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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

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Appellate Case No.: 2024-001841

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Arlene Gariepy, Lee Gariepy, Kimberlee Elliott
and Noah Gariepy,….. ..... Plaintiffs/Respondents,

v.

Midgard Self Storage Seneca SC, LLC
and Reliant Real Estate Management, LLC,.....Defendants/Appellants.

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# FINAL BRIEF OF APPELLANT

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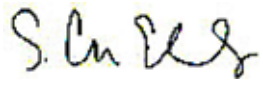

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TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES & RULES**

## STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court committed error in denying Appellants' Motion to Compel Arbitration notwithstanding that Appellants sought arbitration well before the deadline required to do so under the arbitration agreement; Appellants did nothing more before the trial court than participate in mediation and mutual discovery, which would have been necessary in arbitration anyway; and Appellants did not otherwise seek or obtain any substantive rulings on the merits of the case from the trial court or engage in any conduct manifesting an intent to waive their right to compel arbitration?

## STATEMENT OF THE CASE

On or about June 29, 2023, Respondent Arlene Gariepy entered into a self-storage rental agreement ("The Lease") with Appellants to occupy a self-storage unit at Appellant Midgard Self Storage Seneca SC, LLC's ("Midgard"), facility in Seneca, South Carolina. R. p. 10 at ¶ 11. The Lease designated Gariepy to utilize unit L25. *See id.* Respondents allege that, on June 29, 2023, they attempted to store their personal property in unit L25 but were unable access the unit because it was secured by a lock. R. p. 10 at ¶ 13. Respondents allege they sought the help of a Midgard employee who instructed them to store their property in unit L24 instead of L25. R. p. 10 at 14. Respondents allege that, on or about July 24, 2023, Appellants listed "Plaintiffs' storage unit" for sale on storageauctions.com and the unit was subsequently purchased at auction on July 31, 2023. R. p. 11 at ¶¶ 19-20. Respondents allege they never received notice that "their storage unit" had been listed for auction or that "their storage unit" had been sold. R. p. 11 at ¶¶ 22-23.

On September 22, 2023, Respondents filed suit against Appellants alleging several claims, including breach of contract, conversion, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act. R. pp. 12-16 at ¶¶ 24-49. Appellants filed their Answer on October 23, 2023, denying liability. R. pp. 18-25.

In September 2024, Appellants filed a motion to compel arbitration, pursuant to the arbitration agreement in The Lease. R. pp. 32-33. Respondents submitted a memorandum in opposition to Appellants' Motion to Compel Arbitration on September 18, 2024. R. pp. 34-38. Notably, Appellants did *not* argue that the arbitration agreement was unenforceable, void, or invalid, that this dispute does not fall within the scope of the arbitration agreement, or that the agreement was unenforceable for any reason other than waiver or delay. *See id.* The Motion to

Compel Arbitration was heard before the Honorable R. Scott Sprouse on September 19, 2024. On September 23, 2024, Judge Sprouse signed a "Form 4" Order denying Appellants' Motion to Compel Arbitration. R. pp. 1-3. The Order stated, in part, "the parties have conducted significant discovery and a substantial length of time has transpired between the commencement of the action and the commencement of the Motion to Compel Arbitration, which has resulted in prejudice to the Plaintiff," citing *Rhodes v. Benson Chrysler-Plymouth, Inc*., 374 S.C. 122, 125 (Ct. App. 2007). *See id.* Appellants filed a timely Motion to Reconsider on October 3, 2024. R. pp. 90-98. On October 4, 2024, Judge Sprouse signed a "Form 4" Order denying Appellants' Motion to Reconsider without a hearing. R. pp. 4-6.

Appellants filed a timely Notice of Appeal on October 25, 2024.

## FACTS

Respondents are residents of the state of Florida and were building a house in Seneca, South Carolina, with intentions to move there upon completion of the construction. R. p. 8 at ¶¶ 1-4; R. p. 316, lines 8-14. Respondents traveled from Florida to Seneca, South Carolina, on June 29, 2023, believing that construction on their new home would be finished. R. p. 317, lines 11-16; R. p. 326, line 17-p. 327, line 5. Arlene Gariepy signed The Lease online with Midgard while traveling to South Carolina. R. p. 318, line 18-p. 319, line 7; R. p. 327, lines 6-10. Incorporated in The Lease between the parties was the following arbitration agreement:

> **ARBITRATION:** In the event of any claim, dispute or lawsuit by Occupant against Owner (or Owner against Occupant) arising from Occupant's rental or use of the Space or this Lease, the claim or lawsuit shall be submitted to binding arbitration upon the request of either party and the service of that request on the other party. The parties agree that the arbitration shall be conducted and heard by a single arbitrator to resolve the claim, dispute or lawsuit. THE ARBITRATION MUST BE CONDUCTED ON AN INDIVIDUAL BASIS AND OCCUPANT AND OWNER AGREE NOT TO ACT AS A CLASS-REPRESENTATIVE OR IN A PRIVATE ATTORNEY GENERAL CAPACITY IN ANY CLAIM, DISPUTE OR LAWSUIT. Owner will not request to arbitrate any claim, dispute

> or lawsuit that Occupant brings in small claims court. However, if such a claim is transferred, removed or appealed to a different court, Owner may then choose to arbitrate. The arbitration must be brought within the time set by the applicable statute of limitations or within two years of Occupant vacating the premises, whichever occurs first. The Federal Arbitration Act (FAA) shall govern this arbitration agreement. The Arbitration shall be conducted by National Arbitration and Mediation (NAM) under its Comprehensive Dispute Resolution Rules and Procedures for the Self-Storage Industry. The NAM arbitration rules and procedures may be found at www.namadr.com. Occupant understands that Occupant is entitled to a judicial adjudication of disputes with the Owner with respect to this Lease and is waiving that right. The parties are aware of the limited circumstances under which a challenge to an arbitration award may be made and agree to those limitations. Owner and Occupant stipulate and agree that they have had sufficient time and opportunity to consider the implications of their decision to arbitrate and that this provision concerning arbitration represents a voluntary choice after due consideration of the consequences of entering into this provision and Agreement. IF OWNER CHOOSES ARBITRATION, OCCUPANT SHALL NOT HAVE THE RIGHT TO LITIGATE SUCH CLAIM OR LAWSUIT IN COURT OR TO HAVE A JURY TRIAL. OCCUPANT IS ALSO GIVING UP OCCUPANT'S RIGHT TO PARTICIPATE IN A CLASS ACTION OR OTHER COLLECTIVE ACTION LAWSUIT OR ARBITRATION.

R. p. 55 at ¶ 31. Respondent Arlene Gariepy electronically signed the Agreement underneath a bold, all caps statement which states: "**I HAVE READ, UNDERSTAND, AND AGREE TO BE BOUND BY ALL TERMS OF THIS LEASE.**" R. pp. 56-57.

The Lease created a valid, binding, enforceable contract between the parties. R. p. 12 at ¶ 25; R. p. 19 at ¶ 12.

## STANDARD OF REVIEW

The denial of a motion to compel arbitration, based on a finding of waiver, is a legal conclusion subject to *de novo* review on appeal. *Carlson v. S.C. State Plastering, LLC*, 404 S.C.250, 743 S.E.2d 868 (Ct. App. 2013); *MailSource, LLC v. M.A. Bailey & Assoc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003).

## ARGUMENTS

### I. The Lease contains a valid, binding and enforceable arbitration agreement.

It is an indisputable fact that The Lease between the parties is valid, binding, and enforceable, given the allegations of Respondents' Complaint and Appellants' admission of the same in their Answer. R. p. 12 at ¶ 25; R. p. 19 at ¶ 12. It is indisputable that The Lease contained an unambiguous arbitration agreement and waiver of right to a jury trial:

> **ARBITRATION:** In the event of any claim, dispute or lawsuit by Occupant against Owner (or Owner against Occupant) arising from Occupant's rental or use of the Space or this Lease, the claim or lawsuit shall be submitted to binding arbitration upon the request of either party and the service of that request on the other party. The parties agree that the arbitration shall be conducted and heard by a single arbitrator to resolve the claim, dispute or lawsuit. THE ARBITRATION MUST BE CONDUCTED ON AN INDIVIDUAL BASIS AND OCCUPANT AND OWNER AGREE NOT TO ACT AS A CLASS-REPRESENTATIVE OR IN A PRIVATE ATTORNEY GENERAL CAPACITY IN ANY CLAIM, DISPUTE OR LAWSUIT. Owner will not request to arbitrate any claim, dispute or lawsuit that Occupant brings in small claims court. However, if such a claim is transferred, removed or appealed to a different court, Owner may then choose to arbitrate. The arbitration must be brought within the time set by the applicable statute of limitations or within two years of Occupant vacating the premises, whichever occurs first. The Federal Arbitration Act (FAA) shall govern this arbitration agreement. The Arbitration shall be conducted by National Arbitration and Mediation (NAM) under its Comprehensive Dispute Resolution Rules and Procedures for the Self-Storage Industry. The NAM arbitration rules and procedures may be found at www.namadr.com. Occupant understands that Occupant is entitled to a judicial adjudication of disputes with the Owner with respect to this Lease and is waiving that right. The parties are aware of the limited circumstances under which a challenge to an arbitration award may be made and agree to those limitations. Owner and Occupant stipulate and agree that they have had sufficient time and opportunity to consider the implications of their decision to arbitrate and that this provision concerning arbitration represents a voluntary choice after due consideration of the consequences of entering into this provision and Agreement. IF OWNER CHOOSES ARBITRATION, OCCUPANT SHALL NOT HAVE THE RIGHT TO LITIGATE SUCH CLAIM OR LAWSUIT IN COURT OR TO HAVE A JURY TRIAL. OCCUPANT IS ALSO GIVING UP OCCUPANT'S RIGHT TO PARTICIPATE IN A CLASS ACTION OR OTHER COLLECTIVE ACTION LAWSUIT OR ARBITRATION.

R. p. 55 at ¶ 31. The agreement includes a stipulation that the parties had sufficient time to consider the implications of their decision to arbitrate and that they are voluntarily choosing to enter into the agreement after due consideration of the consequences. *See id.* Arlene Gariepy's

electronic signature on page 9 of The Lease satisfies South Carolina law which require signatures for online transactions. *See S.C. Code Ann. § 26-6-70(D); Traynum v. Scavens,* 416 S.C. 197, 203-204,786 S.E.2d 115, 119 (2016).

Therefore, the arbitration agreement contained in The Lease is valid, binding and enforceable, and Respondents do not suggest otherwise.

**II. The arbitration agreement is valid, binding, and enforceable as to all Respondents.**

Respondents, in their Response and Memorandum of Law in Opposition of Defendants' Motion to Compel Arbitration, argue that Respondents Lee Gariepy, Kimberlee Elliott, and Noah Gariepy are non-signatories to The Lease and, therefore cannot be bound by the arbitration agreement or forced to submit to arbitration. R. pp. 34-38. This argument is without merit. "A non-signatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Pearson v. Hilton Head Hosp.,* 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.,* 170 F.3d 349, 353 (2d Cir. 1999) *(*citing *Doloitte Noraudit A/S v. Deloitte Haskins & Sells,* 9 F.3d 1060, 1064 (2d Cir. 1993)).

All Respondents undoubtedly received a direct benefit from The Lease, despite the fact that only Respondent Arlene Gariepy is a signatory. Each Respondent utilized Appellants' facility to store their personal property. In fact, Respondents' Complaint alleges that "Plaintiffs were permitted to use and occupy their storage unit to store their personal property" and "Plaintiffs Arlene, Lee, Kimberly and Noah each had a right to possession of the personal property stored in their self-storage unit at Defendant Midgard's self-storage facility." R. p. 10 at ¶ 12; R. p. 13 at ¶ 29.

It is clear from Respondents' Complaint that each Respondent intended to benefit from The Lease whether they were signatories to the agreement or not and, as such, they should each be bound by The Lease and the arbitration agreement as if they were signatories. The law is well developed under the FAA that non-signatories can be bound by arbitration agreements executed by other parties. *See International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000) ("Rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause."); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1064 (2nd Cir. 1993) (holding that a nonsignatory who knowingly accepted the benefits of the contract is estopped from denying an obligation to arbitrate pursuant to the contract).

Thus, it is clear through the allegations of Respondents' Complaint and their knowing acceptance of the benefits of The Lease that *all* Respondents, including Lee Gariepy, Kimberlee Elliott, and Noah Gariepy, are bound by the arbitration agreement in The Lease.

## III. The arbitration agreement is governed by the Federal Arbitration Act and Federal Law.

As an initial matter, the arbitration agreement provides that it shall be governed by The Federal Arbitration Act (hereinafter "FAA"). "The Federal Arbitration Act (FAA) shall govern this arbitration agreement." R. p. 55 at ¶ 31. "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). The FAA also applies to any arbitration agreement regarding transactions that involve interstate commerce unless the parties agreed otherwise. *Id.* at 538, 542 S.E.2d at 363. The transaction here involved interstate commerce.

Respondents are all residents of the state of Florida. R. p. 8 at ¶¶1-4. Respondents allege they entered into a self-storage rental agreement at Appellant Midgard's self-storage facility

located at 600 Shiloh Road, Seneca, South Carolina 29678. R. p. 10 at ¶ 11. Respondents were in the process of building a home in South Carolina and moving from Florida when they entered into the agreement with Appellants. R. p. 316, lines 8-14; R. p. 317, lines 11-16. After entering into the agreement and depositing their belongings in their leased storage unit, Respondents went back home to Florida and did not return until hearing their belongings had been auctioned. R. p. 320, line 23-p. 321, line 14. Respondents, residents of the state of Florida, drove to South Carolina, entered into an agreement to store their personal property with Appellants in exchange for monetary value, and then went back to Florida. There can be no dispute that the Agreement involved interstate commerce. Finally, Respondents have not disputed that the FAA applies to the arbitration agreement. Thus, the FAA governs the arbitration agreement.

Both state and federal policy favor arbitration of disputes. *See Aiken v. World Fin. Corp.,* 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *Corbin v. Washington Fire & Marine Ins. Co.,* 278 F.Supp 393, 398 (D.S.C. 1968), *aff'd* 398 F.2d 543 (4th Cir. 1968). However, when the FAA applies to a matter, state law is supplanted by federal law. *Trident Technical College v. Lucas & Stubbs, Ltd.,* 286 S.C. 98, 103-104, 333 S.E.2d 781, 785 (1985). "…(T)he FAA 'created a body of federal substantive law,' which was 'applicable in state and federal courts.' … [in *Southland Corp.*] we rejected the view that state law could bar enforcement of [§ 2 of the FAA], even in the context of state-law claims brought in state court." *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 445 (2006) *(quoting Southland Corp. v. Keating,* 465 U.S. 1 (1984)). The FAA "is a declaration of national law equally applicable in state or federal court." *Trident Technical College v. Lucas & Stubbs, Ltd., supra* at 104, 333 S.E.2d at 785 (*quoting Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F.2d 402, 407 (2nd Cir. 1959). "The effect of [Section 2 of the FAA] is to create a body of federal substantive law of arbitrability, applicable to any arbitration

agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Therefore, all issues regarding arbitration should be determined with respect to federal law.

As the trial court's denial of Appellants' Motion to Compel Arbitration cited only South Carolina case law, it was in error and the matter should be remanded. R. p. 1-3.

## IV. Defendants have not waived their right to arbitration under federal or state law.

Respondents' only argument in opposition to Appellants' Motion to Compel Arbitration was that they had waived their right to demand arbitration by not requesting arbitration sooner and by actively participating in the litigation process. R. pp. 34-38. It was upon this basis that the trial court denied Appellants' motions at issue in this appeal. For the reasons that follow, the trial judge erred in holding that Appellants waived the right to arbitrate this dispute. Therefore, this Court should reverse this action and remand this case with instructions to the trial court to enter an order compelling arbitration.

### A. Arbitration agreements must be enforced according to their terms and the agreement here expressly permitted Appellants to compel arbitration at any time within a two-year period after Respondents claims accrued.

The Fourth Circuit's standard for waiver closely mirrors that of the state of Maryland. There is no longer an actual prejudice requirement under federal law. *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022). Thus, the Fourth Circuit evaluates whether a party's conduct in substantially participating in litigation amounts to a waiver of the right to compel arbitration. *Blitz v. USAA Gen. Indem. Co.*, 2024 U.S. Dist. LEXIS 208579 at *12-13, 2024 WL 4815980 (D. Md. Nov. 18, 2024). "The extent to which a party has engaged in discovery and other trial-oriented activities before invoking arbitration or appraisal 'is material to a court's assessment of whether that party has actively litigated in a case.'" *Id*. at *13 (*quoting Commonwealth Equity*

*Servs., Inc. v. Messick*, 831 A.2d 1144, 1155 (Md. Ct. App. 2003). Given the strong federal policy favoring arbitration, the party opposing arbitration on the basis of waiver bears a heavy burden. *American Recovery Corp. v. Computerized Thermal Imaging* 96 F.3d 88, 95 (4th Cir. 1996) (*see also MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001); *Patten Grading & Paving, Inc. v. Skanska United States Bldg., Inc.*, 380 F.3d 200 (4th Cir. 2004)).

Respondents argue that Appellants filed their Motion to Compel Arbitration 351 days after Respondents filed suit, during which time the parties engaged in extensive discovery, including written interrogatories, requests for production, requests for admission, depositions, and mediation. R. pp. 34-38; R. p. 109, line 24-p. 110, line 16. For the following reasons, these claims are not sufficient to establish waiver.

The amount of time between Respondents filing suit and Appellants filing their Motion to Compel Arbitration, without more, is insufficient evidence of waiver. Mere delay does not constitute waiver. *Maxum Foundations, Inc., v. Salus Corp.*, 779 F.2d 974, 982 (4th Cir. 1985).

Significantly, the arbitration agreement set forth the time limitations in which a party must seek arbitration, "The arbitration must be brought within the time set by the applicable statute of limitations or within two years of Occupant vacating the premises, whichever occurs first." R. p. 55 at ¶ 31. This provision provides a definitive contractual timeframe in which Appellants may choose to compel arbitration. By agreement, Appellants are permitted to seek to compel arbitration at any time, so long as they do so within that express timeframe.

In general, there is a three year statute of limitations on breach of contract claims in South Carolina, and Respondents vacated the premises in August 2023. Therefore, under The Lease, arbitration could properly be sought any time before August 2025, the two-year anniversary of Respondents vacating the property. Appellants' Motion to Compel Arbitration

was filed in September 2024, well within the two-year period for compelling arbitration set forth in The Lease. By the agreement of the parties, Appellants' request for arbitration was thus timely.

Further, a number of courts have found that similar, and in some cases longer, delays in asserting arbitration rights did not constitute waiver of said right. *See Cf. Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 122 (2d Cir. 1991) (no waiver despite three-year delay in asserting arbitration right); *De Jesus v. Gregorys Coffee Mgmt., LLC*, 2022 U.S. Dist. LEXIS 138970, 2022 WL 3097883 (E.D.N.Y. Aug. 4, 2022) (declining to find that eight-month delay in seeking right to arbitration supported a finding of waiver); *In re Generali COVID-19 Travel Ins. Litig.*, 577 F. Supp. 3d 284, 294 (S.D.N.Y. 2021) (refusing to find waiver after approximately one year delay in seeking right to arbitration). Here, Appellants' exercise of their express contractual right to compel arbitration within the applicable two-year timeframe shows that they did not intend to waive its contractual right to compel arbitration. This alone is dispositive and requires reversal.

### B. Appellants did not express the intent to waive their right to compel arbitration by engaging in discovery in the trial court, which would have been permitted and required in arbitration.

The discovery taken by Appellants before compelling arbitration was not extensive or excessive and would have been permitted and required in arbitration. It thus does not indicate any intent by Appellants to waive the right to compel arbitration.

Of the discovery which took place in the action prior to the filing of Appellants' Motion to Compel Arbitration, the majority of the activity was initiated by Respondents. Respondents served their First Set of Interrogatories, Requests for Production and Requests for Admission on Appellants on October 7, 2023. On November 16, 2023, Respondents served their First Set of

Supplemental Requests for Production on Appellants. On November 30, 2023, Respondents took the deposition of Appellant Midgard, pursuant to South Carolina Rules of Civil Procedure Rule 30(b)(6). On December 1, 2023, Respondents served their Second Set of Supplemental Requests for Production on Appellants. On December 6, 2023, Respondents noticed the deposition of Angela Swafford for January 5, 2024. However, this deposition was later canceled as the witness could not be located. On February 2, 2024, Respondents took the deposition of Appellant Midgard's employee Sattler Van Dyne. On February 18, 2024, Respondents served their First Set of Supplemental Interrogatories on Appellants. On February 29, 2024, Respondents took the deposition of Appellant Reliant's employee Jill Van Dyne. On July 12, 2024, Respondents served their Second Set of Supplemental Interrogatories and Third Set of Supplemental Requests for Production on Appellants. On July 30, Respondents served their Second Set of Requests for Admission on Appellants. On August 19, 2024, Respondents filed their Motion to Compel outstanding discovery requests.

In contrast to the numerous discovery requests propounded and depositions noticed by Respondents, Appellants discovery activities have been very limited. Appellants served their First Interrogatories and Requests for Production on Respondents on October 23, 2023. Appellants took the depositions of Respondents Arlene Gariepy and Lee Gariepy on May 28, 2024. Arlene Gariepy's deposition began at 10:00am and concluded at 10:57am. R. p. 314-p. 323, line 18. Lee Gariepy's deposition began at 11:07am and concluded at 11:57am. R. p. 324-p. 329, line 12. Activity not initiated by the party moving to compel arbitration should not be considered in determining whether wavier exists. *Patten Grading v. Paving, Inc. v. Skanska United States Bldg., Inc., supra* at 206. As such, the court should only consider a single set of

discovery requests and two depositions which each lasted less than one hour in length in determining whether Appellants waived their right to arbitration.

Importantly, due to the nature of Respondents' claims and the facts at issue in the case, discovery would have been necessary in the context of arbitration even if the case had been referred to arbitration at the outset. Pursuant to the Agreement, arbitration would be conducted by National Arbitration and Mediation under its Comprehensive Dispute Resolution Rules and Procedures for the Self-Storage Industry and, pursuant to those rules and procedures, "The parties shall conduct discovery on a voluntary basis, the procedure of which shall be agreed to by the parties…" R. p. 75. Respondents claim that they leased unit L25 from Appellants but, when they were unable to open unit L25, they were told by one of Appellants' employees to use unit L24 instead. R. p. 10 at ¶¶ 13-14. Respondents claimed that an unidentified employee told them to use a unit other than the unit that was listed on The Lease. Respondents' claims were based on hearsay and discovery was required to determine the identity of the employee referenced in Respondents' Complaint and find out as much information as possible about the conversation between Respondents and said employee to determine what percentage of liability, if any, could be assigned to Appellants in this case. Through the Rule 30(b)(6) deposition testimony of Appellant Midgard, it was determined that the unidentified employee was Angela Swafford and that her employment with Midgard had ended several weeks after Respondents leased their unit due to Ms. Swafford's repeated absences from work. R. p. 175, lines 8-11; R. p. 182, lines 16-20; R. p. 211, lines 9-22. Depositions of Sattler Van Dyne, the market manager over the facility, and Respondents Arlene and Lee Gariepy were necessary in the absence of Ms. Swafford for the parties to determine what happened on the day Respondents signed The Lease. That evidence would have been necessary for either party to adjudicate the case – whether before a judge or an

arbitrator – and, therefore, the discovery would have taken place pursuant to National Arbitration and Mediation's Comprehensive Dispute Resolution Rules and Procedures for the Self-Storage Industry even if the case had been referred to arbitration immediately after Respondents filed their Complaint. Given the circumstances of the case and the limited discovery activity initiated by Appellants, it cannot be said that Appellants so engaged in the litigation process as to constitute a waiver of the right to arbitration.

The fact that Respondents filed a Motion to Compel and sought court intervention in the discovery process is irrelevant, as they would have had a substantially similar right had the case been referred to arbitration at the outset. Pursuant to the applicable Self-Storage Industry Dispute Resolution Rules and Procedures, if the parties fail to voluntarily participate in discovery, the arbitrator has the power to order such discovery as they deem necessary for a full and fair exploration of the disputed issues. R. p. 75. Additionally, the trial court has not ruled on Respondents' Motion to Compel as the parties filed a Consent Order for Continuance regarding the motion until the resolution of the instant appeal. R. pp. 100-102.

**C. Defendants did not waive their contractual right to compel arbitration by engaging in mediation.**

In addition, it cannot be said that, as Respondents argue, Appellants have waived their right to compel arbitration merely by participating in mediation. Mediation is merely an informal attempt to reach a resolution in a case. Mediation provides the parties an opportunity to avoid extra costs associated with preparing the case for adjudication in front of a judge or arbitrator by trying to resolve the dispute amongst themselves. It cannot be said to be prejudicial to either party. It strains credulity that mediation is somehow prejudicial, especially since it is mandatory in all civil actions filed in the South Carolina Circuit Courts. *See* SCADR Rule 3(a).

**D. Appellants did not seek or obtain rulings on the merits of the dispute.**

Finally, Appellants have not sought to use the trial court to obtain any substantive or dispositive rulings on the merits in this action. In fact, other than Appellants' Motion to Compel Arbitration, only one discovery motion was filed in this case, by Respondents. R. pp. 29-31. Besides Appellants' Motion to Compel Arbitration and Respondents' Motion to Compel, the only other involvement of the trial court before the filing of the instant appeal was to enter a Consent Scheduling Order. Since initiating this appeal, Appellants filed a Motion to Stay and the parties filed a joint Consent Order to Stay and a joint Consent Order for Continuance. Respondents have not, and cannot, present any evidence supporting or suggesting that Appellants' utilized the litigation process to such an extent to constitute a waiver of the right to enforce arbitration in this matter.

Many courts have found a party's activity in litigating the merits of an action as a substantial factor in determining whether the right to arbitration has been waived. *See Banq. Inc. v. Purcell*, 2024 U.S. App. LEXIS 23203, 2024 WL 4164126 (9th Cir. Sept. 10, 2024) (finding that Defendants' motion to dismiss claims on the merits demonstrated their intent to actively litigate the case on the merits); *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250 (4th Cir. 1987) (finding waiver of right to arbitration based on filing of three motions to dismiss and partial granting of motion for partial summary judgment, resulting in a partial adjudication on the merits); *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340 (4th Cir. 2009) (finding waiver of right to arbitrate based on pretrial preparations, motion for summary judgment, motions in limine, and multiple pretrial filings); *Smiley v. Forecpoint Fed., LLC*, 2018 U.S. Dist. LEXIS 189246, 2018 WL 5787468 (E.D. Va. Nov. 5, 2018) (finding Defendant did not waive right to arbitrate as it filed no motions to dismiss, motions for summary judgment, or any other dispositive motions before moving to compel arbitration); *Microstrategy, Inc. v.*

*Lauricia,* 268 F.3d 244 (4th Cir. 2001) (emphasizing importance of whether there has been a determination on the merits in waiver analysis); *Witness Insecurity, LLC, v. Hale,* 2013 U.S. Dist. LEXIS 202963, 2013 WL 12162297 (E.D.N.C. Sept. 27, 2013) (considering the importance of seeking a decision on the merits before attempting to arbitrate and finding no waiver due to minimal trial-oriented activities). Appellants did not seek any rulings on the merits of this action before the trial court.

"The [Federal] 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." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., supra* at 24-25 (emphasis added). Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute. *Zandford v. Prudential-Bache Sec., Inc.*, 112 F.3d 723,726 (4th Cir. 1997). A court "has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002).

**E. Arbitration is favored.**

Even if this case were governed by South Carolina law, rather than federal law, Appellants could still not be said to have waived their right to enforce arbitration. South Carolina courts favor arbitration of disputes and resolve any doubts concerning arbitrable issues in favor of arbitration. *See Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 262, 569 S.E.2d 349, 358 (2002). "There is a presumption against finding a party has waived its right to compel arbitration." *Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C. 371, 388, 759 S.E.2d

727, 736 (2014) (*citing E. Dredging & Constr., Inc. v. Parliament House, L.L.C.*, 698 So.2d 102,103 (Ala. 1997). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749,753 (Ct. App. 1999) (*citing Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.* (*citing Hyload Inc. v. Pre-Engineered Prods. Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992). As discussed in depth above, Respondents suffered no prejudice caused by delay in demanding arbitration. The parties would have had to engage in the same discovery whether the case proceeded in the trial court or was referred to arbitration. The parties engaged in mediation, but in no way can an opportunity for the parties to resolve the case amongst themselves be considered prejudicial. Finally, Appellants have not sought any substantive or dispositive rulings to prejudice Respondents' ability to pursue their claims. A waiver of the right to arbitrate is a fact-specific inquiry and, in this case, the facts clearly do not support any finding that the right to arbitrate has been waived.

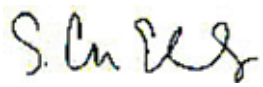
Therefore, Appellants have not waived their right to arbitration under federal law or South Carolina law.

## CONCLUSION

Therefore, for the foregoing reasons, this Court should reverse and vacate the trial court's denial of Appellants' Motion to Compel Arbitration. The court should remand this action with instructions to compel the parties to arbitration.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC



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