Until 1991, Balmer was authorized to sell

both commercial and personal lines of insurance for USF&G. See Affidavit of Barry Balmer, at ¶ 3,4. In 1989, Balmer sold an automobile insurance policy to Vastine Enterprises, Inc., t/a MetroCare Equipment Co. (“MetroCare”), which was to be effective from November 25, 1989, to November 25, 1990. See Stipulation, Ex. G, at ex. B. On January 8, 1990, MetroCare filed for bankruptcy. See Stipulation, Ex. G, at ex. C. Balmer was notified of the bankruptcy filing and was listed as a creditor of the estate. See id. MetroCare then paid Balmer the delinquent amount of the policy premium. See Stipulation, Ex. G, at ¶ 24. On February 8, 1990, USF&G, allegedly unaware of either the bankruptcy filing or the premium payment, sent a notice to MetroCare, canceling its automobile policy effective February 25, 1990, because MetroCare had not paid the policy premium. See Stipulation, Ex. G, at ex. D. When the policy expired on November 25, 1990, USF&G failed to send a nonrenewal letter to MetroCare because it believed that it had canceled the policy in February. If the policy was in effect on November 25, 1990, then USF&G’s failure to send a nonrenewal letter automatically renewed the policy for another year.

On January 30, 1991, Queenie Basmajian was injured in a collision with a MetroCare driver. See Stipulation, Ex. A, at ¶ 4. On September 24, 1991, she filed a personal injury suit against MetroCare, and on October 15, 1992, she filed a personal injury suit against the driver. Both suits were settled on October 13, 1994. See Stipulation, Ex. A, Ex. C, Ex. G, at ex. H. Though MetroCare had tendered the defense of the suit to USF&G, USF&G denied coverage, claiming that MetroCare’s policy had been canceled 11 months before the accident, and in any event, had expired two months before the accident. See Stipulation, Ex. G, at ex. F, ex. I. In its settlement agreement with Basmajian, MetroCare assigned any claims that it may have against

USF&G to Basmajian in return for her agreement not to enforce the agreed-upon judgment against MetroCare. See Stipulation, Ex. C, at ¶ 12-13.

Basmajian then sued USF&G on February 16, 1995, claiming, *inter alia*, that it had denied coverage in bad faith. See Stipulation, Ex. G. USF&G settled with Basmajian for \$415,915.48 on November 18, 1996. See Stipulation, Ex. V. Before settling with Basmajian, USF&G wrote to Balmer's counsel, asking Balmer to participate in the settlement and contending that its liability arose because of Balmer's actions. See Letter from McDevitt to Schmidt of 10/29/96. On December 29, 1997, USF&G sent a demand letter to Balmer, requesting that Balmer participate in arbitration to resolve USF&G's indemnification and contribution claims. See Stipulation, Ex. W. Balmer responded by filing this action.

During the pendency of Basmajian v. USF&G, Balmer cooperated with USF&G's efforts to defend the case. Balmer's counsel, who was retained by Balmer's errors and omissions insurer, provided USF&G with the deposition transcripts of two Balmer employees who had been deposed in Basmajian v. MetroCare. See Stipulation, at ¶ 4-5, Ex. D, Ex. E. Balmer's counsel also supplied USF&G with copies of Balmer's files relating to MetroCare and information concerning the location of former Balmer employees, and arranged meetings between USF&G and Balmer employees, including Barry Balmer himself. See Stipulation, at ¶ 9-14, 17-18. In addition, USF&G deposed two Balmer employees. See Stipulation, at ¶ 15-16.

STANDARD OF REVIEW

The parties have filed cross-motions for summary judgment and have agreed that there are no disputed material facts. Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The court should not resolve disputed factual issues, but rather, should determine whether there are factual issues which require a trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Where, as here, the parties have filed cross-motions for summary judgment, “Rule 56© does not mean that the case will necessarily be resolved at the summary judgment stage Each party must still establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.” Atlantic Used Auto Parts v. City of Philadelphia, 957 F. Supp. 622, 626 (E.D. Pa. 1997). If no factual issues exist and the only issues before the court are legal, then summary judgment is appropriate. See Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir.), cert. denied, 515 U.S. 1159 (1995).

The record before this court reveals no contested factual issues that are material to the current dispute, and the only remaining issues, whether the dispute is within the scope of the arbitration clause in the Agreement, and whether USF&G has waived its right to arbitrate, are legal issues for the court to decide. See AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986) (arbitrability of a dispute is for the court to decide); Laborers’ Int’l Union v. Foster Wheeler Corp., 868 F.2d 573, 576 (3d Cir. 1989). Summary judgment is, therefore, appropriate.

DISCUSSION

A. The Dispute is Within the Scope of the Agreement’s Arbitration Clause.

The Agreement, signed by Balmer and USF&G on November 19, 1993, states that:

[i]f we cannot resolve any dispute or disagreement between us, the matter shall be decided solely by binding arbitration held in the jurisdiction where the branch office of the Company is located which is nearest to your principal address.

Agreement, at § V(T). The same provision excludes disputes involving intellectual property from its scope. See id. The Agreement also

supersedes and replaces any prior representations, understandings, or agreements, whether written or oral, between the parties, including any prior agency agreement The parties warrant that this Agreement (including the Commission Schedules applicable from time to time) is the entire agreement between them with respect to the subject areas addressed and the legal relationship between them, and they have relied upon no other statements, understandings or representations whatsoever as a basis for entering into this Agreement.

Agreement, at § V(C). Thus, the Agreement, rather than any agreement signed between the parties in 1990 or 1991, will control the resolution of this dispute.

Because the arbitration clause is contained within “a contract evidencing a transaction involving commerce,” and the parties are involved in interstate commerce, the federal Arbitration Act¹ (“FAA”) controls this court’s interpretation of the scope of the Agreement. 9 U.S.C. § 2 (1970 & Supp. 1998); See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 (1967) (consulting agreement relating to interstate transfer of manufacturing operation is within the scope of the FAA); Pennsylvania Data Entry, Inc. v. Nixdorf Computer Corp., 762 F. Supp. 96, 98 (E.D. Pa. 1990) (FAA applies to arbitration clause in contract between Massachusetts and

¹ The FAA provides that a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, . . . or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1970 & Supp. 1998). The FAA also permits a district court to order parties to arbitrate under a written arbitration agreement if the court determines that the agreement was made and one party has failed, neglected or refused to arbitrate. See 9 U.S.C. § 4 (1970 & Supp. 1998). If the parties contest whether one party has “default[ed] in proceeding” under the arbitration agreement, the court, or a jury may also decide that issue. Id.

Pennsylvania corporations). The Agreement, which establishes an agency relationship between USF&G, a Maryland corporation, and Balmer, a Pennsylvania corporation, clearly implicates interstate commerce and creates significantly more than the “slightest nexus” with interstate commerce that the Arbitration Act requires. Optopics Laboratories Corp. v. Nicholas, No. 96-8169, 1997 WL 408043, at *4 (E.D. Pa. Jul. 18, 1997); see also Snyder v. Smith, 736 F.3d 409, 417 (7th Cir.), cert. denied, 469 U.S. 1037 (1984), overruled on other grounds by, Felzon v. Andreas, 134 F.3d 873 (7th Cir. 1998) (“the requirement of ‘evidencing a transaction involving commerce’ must be construed broadly”). Though the Agreement provides that it is to be interpreted in accordance with Maryland law, and Maryland law will thus control the merits of the dispute between USF&G and Balmer, questions involving the scope of the arbitration clause in the Agreement are governed by federal law. See Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk, 585 F.2d 39, 43 (3d Cir. 1978) (“whether a particular dispute is within the class of those disputes governed by the arbitration and choice of law clause is a matter of federal law”).

Balmer can only be compelled to arbitrate the current dispute if it is within the scope of the arbitration clause in the Agreement for “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” AT&T Technologies, 475 U.S. at 648 (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)). Federal law, however, implies a “strong presumption” in favor of arbitrability such that arbitration should be ordered “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” Id. at 650. Any “doubts concerning the scope of arbitrable issues should be resolved in favor of

arbitration.” Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); see also Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 227 (3d Cir.), cert. denied, 118 S. Ct. 299 (1997); Specialty Bakeries, Inc. v. Robhal, Inc., 961 F. Supp. 822, 827 (E.D. Pa.), aff’d, 129 F.3d 726 (3d Cir. 1997).

A resolution of the dispute between USF&G and Balmer requires an analysis of Balmer’s management of the MetroCare account and an interpretation of its behavior in light of the indemnification provision in the Agreement. See Stipulation, Ex. W. The broad language of the arbitration clause, which applies to “any dispute or disagreement between us,” thus covers the current dispute. The Third Circuit has characterized the scope of arbitration clauses with similar language as “broad” and “inclusive.” Pritzker v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1114-15 (3d Cir. 1993) (requiring arbitration of claim that broker acted outside scope of her authority to manage account when clause provided for arbitration of “all controversies that may arise between [the parties]”); cf. Bollman Hat Co. v. Root, 112 F.3d 113, 116 (3d Cir. 1997) (words “any” and “all” in contract clause requiring reimbursement for “any payments” have a “universal scope”).

Balmer contends that the current dispute is not within the scope of the arbitration clause, despite its explicit language, because the events which give rise to the dispute occurred when Balmer was selling commercial insurance in 1990 and 1991, and the Agreement was signed when Balmer was no longer authorized to sell commercial insurance in 1993. Balmer, in effect, asks this court to read temporal and subject matter limitations into the Agreement by finding that Balmer only intended to arbitrate disputes arising from its post-1991 business relationship with USF&G.

In support of its position, Balmer cites to Faircloth v. Jackie Fine Arts, Inc., 682 F. Supp. 837 (D.S.C. 1988), rev'd on other grounds, 938 F.2d 513 (4th Cir. 1991). In Faircloth, the court found that a dispute concerning allegedly fraudulent conduct which occurred both before an arbitration agreement was signed and after it expired was not arbitrable because the dispute did not “arise solely from the September 1981 agreement.” Id. at 841. Though the court does not report the language of the 1981 arbitration agreement, it appears to base its conclusion either on a finding that the language of the agreement restricted arbitration to disputes which arose “solely” under its terms, or a finding that the parties’ 1984 agreement, which did not contain an arbitration clause, applied exclusively to conduct occurring after the 1981 agreement expired. See id. at 840-41. Neither of these reasons justifies the limitation that Balmer asks this court to impose on the Agreement. Rather than limiting its scope to disputes which arise solely under the Agreement, the clause at issue here applies to “all disputes or disagreements.” Moreover, there is no later agreement between Balmer and USF&G which eliminates the requirement of arbitration. Thus, Balmer’s reliance on Faircloth is misplaced.

This court is persuaded by the reasoning of courts that have held that when an arbitration clause speaks “in terms of relationships and not timing,” a dispute arising from the relationship between the parties is arbitrable even if the dispute arose before the agreement was signed. Rand Bond of North America, Inc. v. Saul Stone & Co., 726 F. Supp. 684, 688 (N.D. Ill. 1989); see also Zink v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 13 F.3d 330, 332 (10th Cir. 1993) (holding that a broad arbitration clause covered a dispute “despite the fact that the discharge giving rise to the dispute occurred prior to the execution of the agreement”); R.M. Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 539 (5th Cir. 1992) (same); Trott v. Paciolla, 748 F. Supp.

305, 308-09 (E.D. Pa. 1990) (compelling arbitration of a dispute arising before brokerage customers signed account agreement containing clause requiring arbitration of “any controversy between us arising out of your business”). As the language of the clause here is silent as to timing and “speaks in terms of relationships,” and I cannot say “with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute,” I find that it is applicable to the current dispute between the parties. AT&T Technologies, 475 U.S. at 650.

B. USF&G Has Not Waived Its Right to Arbitrate the Dispute.

Having found that the current dispute presents an arbitrable question, I must decide whether USF&G has waived its right to compel Balmer to arbitrate this dispute. Because determining whether a party has waived its right to arbitrate is a preliminary question of arbitrability, the court, rather than the arbitrator, should decide this question by reference to federal law. See Moses H. Cone, 460 U.S. at 24-25 (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”). Balmer contends that USF&G may not compel arbitration because of (1) its decision to “employ the full gambit of judicial pre-trial discovery procedures available against Balmer before demanding arbitration,” (2) its unreasonable delay in demanding arbitration, and (3) the prejudice that Balmer would suffer if forced to arbitrate. Balmer’s Brief, at 7-8.

In this circuit, “prejudice is the touchstone for determining whether the right to arbitrate has been waived,” Hoxworth v. Blinder, Robinson & Co., Inc., 980 F.2d 912, 925 (3d Cir.

1992), and given the strong federal preference for arbitration, “waiver under the [FAA] is not to be lightly inferred.” Great Western, 110 F.3d at 232; see also PaineWebber Inc. v. Faragalli, 61 F.3d 1063, 1068 (3d Cir. 1995). In addition to prejudice, the following factors are relevant to determining whether a party has waived its right to compel arbitration:

(1) the degree to which the party seeking to compel arbitration has contested the merits of his opponent’s claims, (2) whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the district court proceedings, (3) the extent of its nonmerits motions practice, (4) the moving party’s assent to the district court’s pretrial orders, and (5) the extent of the discovery.

Klein v. Boyd, 949 F. Supp. 286, 289 (E.D. Pa. 1996) (citing Faragalli, 61 F.3d at 1069, n.4).

Courts find waiver only when the parties have extensively litigated their claims through discovery and one party would be prejudiced if forced to arbitrate. See Great Western, 110 F.3d at 233; Faragalli, 61 F.3d at 1068. I will address each of Balmer’s three arguments for waiver separately.

1. USF&G’s Discovery in Basmajian

Balmer contends that because USF&G extensively participated in discovery in Basmajian and because some of USF&G’s discovery requests were directed to Balmer, USF&G has acted inconsistently with an intention to arbitrate its claims against Balmer. To the contrary, USF&G’s decision to defend itself against Basmajian’s claims in court and then to seek arbitration with Balmer is consistent with its position that an arbitrator should resolve its dispute with Balmer. Had USF&G brought Balmer into Basmajian as a party, in fact, it may have waived its right to arbitrate with Balmer by seeking a judicial resolution of arbitrable claims. The fact that Balmer possessed evidence relevant to the resolution of Basmajian’s claims against USF&G, and decided

to cooperate with USF&G's discovery requests does not now foreclose USF&G from seeking to resolve its claims against Balmer.

Balmer argues that USF&G, by conducting discovery relevant to its defense, has waived its right to arbitrate. The cases which Balmer cites in support of its position are inapposite because in those cases, courts found that arbitration was waived when the same claims that would be presented to the arbitrator had already been the subject of litigation and discovery in court. For example, in Eagle Traffic Control, Inc. v. James Julian, Inc., 945 F. Supp. 834 (E.D. Pa. 1996), the court found that the defendant had waived its right to compel arbitration of some of its claims when it had litigated those same claims before the court for seven months, and had "engaged in extensive discovery" of those claims by "serv[ing] 190 interrogatories, conduct[ing] 10 depositions, fill[ing] two discovery motions and respond[ing] to several more." Id. at 835. The court also found that the defendant's participation in court proceedings was inconsistent with an intention to arbitrate the claims being litigated. See id. at 835-86. Similarly, in National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 775-76 (D.C. Cir. 1987), the court found that A.G. Edwards had waived its right to compel arbitration of claims which it had litigated for three years, and had even submitted to the court in a summary judgment motion.

Neither of those cases supports Balmer's proposition that USF&G waived its right to arbitration with Balmer by conducting discovery in a non-arbitrable case, to which Balmer was not a party, arising from the same events. These cases, in fact, explicitly recognize that a party does not waive its right to arbitrate by conducting discovery on related, but non-arbitrable, claims. See National Foundation, 821 F.2d at 775 ("Given that the claims arose out of the same

transaction, any discovery that Edwards conducted may be relevant to the non-arbitrable claims, which must be tried in court. It is obviously Edwards' right to conduct discovery on any non-arbitrable claims.”). In Eagle Traffic, the court emphasized that it was the defendant's decision to pursue discovery of the arbitrable claims themselves, and not the defendant's decision to pursue the same discovery for use in a related state court action, that made its actions inconsistent with a duty to arbitrate. See Eagle Traffic, 945 F. Supp. at 835. Because any discovery of which Balmer now complains was obtained in connection with Basmajian's non-arbitrable claims against USF&G, USF&G has not waived its right to arbitrate with Balmer by conducting this discovery.

2. USF&G's Delay in Demanding Arbitration

Balmer next claims that USF&G waived its right to arbitrate by waiting for thirteen months after Basmajian settled to demand arbitration because this “unreasonable delay was yet another strategic move by USF&G to hinder any investigation by Balmer into the claims brought by USF&G.” Balmer's Brief, at 13. There is no evidence in the record that, in the thirteen months that passed, the parties' relative positions changed with respect to their dispute or that USF&G's delay has affected Balmer's ability to obtain information about the dispute. Moreover, as a result of USF&G's October 29, 1996 letter, Balmer was aware of USF&G's intention to seek arbitration even though USF&G had not yet made a formal demand. See Hoxworth, 980 F.2d at 926-27 (party's knowledge of opponent's intention to seek arbitration is relevant factor in waiver inquiry). The cases finding that delay has resulted in prejudice to the party resisting arbitration do not control the result here because they concern delay between the time that the allegedly arbitrable claims were brought in court and the time that they were the subject of a motion to

compel arbitration. See Faragalli, 61 F.3d at 1069; Hoxworth, 980 F.2d at 926. As prejudice is the “touchstone” of this court’s determination of waiver, and waiver is not to be lightly inferred, delay in the absence of prejudice will not waive a party’s right to arbitrate. See Brownyard, 868 F. Supp. at 127 (“a mere delay in proceeding to arbitration will not be considered waiver, and the party objecting to arbitration must show prejudice”). Balmer has pointed to no evidence in the record to demonstrate that it was prejudiced by USF&G’s delayed demand for arbitration, and thus, the delay is not grounds for waiver.

3. Absence of Prejudice

Balmer’s final contention is that it will be severely prejudiced if it is forced to arbitrate within the rules of JAMS/Endispute because USF&G has had much more extensive discovery than Balmer will be able to obtain in arbitration, and Balmer will have insufficient time to investigate fully the events at the root of the dispute, particularly when USF&G has been investigating the events for years. Any disparity in the amount of discovery which USF&G obtained from Balmer during the Basmajian litigation and the amount of discovery Balmer will obtain from USF&G during the arbitration results solely from the fact that USF&G was facing non-arbitrable claims which implicated Balmer’s conduct. As discussed above, USF&G’s participation in discovery in Basmajian did not affect its entitlement to arbitrate against Balmer, and because Basmajian’s claims against USF&G concerned her interactions with Balmer as USF&G’s agent, there is no significant difference between the discovery USF&G took in that case and the discovery that will be necessary to resolve the current dispute. Here, as in Klein, there can be no prejudice resulting from exposure to discovery that is “much more extensive than permitted in arbitration” if the discovery relating to the arbitrable claims and the non-arbitrable

claims is coextensive. Klein, 949 F. Supp. at 290, n.5.

Unlike parties seeking arbitration after participating in discovery on the same claims that are subject to arbitration, USF&G has gained no advantage over Balmer which prejudices Balmer. Cf. National Foundation, 821 F.2d at 774 (affirming district court's finding that plaintiff was prejudiced by motion to compel arbitration of claims that had been litigated for three years because the extensive discovery "placed the parties 'in a radically different posture from what they would have been [in] had arbitration been requested at the outset'"); Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 861 F. Supp. 1402 (N.D. Ill. 1994), aff'd, 69 F.3d 1312 (7th Cir. 1995), cert. denied, 517 U.S. 1134 (1996) (finding prejudice when defendant's arbitration demand came only after plaintiff's second summary judgment motion on arbitrable claims because "defendants were able to obtain discovery that they would not necessarily have been entitled to had there been an arbitration proceeding"). If Balmer feels that a proper resolution of its claims in arbitration depends upon more extensive discovery, or more time, than the arbitrator's rules permit, Balmer may raise those issues with the arbitrator. See Stipulation, Ex. X, at Rule 16(f).

4. Additional Factors in Waiver Analysis

In addition to its failure to demonstrate prejudice, Balmer has failed to identify other relevant factors which suggest that USF&G has waived its right to arbitration. USF&G has filed nothing with this court concerning the merits of its underlying dispute with Balmer, USF&G informed Balmer of its intention to seek arbitration in 1996, well before it did so formally, USF&G's nonmerits motions practice has been restricted to the propriety of compelling arbitration, USF&G has not accepted the district court's jurisdiction over the merits of its claims

by assenting to the court's pretrial orders, and USF&G has conducted no discovery in this court on its arbitrable claims. See Faragalli, 61 F.3d at 1069, n.4; Klein, 949 F. Supp. at 289.

CONCLUSION

Because the parties' current dispute is within the scope of the arbitration clause contained in the 1993 Agreement, and because USF&G has not waived its right to compel arbitration of the dispute, the parties are bound to arbitrate their dispute concerning indemnification and contribution for the Basmajian settlement. Balmer's Motion for Summary Judgment will, therefore, be denied and USF&G's Cross Motion for Summary Judgment will be granted. USF&G's Motion to Compel Arbitration will also be granted, and the parties are directed to submit their dispute to arbitration as provided in the Agreement.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

B.G. BALMER & CO., INC. : CIVIL ACTION
:
v. :
:
UNITED STATES FIDELITY AND :
GUARANTY COMPANY : NO. 98-734

ORDER

AND NOW, this _____ day of October, 1998, after consideration of the parties' cross motions for summary judgment, the plaintiff's supplement to its motion for summary judgment, and the response thereto, IT IS ORDERED that:

- (1) Plaintiff's Motion for Summary Judgment is DENIED;
- (2) Defendant's Cross-Motion for Summary Judgment is GRANTED; and
- (3) Defendant's Motion to Compel Arbitration is GRANTED and the parties are ordered to arbitrate their dispute in accordance with section V(T) of the Independent Agency Agreement.

- (4) The clerk is directed to mark the case “closed” for statistical purposes.

William H. Yohn, Jr., J.