

**THE NORTH RIVER INSURANCE COMPANY and UNITED STATES FIRE
INSURANCE COMPANY, Plaintiffs, v. TRANSAMERICA OCCIDENTAL LIFE
INSURANCE COMPANY, Defendant.**

Civil Action No. 3:99-CV-0682-L

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

**June 12, 2002, Decided
June 12, 2002, Filed, Entered**

SUBSEQUENT HISTORY: *Affirmed by N. River Ins
Co v. Transamerica, 2003 U.S. App. LEXIS 13132 (5th
Cir. Tex., June 5, 2003)*

DISPOSITION: Plaintiffs motion to compel arbitration
granted. Case dismissed with prejudice.

COUNSEL: For NORTH RIVER INSURANCE
COMPANY, UNITED STATES FIRE INSURANCE
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JUDGES: Sam A. Lindsay, United States District Judge.

OPINION BY: Sam A. Lindsay

OPINION

MEMORANDUM OPINION AND ORDER

Before the court is Plaintiffs' Pre-Trial Brief in
Support of Petition to Compel Arbitration, filed March
26, 2002; Defendant's Brief on the Issue of Compelling
Arbitration, filed April 18, 2002; and Plaintiffs' Reply
Brief in Support of Petition to Compel Arbitration, filed
May 3, 2002. ¹ After having reviewed the parties' briefs,
the evidence submitted, and the applicable law, the court
grants Plaintiffs' motion to compel arbitration and **sanc-**
tions Plaintiffs for their failure to comply with orders of
the court. ²

1 The court construes Plaintiffs' "Pre-Trial
Brief in Support of Petition to Compel Arbitra-
tion" as a motion to compel arbitration made
pursuant to *sections 4 and 6* of the Federal Arbitra-
tion Act ("FAA"), *9 U.S.C. § 1, et seq.* *Al-*
though the pretrial brief does not comply with the
formal requirements for the submission of a mo-
tion under the Federal Rules of Civil Procedure
or with our Local Rules, the court granted
Transamerica additional time to respond to the
issues presented by Plaintiffs' brief. In response,
Transamerica filed its own brief, accompanied by
a number of exhibits, to which Plaintiffs submit-
ted a reply. Accordingly, the court construes
Plaintiffs' pretrial brief as a motion and rules on
the issues therein contained.

2 *By request of the court, the parties also filed*
briefs to address certain evidentiary issues. On
April 18, 2002, Transamerica filed Defendant's
Brief on Evidentiary Issues. Plaintiffs filed their
Brief in Response to Transamerica's Brief on
Evidentiary Issues on may 3, 2002. After having
reviewed the evidence submitted by Plaintiffs, the
parties' briefs, and the applicable law, the court
overrules Defendant's objections.

I. Factual and Procedural History

A. Factual History

In 1985, Plaintiffs United States Fire Insurance Company ("U.S. Fire") and North River Insurance Company ("North River") were subsidiaries of Crum & Forster, Inc. ("C&F"). At that time, the Aviation Office of America, Inc. ("AOA") was a Texas insurance company that acted as the managing general agent for C&F's aviation insurance business. As the managing general agent, AOA issued insurance policies on behalf of U.S. Fire and North River to cover worker's compensation claims made by workers in the aviation industry. AOA also arranged reinsurance protection for those policies.

The Zimmerman, Green Line Slip ("Line Slip") was a reinsurance pool which invested funds from a group of subscribers in various reinsurance contracts. The subscribers to the Line Slip were insurance companies that contracted with a pool manager to act as the agent for the member companies. In 1985, Zimmerman, Green Incorporated ("ZGI") acted as the managing agent for the Line Slip. ZGI entered into management agreements with each of its subscribers. These management agreements authorized ZGI to enter into reinsurance contracts on behalf of each subscriber, and specified the maximum percentage share to which ZGI was allowed to bind each participant.

Effective January 1, 1985, Defendant Transamerica Occidental Life Insurance Company ("Transamerica") entered into a management agreement with ZGI (the "1985 Management Agreement"). Under the terms of the agreement, Transamerica authorized ZGI "to bind and accept for the purpose of procuring, underwriting, and servicing, on [Transamerica's] behalf, reinsurance of other insurance or reinsurance companies." Transamerica further agreed to accept a certain portion of the total risk borne by the reinsurance pool. Under the 1985 Management Agreement, Transamerica subscribed to a 23.53 percent share in the Line Slip. The 1985 Line Slip subscribers, and their corresponding shares of the 1985 reinsurance pool, included the following member companies: (1) Transamerica (23.53 percent); (2) Beneficial Life Insurance Company (23.53 percent); (3) Federal Insurance Company (5.88 percent); (4) North American Life and Casualty Company (17.66 percent); (5) Oxford Life Insurance Company (11.76 percent); (6) Republic National Life Insurance Company (5.88 percent); (7) State Mutual Life Insurance Company of America (11.76 percent).

By 1987, ZGI had changed its name to Zimmerman Line Slip, Inc. ("ZLSI"). In 1987, Transamerica entered into a similar management agreement with ZLSI (the "1987 Management Agreement"). Pursuant to the 1987 Man-

agement Agreement, Transamerica subscribed to a 6.81 percent share of the 1987 Line Slip. Similar to the 1985 Line Slip, the 1987 Line Slip was composed of a group of member insurance companies that subscribed to a specific share of premiums and losses arising from reinsurance contracts entered into on their behalf by ZLSI.

Effective December 15, 1985, ZGI entered into two reinsurance contracts ("treaties") with AOA (the "1985 Treaties") on behalf of the 1985 Line Slip. The first treaty, the "Primary Treaty," provided reinsurance for those policies issued by AOA on behalf of U.S. Fire and North River for losses up to \$ 250,000. The second treaty, the "Excess Treaty," provided reinsurance for losses up to \$ 750,000 beyond the first \$ 250,000. Both treaties were "quota share" treaties. Under a "quota share" treaty, a group of reinsurers agrees to accept a fixed percentage of all risks declared under the treaty. Under both the Primary and Excess Treaties, for example, ZGI contracted on behalf of the 1985 Line Slip for 25 percent of the total risk declared under the Treaty.³ The remaining percentage of risk was divided between a number of other insurance carriers. Both Treaties were renewed as of January 1, 1987, until December 31, 1987 (the "1987 Treaties").

³ Transamerica, as a subscriber the 1985 Line Slip, was responsible for 25.53 percent of 25 percent of the total risks declared under the 1985 Treaty with AOA. Similarly, Transamerica would accept 25.53 percent of 25 percent of the premiums due under the Treaty. Under the 1987 Treaties, Transamerica would accept 6.81 percent of 25 percent of the total risks and premiums.

Under the terms of the 1985 and 1987 Treaties, reinsurers who were not admitted in the State of New York were required to post letters of credit as security for the payment of known and reported losses. On or about December 1, 1986, AOA requested letters of credit from Transamerica and from the other non-admitted line slip subscribers to secure their percentage share of the reported losses under the 1985 Treaty. Instead of obtaining letters of credit from Transamerica and the other non-admitted 1985 Line Slip subscribers, ZGI represented that one of the admitted 1985 Line Slip subscribers, State Mutual Insurance Company ("State Mutual"), would act as a "front" for the shares of the other non-admitted members.⁴ Under the 1987 Treaties, ZLSI represented that Business Men's Assurance Company of America ("BMA") would act as the front.

⁴ As explained by Judge Lifland:

Fronting occurs when one reinsurer ("A") agrees to indemnify . . . "ceding" company ("B") if B sustains losses that are within the scope of the reinsurance coverage provided by the agreement between A and B. However, suppose reinsurer C wants to participate in reinsuring A, but may not do so for whatever reason. C can then enter into an agreement with B in which B agrees to represent C in the reinsurance agreement with A. For example, if B wants to participate in the reinsurance agreement for a 10% share and C for a 15% share, under a fronting agreement, B would enter into an agreement with A for a 25% [share] and then collect and dis-

tribute losses and premiums from C as appropriate (15%). In this case, C has an interest in the business assumed, albeit an indirect one, through B, which is "fronting."

General America Life Ins. Co. v. International Insurance Co., Civ. Action No. 98-5588 (JCL), slip op. at 3 n.1 (D.N.J. Jan. 3, 2000).

In effect, ZGI added the percentage interests of the non-admitted Line Slip members and represented their interests in the 1985 Line Slip under the admitted fronting company. For example, ZGI signed the 1985 treaties representing the Zimmerman Line Slip membership as:

Federal Insurance Co. (Chubb Group)	5.88%
North American Life and Casualty Co.	17.66%
State Mutual Life Assurance Co. of America	76.46%

The signature pages of the 1985 Treaties indicates that State Mutual owns a 76.46 percent share of the 1985 Line Slip. This 76.46 percent share, however, is the aggregate share of the shares owned by all of the non-admitted insurance companies that subscribed to the

1985 Line Slip. Similarly, the signature pages on the 1987 Treaties represent the 1987 Line Slip participation as follows:

Beneficial Life Insurance Co.	10.23%
Business Men's Assurance Co. of America	54.54%
Provident Mutual Life Ins. Co.	6.82%
Resources Life Ins. Co.	10.23%
Security Benefit Life Ins. Co.	11.36%
State Mutual Life Ins. Co. of America	6.82%

On the 1987 Treaties, BMA's share represents the aggregate shares owned by the non-admitted subscribers to the 1987 Line Slip. As a result of these fronting arrangements, Transamerica's interests in the reinsurance arrangements with AOA does not appear on the signature lines of either the 1985 or the 1987 Treaties.

ZGI (and later ZLSI) (collectively, the "Zimmerman entities") never sought authorization from, nor entered into any agreement with, either State Mutual or BMA to front for Transamerica's obligations under the treaties. Premiums under the treaties, however, were collected

and distributed according to the percentage shares of the 1985 and 1987 Line Slip, rather than the percentages specified on the signature pages of the Treaties. Transamerica accepted premiums and paid cash calls from AOA according to its Line Slip membership, even though Transamerica's participation in Line Slip is not noted on either of the Treaties.

Both the 1985 and the 1987 Treaties contain an arbitration clause.⁵ In 1992, Plaintiffs commenced an arbitration proceeding against all of the reinsurers, including the Zimmerman Line Slip, with respect to certain disputes under the Treaties. In 1993, the Zimmerman Line

Slip appointed its party-designated arbitrator. In 1995, the Zimmerman Line Slip ceased functioning, and since that time, Transamerica has denied liability under the Treaties.

5 The arbitration clauses in the 1985 and 1987 Treaties are identical and provide as follows:

If any dispute shall arise between the Reinsurer and the Reassured, either before or after termination of this Contract, with reference to the interpretation of this Contract or the rights of either party with respect to any transaction under this Contract, the dispute shall be referred to three arbitrators, one to be chosen by each party and the third by the two so chosen. . . . The arbitration shall take place in the State of Texas and the arbitration proceedings are to be governed by rules of the American Arbitration Association and the Texas State Arbitration Law.

B. Procedural History

Plaintiffs commenced this action on March 2, 1999, by filing their Original Petition in the District Court of Dallas County, seeking an order compelling arbitration under the TGAA Transamerica removed from state court based on diversity of citizenship on March 29, 1999. On September 27, 1999, Plaintiffs moved for leave to file their first amended petition.

By order dated January 27, 2000, this court granted Plaintiffs' motion to file an amended petition and stated:

In granting Plaintiffs' motion, the court notes that Plaintiffs' Amended Complaint requests the court to enter an order compelling arbitration. Plaintiffs requested this same relief in their original petition. *If Plaintiffs, however, desire for the court to enter an order compelling arbitration, they must petition the court for such relief by submitting a properly filed motion. See 9 U.S.C. § 4.*

(emphasis added). Plaintiffs, however, never filed a motion to compel Transamerica to arbitrate. On July 19,

2000, Plaintiffs moved for a default judgment against Transamerica. By Order dated March 30, 2001, this court denied Plaintiffs motion and again instructed Plaintiffs to file a motion to compel arbitration, stating:

Both parties appear to raise issues that may be dispositive of this case. Plaintiffs contend that this case should be arbitrated and request . . . an order compelling arbitration. Defendant, on the other hand, contends that Plaintiffs lack standing to pursue this action, and therefore the court lacks subject matter jurisdiction. These are matters that should be addressed by motions. Accordingly, if any party intends to pursue an issue that may be dispositive of this case, it is directed to file a dispositive motion on the issue(s) no later than **May 31, 2001.**

(emphasis in original). Despite having *twice* admonished Plaintiffs to submit a properly filed motion to compel arbitration, Plaintiffs have not done so. Instead, the parties submitted their pretrial materials in anticipation of the pretrial conference held on March 28, 2002.

On the eve of the pretrial conference, Plaintiffs submitted their "Pre-Trial Brief in Support of Petition to Compel Arbitration." In their briefing papers, Plaintiffs requested an evidentiary hearing and an order compelling arbitration. On the day of the pretrial conference, Plaintiffs submitted three binders of trial exhibits. Because the Defendant had not received Plaintiffs "Pre-Trial Brief" until the morning of the pretrial conference, and because the Defendant objected to many of the exhibits contained in the binders, the court continued the pretrial conference to allow for additional briefing. The matter having been fully briefed, the court now considers the issues presented.

II. Analysis

Plaintiffs contend that Transamerica is a party to the 1985 and 1987 Treaties, and as a party, is subject to the arbitration provisions contained in the contracts. Transamerica contends that it is not subject to the arbitration clause in the 1985 and 1987 Treaties because it never signed the contracts. In the alternative, Transamerica contends that Plaintiffs waived their right to pursue arbitration under the agreements by pursuing their claims in court.

A. Plaintiffs' Motion to Compel Arbitration

Transamerica first contends the FAA preempts Plaintiffs' claims under the TGAA. The FAA does not preempt state arbitration rules if the state rules do not

undermine the goals and policies of the FAA. *Volt Informational Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 477, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989). Both federal and Texas state law favor arbitration. *Moses H. Cone Memorial Hospital v. Mercury Constr. Co.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983); *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944, 39 Tex. Sup. J. 856 (Tex. 1996). Further, the Fifth Circuit has held that the Texas General Arbitration Act ("TGAA") can govern the scope of an arbitration agreement without undermining the federal policy underlying the FAA. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 247-48 (5th Cir. 1998). Accordingly, the court applies Texas law in determining the scope and applicability of the arbitration clause in this case.

Under Texas law, a party seeking to compel arbitration must establish: (1) the existence of a valid agreement to arbitrate; and (2) that the claims asserted by the party attempting to compel arbitration are within the scope of the arbitration agreement. *ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307, 311 (5th Cir. 1999); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573, 42 Tex. Sup. J. 377 (Tex. 1999). Texas law provides "if a party opposing an application [for arbitration] denies the existence of the agreement, the court shall summarily determine that issue." *Tex. Civ. Prac. & Rem. Code Ann. § 171.021*. "If the facts shown by the affidavits, pleadings, discovery, and stipulations are undisputed, the trial court should hold a summary hearing, rather than a full evidentiary hearing, and apply the terms of the arbitration agreement to the facts." *ASW Allstate*, 188 F.3d at 311. "If the material facts necessary to determine the issue are controverted by an opposing affidavit or otherwise admissible evidence, the trial court must conduct an evidentiary hearing to determine the disputed facts." *Id.* (quoting *Howell Crude Oil Co. v. Tana Oil & Gas Corp.*, 860 S.W.2d 634, 639 (Tex. App.--Corpus Christi 1993, no writ).

A court should not deny arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 230 (Tex. App.--Houston 1993, writ denied). "Courts must indulge every reasonable presumption in favor of arbitration, and all doubts as to the arbitrability of an issue must be decided in favor of arbitration." *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753, 44 Tex. Sup. J. 900 (Tex. 2001). The party opposing arbitration bears the burden of proving that no valid arbitration agreement exists as to the dispute. *Fridl v. Cook*, 908 S.W.2d 507, 511 (Tex. App.--El Paso 1995, writ dismissed w.o.j.).

Notwithstanding the strong federal and state policies in favor of arbitration, arbitration is nevertheless a matter of contract law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995). Under this principle, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Air Line Pilots Assoc. v. Miller*, 523 U.S. 866, 140 L. Ed. 2d 1070, 118 S. Ct. 1761 (1998); *Volt*, 489 U.S. at 478 ("The FAA does not require parties to arbitrate when they have not agreed to do so."); *EEOC v. Waffle House*, 534 U.S. 279, 122 S. Ct. 754, 763, 151 L. Ed. 2d 755 (2002) (stating "we look first to whether the parties agreed to arbitrate a dispute . . . It goes without saying that a contract cannot bind a non-party."). Here, Transamerica asserts that Plaintiffs have produced no written agreement binding the parties to arbitration. Specifically, Transamerica contends that it is not a party to the 1985 and 1987 Treaties because it is not listed as on the signature page along with the other members of the 1985 and 1987 Line Slips. The court disagrees.

Courts have recognized a number of theories arising out of common-law principles of contract and agency law to bind non-signatories to the arbitration agreements of others. See *Thompson - CSF, S.A. v. American Arbitration Assoc.*, 64 F.3d 773, 776 (2d Cir. 1995) (stating "a non-signatory party may be bound by the 'ordinary principles of contract and agency.'"); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986) (same); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 532 (5th Cir. 2000) (dissenting opinion, reciting applicable law). For example, courts have recognized at least five theories for binding non-signatories to arbitration agreements, including: (1) alter ego or veil piercing; (2) incorporation by reference; (3) assumption of the arbitration agreement; (4) agency; and (5) equitable estoppel. See *Thompson - CSF, S.A.*, 64 F.3d at 776. Using tradition principles of agency law, if a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered by that agreement. See *Pritzker v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir. 1993); see also *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990) (applying arbitration provision to non-signatory agents of corporation that was party to arbitration agreement). Similarly, an undisclosed principal may enforce a contract made for its benefit by an agent even though the signatory to the arbitration clause was unaware of the existence of the principal. See *Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F.2d 4, 6-7 (2d Cir. 1981). The principles of agency law have been further applied to bind non-signatory business entities to arbitration agreements. See *Pritzker*, 7 F.3d at 1122 (citing cases).

In this case, traditional principles of agency law demonstrate that Transamerica was a party to the 1985 and 1987 Treaties entered into between AOA and the Zimmerman entities. Under Texas law, a principal is liable for contracts made by its agent acting within the scope of the agent's authority. *See, e.g., Medical Personnel Pool of Dallas, Inc. v. Seale*, 554 S.W.2d 211, 213 (Tex. App.--Dallas 1977, writ ref'd n.r.e.); *Ross F. Meriwether & Assoc., Inc. v. Aulbach*, 686 S.W.2d 730, 731 (Tex. App.--San Antonio 1985, no writ) ("An agent is not a party to, nor individually liable on a contract he enters into on behalf of his principal. It is the principal who enters into the contract.") Further, "a grant of authority to an agent includes the implied authority to do all things proper, usual, and necessary to exercise that authority." *Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1471 n.6 (5th Cir. 1993) (holding bargaining association impliedly authorized to enter into arbitration clause on behalf of its members, stating "an agent's power to use an arbitration clause includes the power to enter and to invoke it").

Transamerica cannot dispute that it was a subscriber to the 1985 and 1987 Line Slips, or that the Zimmerman entities acted as its duly authorized agents. The evidence demonstrates that Transamerica entered into a series of management agreements with the Zimmerman entities authorizing these entities to bind Transamerica to reinsurance contracts. The agency between Transamerica and the Zimmerman entities expressly authorized the Zimmerman entities "to bind and accept" on Transamerica's behalf, "in the procuring, underwriting, and servicing of Reinsurance Contract(s)." Pursuant to this authority, the Zimmerman entities entered into 1985 and 1987 reinsurance Treaties with AOA. Accordingly, the court concludes that Zimmerman entities, acting as Transamerica's authorized agents, bound Transamerica to the reinsurance Treaties at issue in this case.

That Transamerica does not appear on the signature page of the 1985 and 1987 Treaties is of no moment. Under Texas law, an undisclosed principal may be held liable, even when his agent acts without authority, if the principal retains the benefits of the transaction. *Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex. 1980) ("When the benefits received are the direct, certain, and proximate result of the agent's unauthorized act, retention of those benefits after the principal acquires knowledge of the transaction constitutes affirmance of the act and ratification of the transaction. "). A principal ratifies a contract when he retains the benefits of the transaction after acquiring full knowledge, even though he had no knowledge originally of the unauthorized act of his agent. *See id.; Hornblower & Weeks-Hemphill, Noyes v. Crane*, 586 S.W.2d 582, 588 (Tex. Civ. App.--Corpus Christi 1979, writ ref'd n.r.e.).

Plaintiffs have submitted abundant evidence demonstrating that Transamerica received premiums and paid losses in accordance with the terms of the 1985 and 1987 Treaties. Moreover, the evidence indicates that Transamerica received premiums and paid losses in proportion to its Line Slip share for its given years of participation. Transamerica failed to controvert any of this evidence. Based on these facts, the court concludes that Transamerica ratified the contracts at issue.

Transamerica's ratification of the Treaties includes ratification of the arbitration provisions. A principal's ratification of an agent's act extends to the entire transaction. 609 S.W.2d at 757 ("A principal may not, in equity, ratify those parts of the transaction which are beneficial and disavow those which are detrimental."); *Condor Petroleum Co. v. Greene*, 164 S.W.2d 713, 721 (Tex. Civ. App.--Eastland, 1942, writ ref'd w.o.m.) (stating "principal who . . . retains the benefits of a contract . . . cannot repudiate that part of the contract which is unsatisfactory to him"). Transamerica therefore may not, on the one hand, accept premiums due under the 1985 and 1987 Treaties, and on the other hand, refuse to comply with the express provisions of the agreement.

Based on the substantial evidence submitted by the Plaintiffs, and the lack of relevant evidence submitted by the Defendant, the court concludes Transamerica has not carried its burden of proving that no valid arbitration agreements exist as to the dispute between the parties. On the contrary, the court finds that the uncontroverted evidence submitted by the Plaintiffs conclusively establishes the existence of a valid agreement to arbitrate. The evidence further demonstrates that Transamerica is a party to such an agreement by virtue of its agency relationship with the Zimmerman entities. Finally, the court finds that Plaintiffs' claims fall within the scope of the arbitration agreements.

B. Waiver

Transamerica next contends that Plaintiffs waived their arbitration rights by substantially invoking the litigation process. The legal standard for determining waiver is the same under both the FAA and TGAA. *See Sedillo v. Campbell*, 5 S.W.3d 824, 826 (Tex. App.--Houston [14th Dist.] 1999, no writ). There is a strong presumption against waiver of arbitration. *See, e.g., Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1164 (5th Cir. 1987) ("Waiver of arbitration is not a favored finding and there is a presumption against it."). A party alleging waiver carries a heavy burden. *Associated Builders v. Ratcliff Constr. Co.*, 823 F.2d 904, 905 (5th Cir. 1987), and "all doubts regarding waiver should be resolved in favor of arbitration." *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 594 (Tex. App.--Houston [14th Dist.] 1999, pet. filed).

A court may find a party has waived its right to arbitrate when "the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party." *Subway Equipment Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5th Cir. 1999) (internal quotations omitted); *Valero Energy Corp.*, 2 S.W.3d at 594. The waiver, however, must be intentional, *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89, 40 Tex. Sup. J. 104 (Tex. 1996), and "may only be implied from a party's actions if the facts demonstrate that the party seeking to enforce arbitration intended to waive its arbitration right." *Valero Energy Corp.*, 2 S.W.3d at 594; see also *Subway Equipment Leasing Corp.*, 169 F.3d at 329 (stating a party "must, at the very least, engage in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration"). Prejudice, in this context, "refers to inherent unfairness--in terms of delay, expense, or damage to a party's legal position--that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Subway Equipment Leasing Corp.*, 169 F.3d at 327.

With this standard in mind, the court finds Transamerica has not demonstrated that Plaintiffs waived their right to arbitrate this matter. Since removal to this court, Plaintiffs have moved to file an amended complaint, moved to seek a default judgment, pursued their rights of discovery under the Federal Rules of Civil Procedure, and moved to take deposition testimony after the discovery deadline. These activities fall well short of what is required to establish waiver under the applicable standard in this circuit. See, e.g., *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656, 661 (5th Cir. 1995) (finding no waiver despite removing action to federal court, filing a motion to dismiss, filing a motion to stay proceedings, answering complaint, asserting a counterclaim, and engaging in discovery); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 576-77 (5th Cir. 1991) (finding no waiver despite serving interrogatories, requesting production of documents, attending pretrial conference, and waiting thirteen months before seeking to compel arbitration); *Tenneco Resins, Inc. v. Davy Int'l, AG*, 770 F.2d 416, 420-21 (5th Cir. 1985) (finding no waiver despite seeking a stay, filing an answer to complaint, serving interrogatories, requesting production of documents, moving for a protective order, agreeing to a joint motion for continuance, requesting an extension of the discovery period, and waiting eight months before seeking to compel arbitration). Similarly, the court finds no evidence of prejudice as it is defined in this context.

Having found Plaintiffs have not waived their arbitration rights under the 1985 and 1987 reinsurance Treaties, the court believes the dispute between the parties must be submitted to arbitration in accordance with the

agreement. Accordingly, the court compels arbitration in accordance with the TGAA and the arbitration provisions contained in the 1985 and 1987 Treaties.

C. Sanctions

Finally, the court believes sanctions are appropriate in light of Plaintiffs' disregard of two court orders. The court's orders were plain and unequivocal. Plaintiffs' failure to submit a properly filed motion to compel arbitration within the time constraints set forth by the court's orders caused unnecessary delay in the disposition of this matter. Had Plaintiffs filed their briefing papers in accordance with the court's instructions and served them on the Defendant before the eleventh hour, the court could have ruled on these issues well in advance of the trial setting. As a result of Plaintiffs' conduct, however, precious court time was wasted, causing the court to delay the resolution of other cases and the Defendant to incur additional expenses in the preparation for trial. For example, Defendant was required to amend and resubmit its pretrial materials and attend a pretrial conference, all of which was rendered unnecessary by Plaintiffs' untimely motion. Because these additional expenses incurred by Defendant was a direct result of Plaintiffs' failure to adhere to two prior orders, the court concludes they should be sanctioned for such failures.

Defendant urges the court to dismiss Plaintiffs' arbitration claim with prejudice. "A dismissal with prejudice is appropriate only if the failure to comply with the court's order was the result of purposeful delay or contumaciousness, and the record reflects that the district court employed lesser sanctions before dismissing the action." *Long v. Simmons*, 77 F.3d 878, 880 (5th Cir. 1996) (citation in footnote omitted). Finding no record of contumacious conduct or purposeful delay, the court believes dismissal of the arbitration claim is inappropriate.

The Fifth Circuit has set forth a number of lesser sanctions that a court is to consider before it dismisses with prejudice: "Assessments of fines, costs, or damages against the plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings are preliminary means or less severe sanctions that may be used to safeguard a court's undoubted right to control its docket." *Boudwin v. Graystone Ins. Co.*, 756 F.2d 399, 401 (5th Cir. 1985). The court believes a monetary sanction is appropriate under the circumstances of this case. The court therefore **orders** Plaintiffs to pay all reasonable attorney's fees and costs incurred by the Defendant to amend its pretrial materials, to prepare for the pretrial conference, and to attend the pretrial conference on March 28, 2002.

III. Conclusion

For the reasons stated herein, the court **grants** Plaintiffs motion to compel arbitration and **orders** the parties to arbitrate this matter in accordance with the Texas General Arbitration Act and the provisions of the arbitration agreements.

It is further ordered, for the reasons previously stated, that Plaintiffs pay reasonable attorney's fees and costs as sanctions to the Defendant for its filing and preparation of pretrial materials as provided above. In the unlikely event a problem arises between the parties regarding the amount of sanctions to be awarded the Defendants, the parties may seek redress from the court.

Having determined all of the issues raised by the parties must be submitted to binding arbitration, and finding no other reason to retain jurisdiction over this matter, the court **dismisses this case with prejudice**. See *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992).

It is so ordered this 12th day of June, 2002.

Sam A. Lindsay

United States District Judge