EFiled: Mar 05 2024 06:58PM EST
Filing ID 72256772
Case Number 475,2023

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| CSC UPSHOT VENTURES, I, L.P.,<br><br>Respondent-Below/Appellant,<br><br>v.<br><br>PURVI GANDHI-KAPOOR,<br><br>Petitioner-Below/Appellee. | No. 475, 2023<br><br>On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2022-0881-JTL |

# APPELLEE'S ANSWERING BRIEF

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DATED: March 5, 2024

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## NATURE OF PROCEEDINGS

Purvi-Gandhi Kappor ("Gandhi") brought a summary advancement action in September of 2022 in the Court of Chancery. Gandhi sought to enforce mandatory advancement provisions in the operating agreement of her employer, Hone Capital LLC ("Hone") and the partnership agreement of CSC Upshot Ventures I, LLP ("Upshot"), a fund she helped to manage. Hone sued Gandhi in California alleging actions which fall within the Hone and Upshot advancement clauses, and Gandhi has incurred and is continuing to incur substantial fees and expenses in defending such action.

Hone and Upshot are owned by the same ultimate parent company, China Science & Merchants Investment Management Group Co. Ltd. ("CSC"). The Hone operating agreement does not contain an arbitration clause; the Upshot agreement does. CSC chose not to split the case among two fora, but rather to litigate in one and hire joint counsel (twice). Thus, never during the merits proceedings did Upshot tell the trial court the claims against it should be arbitrated.

Instead, Upshot chose to litigate in Delaware. It lost completely. The trial court granted Gandhi's motion for summary judgment. It ordered Hone and Upshot to pay Gandhi's outstanding fees, her fees in defending the California action going forward, and "fees-on-fees" for her advancement action.

Upshot and Hone defied the court's order. The court found each in contempt of court and assessed a coercive sanction of a daily fine.

Upshot and Hone ***continued*** to defy the court's orders. Gandhi sought appointment of a receiver to obtain compliance with the orders, and the court indicated a willingness to do so. In response, Upshot raised its arbitration clause for the first time, on August 18, 2023 – four-and-a-half months after the court granted summary judgment, and a month after the court found Upshot in contempt.

Under every precedent, Upshot waived its right to arbitrate Gandhi's claims. To avoid its waiver and the court's orders against it, Upshot has concocted a nonsensical argument that the trial court never had subject matter jurisdiction to hear Gandhi's claims due to the existence of the arbitration clause Upshot chose not to enforce. Upshot moved to dismiss Gandhi's claims and void the court's previous orders against Upshot. Upshot did not have a single authority supporting its position that it did not waive the provision by participating in litigation that was entirely resolved on summary judgment.

The trial court denied Upshot's motion. In a lengthy opinion, the court correctly held that under existing precedent, Upshot can and did waive its right to enforce the arbitration clause, and the court had jurisdiction to decide the issue.

Upshot's first argument on appeal, that arbitration provisions are nonwaivable, has no caselaw support and is indefensible as a matter of judicial case

management. Contrary to its second argument, the trial court did not plainly err by ruling Upshot had waived arbitration by waiting until after completely losing a motion for summary judgment and Gandhi was required to file two motions for sanctions.

Gandhi respectfully requests that this Court affirm the Chancery Court's correct, commonsense ruling.

## SUMMARY OF ARGUMENT

1. Upshot argues that an arbitration clause may not be waived in a Delaware court. Upshot's argument fails because, among other things: (1) arbitration clauses, like other contract clauses, can be waived; and (2) eliminating waiver of arbitration clauses would violate the Federal Arbitration Act prohibition on "bespoke" contract law rules for arbitration clauses that deviate from general contract law. Gandhi denies Upshot's argument based upon *Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999), which misreads that case. Upshot does not point to a single Delaware (or United States) authority holding arbitration provisions nonwaivable; nor is such a holding sensible court policy.

2. The trial court did not plainly err in ruling that Upshot waived its right to arbitrate by waiting until after completely losing a motion for summary judgment and Gandhi was required to file two motions for sanctions. The trial court properly found that this "would be the ultimate do-over" for which Upshot has "not provided any precedent." Prejudice is not an element of the proper waiver analysis; but even if it were, Gandhi would be grossly prejudiced by such a total "do-over" in this summary advancement case.

## STATEMENT OF FACTS

### A. Hone and CSC sue Gandhi in California alleging wrongdoing relating to Upshot.

In 2020, Hone sued its former CFO, Purvi Gandhi in California on behalf of itself and its ultimate parent company, CSC. A186 ¶¶ 2 (calling CSC the "*de facto* co-plaintiff"). Upshot is also an indirect subsidiary of CSC and its main United States investment vehicle. Op. 4;[1] A188 ¶ 17. Hone managed all of CSC's United States investments, including Upshot. Op. 5; A189 ¶ 19.

Hone alleges that Ms. Gandhi committed various wrongdoings during her tenure relating to Upshot. Op. 5. Hone also sued Gandhi's boss, Bixuan ("Veronica") Wu. *Id.* Gandhi has brought various compulsory counterclaims, including a claim against Upshot. Op. 5; A179; A344-390.

### B. The parties litigate Gandhi's Delaware advancement action.

Gandhi incurred significant fees and expenses in the California action. Op. 5.

Gandhi demanded advancement from Hone and Upshot under mandatory advancement provisions in Hone's operating agreement and Upshot's partnership agreement. A214-215. Gandhi filed her Petition for Advancement on September 30, 2022 ("Petition"). A218-231.

[1] Citations to the trial court's corrected December 4, 2023 opinion, attached to Appellant's Opening Brief ("OB") as Exhibit A, appear as "Op.__."

The Hone operating agreement does not have an arbitration clause (B069-080); the Upshot partnership agreement does (A170). Upshot knew from the start about its arbitration clause as it is in its own partnership agreement, which Upshot acknowledged. A232 (October 2022 email from Upshot's California counsel J. James Li, Esquire responding to Gandhi's Petition stating "the indemnification matter… requires arbitration"); B085 ¶ 2 (Li is Upshot's counsel).

Rather than litigating advancement in two fora, Upshot and Hone chose twice to hire common counsel (A041 D.I. 12; A042 D.I. 7) and litigate Gandhi's claims in the Delaware action through and beyond the court's determination of the merits (A021-042).

Upshot stipulated to a schedule to respond to Gandhi's complaint. A242-244. Upshot answered Gandhi's complaint without invoking the Upshot arbitration clause. A245-257. Upshot stipulated to an order that the claims as to it could be resolved by a "dispositive motion." B081. Gandhi moved for summary judgment as to Upshot and Hone. A277-31. Upshot and Hone opposed. A312-325. Neither side sought merits discovery.[2]

[2] Upshot references discovery done by Gandhi, but such discovery related to Upshot and Hone's contempt of court and Hone's motion to vacate its initial stipulation to advancement on the supposed grounds its Delaware counsel did not have authority. A018 D.I. 79, A019 D.I. 76, A025 D.I. 61, A026 D.I. 60, A027 D.I. 57, A035-036 D.I. 27-28, A38, D.I. 20-21.

Upshot did not seek arbitration, nor did it argue there was any factual dispute necessitating trial or even more evidence. A312-324. The court granted Gandhi's summary judgment motion in full, and Upshot and Hone were both ordered to pay Gandhi's outstanding fees and expenses as well as "fees-on-fees" for her advancement action (no motion to reargue was filed). A332-341.[3] Neither complied, so Gandhi moved for sanctions. B093-104. Again Upshot did not seek arbitration; indeed, it urged the court to enter a "judgment" on which Gandhi could attempt to collect. B108.

The court found Upshot and Hone in contempt and imposed a coercive fine. A393-A415; B111-117. After Upshot and Hone ***remained*** in contempt Gandhi moved for further sanctions, including appointment of a receiver to obtain compliance with the court's order. B118-131. The court issued an Order to Show Cause why a receiver should not be appointed over Hone and Upshot. B132-134.

[3]Upshot critiques aspects of the trial court's order granting summary judgment. OB 10-11. Upshot's criticisms are irrelevant to this appeal in aid of arbitration – and meritless. Upshot admitted Gandhi is one of the "indemnitees" covered by the Upshot advancement clause. A254 (Upshot admitting Gandhi is a member of Upshot's general partner); A164 § 15.4(a) (provision requiring indemnification of such members). The Upshot advancement clause provides indemnification to the "fullest extent permitted by law" and covers any claims that "arise out of or in any way relate to [Upshot], its properties, business or affairs." *Id*. The trial court properly found multiple grounds for this clause's application. A338-341. *See also*, Op. 5, n.3 (court responding to Upshot's criticisms). The carve-out Upshot references does not apply to Gandhi. A164 § 15.4(a) (no reference to disputes involving general partner members).

### C. Upshot for the first time asserts a defense that the court never had jurisdiction over Gandhi's Petition because of the Upshot arbitration clause.

In response, on August 18, 2023, Upshot's third set of counsel filed its Rule 12(b) motion to dismiss and Rule 60(b) motion invoking the arbitration clause to the trial court for the first time to void the court's prior orders on the grounds the court lacked subject matter jurisdiction. A418-430. Upshot criticized the court for not addressing in its summary judgment order the provision Upshot had not raised to the court in its answer or opposition to the summary judgment motion. A421 ¶ 11.

On August 21, 2023, the court ordered Upshot to show cause under Chancery Court Rule 11(c)(1)(B) why there is a "good faith basis to believe that the arbitration provision has not been waived for purposes of this case", an issue "so glaring as to warrant more than a passing mention in a footnote." A019 D.I. 77. A further Upshot filing supported its motion to dismiss. B135-148.[4] Gandhi then filed her response. B161-183.

The court held a hearing on Upshot's motion on September 26, 2023. A447-534.[5] On December 4, 2023, the court entered its order denying the motion to dismiss. Op. 1-52.

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[4] The court discharged its Rule 11 order. A014 D.I. 92.

[5]At that same hearing the court also heard Gandhi's motion for further sanctions, and indicated it was inclined to appoint a receiver over Upshot due to its ongoing contempt. A526. Only then did Upshot cure its contempt (A535-537), contrary to its

The court held: 1) it had subject matter jurisdiction to determine whether a waiver had occurred (Op. 25); 2) under long-standing precedent, an arbitration provision can be waived by engaging sufficiently in litigation (Op. 29); 3) under "extant precedent" waiver is a substantive issue of arbitrability to be decided by the court (Op. 32-40); 4) following the majority rule, incorporation of arbitral rules is not sufficient to delegate the issue to the arbitrator (Op. 43); 5) the waiver issue was non-delegable (Op. 43) and 5) Upshot waived the arbitration clause through its conduct in this case (Op. 52).

Upshot does not appeal the court's rulings that the court, not an arbitrator, is the proper decision-maker as to waiver. OB 15-16, n.7.[6]

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assertion that upon hiring current counsel it began to "comply" with its "obligations under the trial court's advancement orders. OB 13.

[6] Although not appealing the issue, Upshot states the trial court "departed from the majority federal rule" in deciding that "whether a judicial conduct waiver has occurred is always an issue that a court must decide." OB 16 (citing Op. 46). The trial court followed the unanimous holdings of the federal courts that judicial conduct waiver is an issue for the court, not the arbitrator, to decide (Op. 32-40), as well as the majority rule that incorporation of arbitral rules is insufficient to delegate the issue to an arbitrator (Op. 40-43). The court's further determination that such issue cannot, even with clear and unmistakable language, be delegated to an arbitrator, is the only finding that departed from the majority federal rule, and was not a necessary finding to support the court's conclusion.

## ARGUMENT

## I. A CONTRACTUAL RIGHT TO ARBITRATE CAN BE WAIVED.

### A. Question Presented

Whether arbitration provisions are non-waivable for lack of subject matter jurisdiction in cases in courts of the State of Delaware.

### B. Scope of Review

Gandhi agrees that whether a court has subject matter jurisdiction is a question of law this Court reviews *de novo*.

### C. Merits of Argument

Upshot argues that the mere existence of an arbitration clause divests a court of jurisdiction regardless of whether or when a party seeks to enforce the clause. Under Upshot's theory a party can never waive arbitration clauses no matter their conduct before a court.[7] But Delaware (and U.S.) law universally provides that arbitration clauses ***can*** be waived. There is no policy basis for marking arbitration provisions unwaivable, ***nor does Upshot even argue that there is***. Rather, Upshot simply ignores the fact that its argument is foreclosed by Delaware law. Upshot's far-fetched theory is also foreclosed by the Federal Arbitration Act, which prohibits treating arbitration clauses differently than other contract clauses.

[7] Upshot does not argue that the issue of waiver should be decided by an arbitrator. Under Upshot's theory, even if an arbitrator determined Upshot had waived its right to arbitrate, Gandhi's claims still could not be heard by a Delaware court for lack of subject matter jurisdiction.

Neither *Elf Atochem* nor any other precedent holds that arbitration clauses may not be waived.

### 1. Upshot's argument fails because arbitration clauses are waivable.

As Upshot itself correctly admits, "it has long been the law that a party to an arbitration agreement may waive its contractual right to arbitrate." OB 27.

Delaware courts for decades have recognized and enforced judicial conduct waivers. *See e.g., Menn v. Conmed Corp*., 2019 WL 925848, at *2 (Del. Ch. Feb. 25, 2019); *Align Strategic P'rs LLC v. Moesser*, 2016 WL 791261, at *5 (Del. Ch. Feb. 26, 2016); *Delta & Pine Land Co. v. Monsanto Co*., 2006 WL 1510417, at *5 (Del. Ch. May 24, 2006); *The Town of Smyrna v. Kent Cty. Levy Ct*., 2004 WL 2671745, at *3 (Del. Ch. Nov. 9, 2004); *Parfi Hldg. AB v. Mirror Image Internet, Inc*., 842 A.2d 1245, 1260–62 (Del. Ch. 2004); *Ballenger v. Applied Digit. Sols., Inc.*, 2002 WL 749162, at *7–8 (Del. Ch. Apr. 24, 2002); *Russykevicz v. State Farm Mut. Auto. Ins. Co*., 1994 WL 369519, at *2 (Del. Ch. June 29, 1994); *Wilshire Rest. Grp., Inc. v. Ramada, Inc.*, 1990 WL 195910, at *3 (Del. Ch. Dec. 5, 1990); *Dorsey v. Nationwide Gen. Ins. Co.*, 1989 WL 102493, at *2 (Del. Ch. Sept. 8, 1989); *James Julian, Inc. v. Raytheon Serv. Co*., 424 A.2d 665, 668 (Del. Ch. 1980); *W. R. Ferguson, Inc. v. William A. Berbusse, Jr., Inc.*, 216 A.2d 876, 878 (Del. Super. 1966) (listing Delaware cases deciding whether or not a party has waived their right to arbitrate a claim); *Falcon Steel Co. v. Weber Eng'g Co., Inc*., 517 A.2d 281, 288

(Del. Ch. 1986) (recognizing judicial conduct waiver); *Perik v. Student Res. Ctr., LLC*, 2024 WL 181848, at *2 (Del. Ch. Jan. 17, 2024) (arbitration clause waived).

The court below noted the federal courts of appeals have held unanimously that a party can waive a right to arbitrate by engaging sufficiently in litigation. Op. 26, n. 57 (citing *Jones Motor Co. v. Chauffeurs, Teamsters & Helpers Local Union No. 633*, 671 F.2d 38, 44 (1st Cir. 1982); *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 626 F.3d 156, 159 (2d Cir. 2010); *Ehleiter v. Grapetree Shores, Inc*., 482 F.3d 207, 217 (3d Cir. 2007); *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001); *Nicholas v. KBR, Inc*., 565 F.3d 904, 907 (5th Cir. 2009); *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor De Stat*, 289 F.3d 434, 438 (6th Cir. 2002); *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc*., 50 F.3d 388, 390 (7th Cir. 1995); *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1090 (8th Cir. 2007); *Hill v. Xerox Bus. Servs., LLC*, 59 F.4th 457, 471 (9th Cir. 2023) *BOSC, Inc. v. Bd. Of Cty. Comm'rs*, 853 F.3d 1165, 1170 (10th Cir. 2017); *Krinsk v. SunTrust Banks, Inc*., 654 F.3d 1194, 1203 (11th Cir. 2011); *Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc*., 821 F.2d 772, 775 (D.C. Cir. 1987)). The United States Supreme Court also recently reaffirmed arbitral waivers. *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022).

If Upshot's argument that arbitration provisions deprived courts of subject matter jurisdiction were correct, that would be an unwaivable defense. Op. 9-10

(citing Ch. Ct. Rule 12(h)(3)); *see also* Rule 60(b)(4) (allowing relief where a judgment is "void").

Because arbitration clauses are waivable, Upshot's argument that once it filed its motion citing the arbitration provision the court lost jurisdiction to consider whether Upshot had waived that provision fails. There is zero authority for Upshot's position.

Nor would it make any sense to change the law. Under Upshot's theory, since arbitration clauses cannot be waived, an arbitration clause could be raised for the first time after summary judgment, trial, and on appeal; even final judgments could be void under Court of Chancery Rule 60(b). Any number of Delaware court orders, final or otherwise, would be vulnerable to challenge. Parties could never agree to waive an arbitration right because it would be unenforceable. Such a rule could incentivize defendants ***not*** to include arbitration as a defense in their answers: heads they win in court, tails they then raise the provision and argue the merits must be decided in arbitration after all. That is not the law in Delaware, nor should it be.

Gandhi is only aware of one other Delaware case considering this argument - *Specialty Dx Holdings, LLC v. Lab. Corp. of Am. Holdings*, 2020 WL 4581007 (Del. Super. Ct. July 27, 2020). There the defendant made a tardy argument that a dispute resolution provision "divest[ed] the Court of subject matter jurisdiction," and that "this lack of subject matter jurisdiction cannot be waived." *Id.* at *3. The court flatly

rejected this argument, holding "that is not the law in Delaware" because arbitrability is waivable. *Id.* at *3-4.

### 2. The trial court properly viewed arbitration clauses as forum selection clauses.

The trial court correctly noted: "A party like Upshot can waive its right to arbitration by engaging sufficiently in litigation. That also means that an arbitration provision cannot deprive a court of subject matter jurisdiction, because a lack of subject matter jurisdiction cannot be waived." Op. 29.

It being firmly established that an arbitration provision can be waived, the trial court provided the analytic framework to properly read *Elf Atochem*.[8]

As the trial court explained below in its notably thorough and scholarly opinion, subject matter jurisdiction refers to a court's "authority to adjudicate the type of controversy involved in the action." Op. 10 (citing Restatement (Second) of Judgments § 11 (Am. L. Inst. 1982)). "A court derives its subject matter jurisdiction from the constitutional or statutory provisions that create or empower the court." *Id.* "A court's subject matter jurisdiction thus refers to the types of cases that the

[8] Nothing in *Elf Atochem* states that judicial conduct waivers do not exist. The issues before the Court in *Elf Atochem* were whether an "LLC, which did not itself execute the LLC agreement in this case…is nevertheless bound by the Agreement" and whether "contractual provisions directing that all disputes be resolved exclusively by arbitration or court proceedings in California are valid" under the Delaware Limited Liability Company Act. *Elf Atochem*, 727 A.2d at 287. The Court ruled that the relevant LLC agreement was binding on the LLC, and that "the contractual forum selection provisions must govern." *Id.*

sovereign creating the court has authorized the court to hear." *Id*. at 10-11. The court has jurisdiction over Gandhi's claims under the statutory grant of authority in 6 *Del. C.* § 17-111.[9] Op. 13-14.

"Because a court's subject matter jurisdiction derives from a grant of sovereign authority, parties cannot alter it by private ordering." Op. 11. "[S]ubject matter jurisdiction may not be created by waiver or by agreement of the parties. Similarly, such an agreement also may not restrict or eliminate subject matter jurisdiction that is otherwise present." *Id*. (citing 2 *Moore's Federal Practice* § 12.30[1], Lexis+ (3d. ed. coverage through Nov. 2023); *Kroll v. City of Wilmington*, 2023 WL 6012795, at *14 (Del. Ch. Sep. 15, 2023) ("Subject matter jurisdiction concerns this court's powers, not the parties' rights. Therefore, parties may not waive the existence or non-existence of subject matter jurisdiction"); *de Adler v. Upper N.Y. Inv. Co. LLC*, 2013 WL 5874645, at *8 (Del. Ch. Oct. 31, 2013) ("The Court's

[9] The Delaware Revised Uniform Limited Partnership Act ("DRULPA") provides that a limited partnership "may, and shall have the power to, indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever." 6 *Del. C.* § 17-108. This includes providing for advancement of fees and expenses. *E.g., Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479 (Del. Ch. Sept. 10, 1999) (interpreting 6 *Del. C.* § 17-108 to authorize advancements as well as indemnification).

subject matter jurisdiction cannot be determined by contract, by consent in the pleadings, or even by procedural waiver." (footnotes omitted)).[10]

Parties, by contract, can agree to litigate their dispute in arbitration. Courts will enforce such an agreement – however, "Principles of contract law, not a lack of subject matter jurisdiction, generate that outcome." Op. 12.

Forum selection clauses do not "oust" a court of its subject matter jurisdiction – instead such clauses raise the question of whether a "court should ... exercise[ ] its jurisdiction to ... give effect to the legitimate expectations of the parties." Op. at 11-12, citing *Schwartz v. Cognizant Tech. Sols. Corp.,* 2022 WL 880249, at *5 (Del. Ch. Mar. 25, 2022) (citation omitted).

[10] Upshot argues that parties can affect subject matter jurisdiction through contract by, for example, stipulating to a certain amount or type of damages thus precluding subject matter jurisdiction of courts who are not authorized to hear such claims. OB 27-28, n.13. But unlike Upshot's example, here on their face Gandhi's claims ***do*** fall within the Chancery Court's jurisdiction. It is only upon a subsequent determination that an enforceable arbitration clause exists that the court declines to hear the case. *See, e.g.*, A438 (Upshot noting "***without a waiver***…this Court lacks subject matter jurisdiction") (emphasis added); *Carder v. Carl M. Freeman Communities, LLC*, 2009 WL 106510, at *3 (Del. Ch. Jan. 5, 2009) ("***If*** a claim is arbitrable, *i.e.*, properly committed to arbitration, this Court lacks subject matter jurisdiction") (emphasis added); *Coronado Coal II, LLC v. Blackhawk Land & Res., LLC*, 2023 WL 164620, at *3 (Del. Ch. Jan. 12, 2023) ("Delaware Courts lack subject matter jurisdiction…[o]nce it is determined that the parties are obligated to submit…the dispute to arbitration"). Upshot's argument ignores that none of its authorities reach the issue of subject matter jurisdiction until they have first determined an enforceable arbitration clause exists. If arbitration clause has been waived it is no longer enforceable, so it cannot have any effect on the court's jurisdiction.

"An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause" so the same principles apply. Op. 12 (citing *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 519, (1974), quoted in *Nat'l Indus. Gp. (Hldg.) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 384, n. 41 (Del. 2013); *accord Fairstead Cap. Mgmt. LLC v. Blodgett*, 288 A.3d 729, 753–54 (Del. Ch. 2023)).

Following this reasoning, the United States Courts of Appeals for the Third, Fifth, Seventh, and Eighth Circuit have held that an arbitration agreement does not alter a court's subject matter jurisdiction. Op. 12 (citing *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 272 (3d Cir. 2004) (holding that arbitration is not a jurisdictional issue); *Ruiz v. Donahoe*, 784 F.3d 247, 250 (5th Cir. 2015) ("[A]greements to arbitrate implicate forum selection and claims-processing rules not subject matter jurisdiction."); *Grasty v. Colo. Tech. Univ.*, 599 Fed. Appx. 596, 597 (7th Cir. 2015) ("[A]n agreement to arbitrate does not affect a district court's subject-matter jurisdiction. An arbitration clause is a type of forum-selection clause."); *Seldin v. Seldin*, 879 F.3d 269, 272 (8th Cir. 2018) ("[T]he existence of that [arbitration] agreement alone does not deprive the federal courts of jurisdiction.")). The court

also noted that the "majority of the federal district courts to consider the issue have reached the same conclusion." Op. 12-13 (citations omitted).[11]

Indeed, the "prevailing trend outside of Delaware is to treat motions to dismiss in favor of arbitration as arising under Rule 12(b)(3), not Rule 12(b)(1)." Op. at 24 (citing *Air-Con, Inc. v. Daikin Applied Latin Am*., LLC, 21 F.4th 168, 174–75 (1st Cir. 2021) (collecting cases which hold that Rule 12(b)(1) is the wrong mechanism to decide a motion to compel arbitration); *Grasty*, 599 Fed. Appx. at 597 ("An arbitration clause is a type of forum-selection clause. Motions to compel arbitration thus concern venue and are brought properly under Federal Rule of Civil Procedure 12(b)(3), not Rule 12(b)(1)."") (citations omitted); *Seldin*, 879 F.3d at 272 ("[A] Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is not the

[11]Upshot argues that federal statutes granting subject matter jurisdiction "use mandatory language, without reference to modification by agreement." OB 26, n. 12 (citing 28 U.S.C. §§ 1332(a) (providing that "district courts *shall* have original jurisdiction of all civil actions" where diversity exists and the amount in controversy exceeds $75,000) & § 1331 ("The district courts *shall* have original jurisdiction of all civil actions arising under the Constitution, laws or treatises of the United States.")). In contrast, DRULPA states actions regarding partnership agreements "*may* be brought in the Court of Chancery." *Id*. (citing 6 Del. C. §17-111). But jurisdiction is established in federal court when a diversity action is filed; the arbitration analysis is a separate, subsequent step. Likewise, jurisdiction is established in Delaware when the plaintiff elects to file a partnership action therein; the arbitration analysis is again a separate, subsequent step. *See supra*, n. 10. The use of "may" versus "shall" is of no consequence; either language conveys jurisdiction upon the court. As to Upshot's alleged "lack of reference to modification by agreement" in federal law, the FAA most certainly provides for the parties to contract for a different forum. *See* 9 U.S.C. § 1 et seq. (providing for mandatory stay of any action where valid arbitration clause exists).

appropriate mechanism to use to attempt to compel arbitration.") (citation omitted); *Brown v. Five Star Quality Care, Inc.*, 2016 WL 8710474 at *5 (D.S.C. Jan. 8, 2016) ("Arbitration clauses are forum-selection clauses. Thus, in this this Circuit, motions to dismiss claims because the claims are subject to binding arbitration are properly made under Rule 12(b)(3)." (citation omitted)).

A leading federal treatise explains that:

> Though such an agreement waives the parties' right to a federal forum and requires dismissal, that is due to the court's decision to enforce the waiver and surrender its jurisdiction, not because of a lack of jurisdiction over the dispute. Accordingly, a motion seeking to enforce the agreement does not challenge the court's subject matter jurisdiction and cannot be brought under Rule 12(b)(1).

2 Moore's, *supra*, § 12.30[1].[12]

[12] In the trial court's view, Rule 12(b)(1) may also be an appropriate vehicle for deciding judicial conduct waiver as it has been used in other "subject matter adjacent" situations. Op. 14-21. Rule 12(b)(1) is also used to address "whether a court should decline to exercise subject matter jurisdiction that the court otherwise would have, such as abstention and justiciability issues." Op. 15-16 (citing 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (3d ed. 2023)). "Thus, the scope of Rule 12(b)(1) is flexible, often serving as a procedural vehicle for raising various residual defenses" that "share the common theme of challenging the court's ability to proceed with the action." *Id.* at 16*; see also Salem Church (Del.) Assocs. v. New Castle Cty.*, 2006 WL 2873745, at *4 (Del. Ch. Oct. 6, 2006) (Rule 12(b)(1) often used to raise failure to exhaust administrative remedies, which is "not a jurisdictional or absolute requirement" but "a judicially created doctrine, which courts exercise discretionally"); Op. 16-20 (discussing additional uses of Rule 12(b)(1)).

Therefore, the trial court properly cited the authors of the leading treatise on Delaware LLCs, which suggest "'reading *Elf Atochem* less expansively as a decision that simply ... enforces a contractual 'forum selection clause,'" and arguing that "even 'the DLLC Act's enhanced freedom of contract policy lacks sufficient vitality to alter the general rule that parties by agreement cannot confer subject matter jurisdiction on a court.'" Op. 22 (citing and quoting Robert L. Symonds, Jr. & Matthew J. O'Toole, *Symonds & O'Toole on Delaware Limited Liability Companies* § 4.09[D][1] n.294 (2d. ed. 2019)).

"Once *Elf Atochem* is understood as holding that a court should decline to exercise its subject matter jurisdiction when parties have agreed to an otherwise enforceable arbitration provision, the conflict disappears." Op. 22-23. Although *Elf Atochem* used the language of subject matter jurisdiction to reach its result, "[t]he gravamen of the decision was thus that the contract controlled." Op. 22. (citing *Elf Atochem*, 727 A.2d at 298 ("the contractual forum selection provisions must govern.")).

As Upshot notes, its additional authorities all stemmed from *Elf Atochem*. OB 22. The same interpretation can be given to these subsequent decisions. *E.g., NAMA Hldgs., LLC v. Related World Mrkt. Ctr*., LLC, 922 A.2d 417, 429 (Del. Ch. 2007).[13]

[13] Upshot's position is also contrary to the fact that cases subject to arbitration are often stayed by the court, not dismissed. *See, e.g., City of Wilmington v. Wilmington Firefighters Local 1590, Int'l Ass'n of Firefighters,* 385 A.2d 720, 725 (Del. 1978)

### 3. The trial court's decision is consistent with the FAA prohibition against "bespoke" contract rules for arbitration clauses.

Delaware law provides that parties can waive contract clauses. *See, e.g.*, *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc*., 871 A.2d 428, 444 (Del. 2005) ("It is well settled in Delaware that contractual requirements or conditions may be waived").

Upshot seeks to eliminate waiver as to arbitration clauses only, thus creating an arbitration-specific rule of contract law.

In *Morgan*, the U.S. Supreme Court considered whether the "strong federal policy favoring arbitration" supports "an arbitration-specific waiver rule." *Morgan*, 596 U.S. at 416. The Court found that the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 1 *et seq.*, prohibits such "bespoke rule of waiver for arbitration" and requires arbitration clauses be on equal footing as other contracts. *Morgan,* 596 U.S. at 418*; see also* 9 U.S.C. § 2 (providing arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). The Court held that the appropriate court policy

(case should be stayed pending arbitration and "jurisdiction…retained by the Court"). Indeed, in the *Wu* action Upshot stipulated to "temporarily staying this action as to Upshot Fund", not a dismissal. A433. If Upshot were correct that the court lacks jurisdiction, a stay would have been improper.

towards arbitration is "about treating arbitration contracts like all others, not about fostering arbitration." *Morgan* at 418.

Upshot seeks to solely render arbitration clauses non-waivable, while other contract clauses are waivable under Delaware law. Such a "bespoke" rule for arbitration clauses is prohibited by the FAA.[14]

#### 4. 6 *Del. C.* § 17-109 does not alter the analysis.

Upshot argues that the Delaware Revised Uniform Limited Partnership Act ("DRULPA") provides a "carveout" from the court's jurisdiction by providing that in a partnership agreement, "a partner may consent to be subject to the…exclusivity of arbitration in a specified jurisdiction." OB 25 (citing 6 *Del. C.* § 17-109(d)). Upshot thus argues that an arbitration clause in a partnership agreement takes away "the general grant of jurisdiction to the Court of Chancery in Section 17-111." *Id*.

Section 17-109 relates to *in personam* jurisdiction, not subject matter jurisdiction. Section 17-109 is titled "Service of process on partners and liquidating trustees." 6 *Del. C.* § 17-109. Each of the four sections discuss methods of service of process on partners and/or liquidating trustees. *Id*.; *see also*, *R & R Capital, LLC*

[14] The FAA applies here, as the Upshot partnership agreement contemplates foreign and interstate commerce, *see, e.g.*, A105-178 (Upshot partnership agreement between California residents and Delaware, Hong Kong, Cayman and Chinese entities) & A349-351 (foreign location of related entities and individuals; Upshot funded with capital from China), and the parties did not contract to displace the federal default standard. *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *7 (Del. Ch. Dec. 4, 2007).

*v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318, at *4 (Del. Ch. Aug. 19, 2008) (Section 109(d) "is at most a venue provision").

Furthermore, subsection (d) refers to "partners" consenting to jurisdiction and creates a separate rule for "limited partners." 6 *Del. C.* § 17-109(d). Thus, the structure of the statute also suggests it is best interpreted as intending to affect personal, not subject matter jurisdiction. Moreover, its effect is limited to the categories of parties it specifically references – which does not include Gandhi.

Nonetheless, even assuming *arguendo* Section 17-109 relates to subject matter jurisdiction and applies to Gandhi, a valid arbitration agreement would still be a prerequisite to the alleged effect of this statute on the court's jurisdiction. Indeed, that section refers to "agreeing to arbitrate any arbitrable matter." 6 *Del. C.* § 17-109(d). Thus, like in every other case, even if it were interpreted to affect the court's jurisdiction, courts in cases where Section 17-109(d) applies still would need to make the threshold determination as to whether or not an enforceable arbitration clause exists or has been waived. Nothing in Section 17-109(d) suggests or provides otherwise. *See also Elf Atochem*, 727 A.2d at 296 (finding claims were arbitrable and then considering effect of Section 18-109(d)).

More broadly, nothing in that statute suggests that statute was intended, beyond merely allowing persons to agree to arbitration, to provide that such an agreement would be given different treatment than any other such agreement (like

being nonwaivable). Any such interpretation would also violate the FAA's prohibition on "bespoke" rules for arbitration clauses. *See supra* Argument I.C.3.

## II. THE TRIAL COURT DID NOT PLAINLY ERR IN HOLDING THAT UPSHOT WAIVED ITS RIGHT TO ARBITRATION.

### A. Question Presented.

Did the trial court plainly err in holding that Upshot waived its right to enforce the arbitration clause by not asserting it as a defense until after filing an answer, losing an advancement petitioner's fully dispositive motion for summary judgment, being found in contempt for failure to pay advancement, and under threat of receivership for further contempt?

### B. Scope of Review.

"This Court reviews a trial court's finding of waiver under the standard of plain error." *N. Am. Leasing, Inc. v. NASDI Holdings, LLC*, 276 A.3d 463, 470 (Del. 2022). "In order for this Court to find plain error, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id*.

### C. Merits of Argument.

The court did not plainly err in finding Upshot waived its right to arbitrate Gandhi's claims. As the trial court found, "Upshot has not pointed to any precedent in which a court permitted a party to invoke an arbitration provision after losing on the merits and being held in contempt." Op. 52. "To permit a party to invoke an arbitration clause at that stage would be the ultimate do-over." *Id*. "From every perspective, Upshot waived its right to arbitrate." *Id*.

### 1. The trial court did not plainly err in holding that Upshot waived its arbitration clause.

The trial court found: "Upshot did not act like a party intent on asserting its right to arbitrate." Op. 48*; see Morgan*, 596 U.S. at 417 (waiver occurs where party "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right"); *Wilshire Rest. Gr., Inc. v. Ramada, Inc*., 1990 WL 195910, at *3 (Del. Ch. Dec. 5, 1990) (arbitration can be waived "if the party seeking arbitration has actively participated in a lawsuit or taken other action inconsistent with its right to arbitrate") (citation omitted).

The court held that Upshot waived its right to arbitrate, basing its holding upon these facts:

> Upshot delayed raising the Arbitration Provision for eleven months. Upshot answered the complaint without mentioning the Arbitration Provision, stipulated to a schedule for presenting a case-dispositive motion that did not mention arbitration, and briefed Gandhi's motion for summary judgment without mentioning the Arbitration Provision. The motion for summary judgment resulted in the issuance of the Advancement Order, which resolved Gandhi's right to obtain advancements on the merits. Upshot then failed to comply with the Advancement Order, and the court held Upshot in contempt. It was only after Gandhi filed a second motion for sanctions that Upshot raised the Arbitration Provision.

Op. 48.

Upshot does not dispute these facts. The court noted that "to minimize the significance of its actions, Upshot strives to portray itself as a passive respondent. Upshot has been a respondent, but not a passive one." Op. 48. Upshot argues the

court erred in such finding because each of its filings was done in response to a court order. OB 33-34. A defendant cannot avoid the consequences of its actions by arguing that they were somehow required by the court, as that is undoubtedly true of most defendant actions. Rather, the question is whether its actions were "inconsistent with its right to arbitrate." *Wilshire Rest.*, 1990 WL 195910, at *3; *Morgan,* 596 U.S. at 417.

Stipulating to a schedule to answer Gandhi's Petition (A242); filing an answer and not raising arbitration (A245); stipulating to an order providing that Gandhi's claims against Upshot could be resolved by a "dispositive motion" heard by the court (B081-083); briefing the merits of all of Gandhi's claims against Upshot without raising arbitration (A312-325); and responding to Gandhi's motion for sanctions without questioning the court's jurisdiction and asking the court to enter "judgment" against Upshot" (B108) (arguing the "appropriate remedy" against Upshot is "a judgment") are all actions "inconsistent with [Upshot's] right to arbitrate."

Upshot argues it did not waive arbitration because it did not do certain specific affirmative things that respondents often or usually do not do, like take discovery, file a claim, or announce it was foregoing arbitration. OB 30-34. Upshot cannot avoid the consequences of its many actions plainly waiving arbitration by pointing to select actions it did not take.

The trial court did not plainly err when it held that Upshot's lack of discovery did not preclude a finding of waiver. Op. 49. The court noted, "Advancement proceedings are summary and expedited. Parties do not typically take discovery, and the court generally resolves the case as a matter of law." *Id*. "For an advancement case, the failure to take discovery does not change the outcome." *Id*.

Upshot raised no factual issue in dispute regarding Gandhi's motion for summary judgment. A312-325. Upshot, like Gandhi, analyzed the issue in terms of the language of the arbitration clause and the allegations in the pleadings in the California action. *Id.*;[15] *see also, e.g., La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc*., 626 F.3d 156, 159 (2d Cir. 2010) (noting that "[n]o discovery took place" in the eleven months before arbitration was sought, "but the litigation was hardly dormant"); *Khan v. Parsons Global Servs., Ltd*., 521 F.3d 421, 428 (D.C. Cir. 2008) (defendant's non-pursuit of discovery was not dispositive, especially where discovery would likely focus on matters in the defendant's possession and control).[16]

[15] Upshot notes that Gandhi did take discovery but does not explain how that affects its waiver. In any event, as set forth above, *supra* n. 2, Gandhi's discovery was related to Upshot's contempt of court.

[16] Furthermore, discovery relates to whether prejudice had occurred. *See, e.g., Hoxworth v. Blinder, Robinson & Co., Inc*., 980 F.2d 912, 926–27 (3d Cir.1992) (noting factors such as discovery are "generally ... indicative of whether a party opposing arbitration would suffer prejudice attributable to the other party's delay in

Upshot argues that its 11-month delay in raising arbitration is shorter than in some cases holding no waiver. OB 34-39. But, as the trial court noted: "None of [Upshot's] cases involved a summary proceeding. Upshot's eleven months did not take place in a non-expedited case, but rather in a summary advancement proceeding" which the Court of Chancery "strives to resolve…in forty-five to ninety days so that the advancement right – if it exists – can fund the underlying litigation." Op. 49 (citing *Trascent Mgmt. Consulting, LLC v. Bouri*, 152 A.3d 108, 110 (Del. 2016) (advancement proceedings are summary and, thus, expedited)).[17]

In another recent advancement action, the Chancery Court held that a party had waived arbitration when it litigated for "three months," briefed a summary judgment motion, and did not raise an arbitration clause until the day before the hearing. *Perik v. Student Res. Ctr., LLC*, 2024 WL 181848, at *2 (Del. Ch. Jan. 17, 2024). "[R]aising an arbitration provision on the eve of an advancement summary judgment hearing represents a significant delay relative to the proceedings." *Id.*

Upshot argues "other courts have not found waiver after merits rulings." OB 40. But the trial court correctly noted, "Upshot has not pointed to any precedent in

seeking arbitration"). But prejudice is not relevant to the waiver inquiry. *See infra* Argument II.C.3.

[17] In taking into account the particular circumstances of this summary advancement case, the trial court was in fact conducting the "normal analysis" of arbitration waiver, not departing from it as Upshot argues. OB at 40.

which a court permitted a party to invoke an arbitration provision after losing on the merits and being held in contempt." Op. 52. In none of Upshot's cited authorities did a party raise an arbitration defense after losing on the merits on all claims, let alone further significant delay. *See Brownstone Inv. Grp., LLC v. Levey*, 514 F. Supp. 2d 536, 541 (S.D.N.Y. 2007) (case was "long way" from determination on the merits when arbitration clause invoked); *Rush v. Oppenheimer & Co.*, 779 F.2d 885 (2d Cir. 1985) (no waiver after motion to dismiss was denied); *Flynn v. Labor Ready, Inc.*, 751 N.Y.S.2d 722, 723 (Sup. Ct. 2002), *aff'd as modified*, 775 N.Y.S.2d 357 (App. Div. 2004) (motions heard by court did not "engage the factual substance of the dispute" and only resolved procedural issues).

Gandhi is not aware of any case in which a court has ever granted a party such an "ultimate do-over." Op. 52. Rather, waiver occurs even when only some merits issues have been decided. *See, e.g., Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 456 (3d Cir. 2011) ("By responding to Cassady's motion to dismiss, Gray undoubtedly engaged in motion practice on the merits of the dispute."). Waiver occurs even where merits are in the process of being litigated such that a litigant can sense an adverse court decision. *See Jones Motor Co. v. Chauffeurs, Teamsters & Helpers Loc. Union No. 633 of New Hampshire*, 671 F.2d 38, 43 (1st Cir. 1982) (doing otherwise would allow party "sensing an adverse court decision a second chance in another forum," and "waste scarce judicial time and effort"); *Cabinetree of Wisconsin, Inc. v.*

*Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (party may not "***play heads I win, tails you lose***," by trying to "see how the case" goes in court "before deciding whether it would be better off there or in arbitration") (emphasis added); *see also Momentum Project Controls, LLC v. Booflies to Beefras LLC*, 2023 WL 4196584, at *5 (Tex. App. June 27, 2023) (waiver where party "waited until after receiving an adverse result" on opponent's motion for partial summary judgment before seeking arbitration); *Stickles v. Atria Senior Living, Inc.*, 2023 WL 2062949, at *2 (N.D. Cal. Feb. 16, 2023) ("[T]he fact that defendants waited until after the outcome of summary judgment indicates waiver.").

As the trial court concluded, "To permit a party to invoke an arbitration provision at [this] stage would be the ultimate do-over." Op. 52.

**2. The court did not plainly err in finding that Upshot's decision to litigate Gandhi's claims on the merits before the trial court was intentional.**

As the trial court found, "Upshot plainly knew about the Arbitration Provision, which appears in its own limited partnership agreement." Op. 48. "Upshot chose to litigate." *Id*.

Upshot itself cites an email from its California counsel, J. James Li, Esquire of LiLaw Inc., raising the arbitration clause days after Gandhi filed her Petition. *See* A232 (Li emailing Gandhi's counsel three days after she filed her Petition stating that "the indemnification matter also requires arbitration"). The relevant arbitration

provision is contained within Upshot's very own partnership agreement, signed by its managing members, including Ming Yeh, who is still one of its managers. A171. Upshot's partnership agreement was an exhibit in the summary judgment proceeding. B001-068.[18]

Upshot argues if "merely having an arbitration provision is sufficient to constitute knowledge under Delaware law, then this Court's standard for waiving arbitration could dispense with the knowledge requirement altogether." OB 29, n.14. This argument ignores all the indisputable factual support for the trial court's finding.

Upshot argues it promptly raised the arbitration provision in another advancement action by Veronica Wu. OB 30. That is irrelevant to whether Upshot waived arbitration in this action. Having lost on the merits before the trial court, obviously Upshot had a motive to avoid Wu's claims being heard by the same tribunal.

[18] Upshot argues "Gandhi obtained zero evidence of [Upshot's] intentional waiver at Yeh's deposition." OB 30. But Yeh's deposition was a Rule 30(b)(6) deposition lasting less than four hours Gandhi was given permission to take in the court's Opinion Holding Respondents in Contempt on the topics relating to Upshot's contempt of court (A413), which topics were first noticed before Upshot even raised the arbitration clause (A027 D.I. 57). It only took place after the Court noted via order to show cause that "Upshot Fund also has successfully prevented all of the expedited discovery this Court ordered" – including (previously) such deposition. B133.

Upshot points to the fact that one week after its new (third) counsel was hired Upshot raised the arbitration provision. OB 30. But Upshot's new attorneys arrived in the case after Upshot had lost on the merits. Upshot's tactical maneuver to attempt to avoid a significant adverse court merits ruling[19] is not evidence of a lack of waiver; instead, it demonstrates the necessity of a waiver rule for arbitration provisions (and the correctness of the trial court's ruling), to avoid Delaware trial courts being subjected to such serial attempts to obtain, and then try to avoid, their rulings.

As in *Wilshire Restaurant*, the "record indicates that" Upshot Fund "decided (for tactical reasons best known to it) to litigate" this dispute in this Court, "but later changed its mind" and decided to arbitrate.[20] 1990 WL 195910, at *2. Arbitration is waived when, as here, a litigant "test[s] the waters" by requiring a court to address

[19] The trial court observed regarding Upshot's motion to dismiss "I feel like there have been a lot of maneuverings all along…I've had to deal with it more than I think one should have to deal with a normal advancement case already…and then I had this novel…post summary judgment, post-contempt waiver argument thrown in." A498. Respondent's change of course regarding arbitration is consistent with numerous other dubious or frivolous legal tactics in Delaware and California. *See* B118-131; B149-160.

[20] Such Upshot "tactical reasons" for not seeking arbitration may have been: (1) because there is no Hone arbitration clause, parent CSC could have to pay their lawyers for three proceedings in three different fora, plus advancement and fees-on-fees; and (2) both Hone and Upshot had broad advancement provisions (which this Court held applied). In other words, Upshot apparently decided it did not want a third "front". *Compare* A232 (taking issue with this action as a "second front in Delaware"); *see also* A464 (Hone avoided splitting claims in California action).

its arguments before raising arbitration. *Specialty Dx Holdings, LLC v. Lab. Corp. of Am. Holdings*, 2020 WL 4581007, at *4 (Del. Super. July 27, 2020).

### 3. The trial court did not plainly err in holding that arbitration provisions should not be favored above other contract provisions.

*Morgan* held that the "strong federal policy favoring arbitration" does not support "an arbitration-specific waiver rule" such as applying a "prejudice" requirement to waiver of arbitration clauses. *Morgan*, 596 U.S. at 416. The *Morgan* decision held that the FAA prohibits a "bespoke rule of waiver for arbitration" and requires arbitration clauses be on equal footing as other contracts. *Morgan*, 596 U.S. at 417*;* s*ee also* 9 U.S.C. § 2 (arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

Delaware law does not have prejudice as an element of waiver. *See AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc*., 871 A.2d 428, 444 (Del. 2005) (listing waiver requirements, each which focus on the waiving party's actions). Applying the additional requirement of a finding of prejudice to find an arbitration clause has been waived would be a "bespoke" rule of contract interpretation for arbitration clauses which the public policy in favor of arbitration cannot be used to support under *Morgan*.

Upshot argues Gandhi must "demonstrate prejudice sufficient to overcome the public policy favoring arbitration." OB 42 (citing *H&S Ventures, Inc. v. RM Techtronics, LLC*, 2017 WL 237623 (Del. Super. Jan. 18, 2017) and *Halpern Med. Servs., LLC v. Geary*, 2012 WL 691623 (Del. Ch. February 17, 2012)). But the trial court properly found, relying upon *Morgan*, 596 U.S. at 418, "Upshot's argument that the court should ignore its waiver of the Arbitration Provision on public policy grounds is no longer sound." Op. 51.

The trial court properly found the "*Morgan* decision is binding for purposes of the FAA." *Id*.

Upshot argues that "Delaware has a policy favoring arbitration, which should not be ignored." OB 43. But here, where the FAA governs, federal policy is implicated. *Dresser Indus., Inc. v. Glob. Indus. Techs., Inc.*, 1999 WL 413401 at *4 (Del. Ch. June 9, 1999); *see also Willie Gary LLC v. James & Jackson LLC*, 2006 WL 75309, at *5 (Del. Ch. Jan. 10, 2006), *aff'd but criticized on other grounds*, 906 A.2d 76 (Del. 2006) (FAA "requires that contracts with arbitration clauses be interpreted in accordance with the ordinary principles of contract interpretation that would otherwise govern"); *Kingery Constr. Co. v. 6135 O St. Car Wash, LLC*, 979 N.W.2d 762, 768 (Neb. 2022) ("FAA preempts inconsistent state laws that apply solely to the enforceability of arbitration provisions in contracts involving interstate

commerce."); *Davis v. Shiekh Shoes*, LLC, 300 Cal. Rptr. 3d 787, 795 (Ct. App. 2022) (where FAA applies "*Morgan* is controlling.").

Even if *Morgan* were not binding, as the trial court noted, Delaware pronouncements of public policy favoring arbitration "generally echoed what was understood to be federal policy." Op. 50 (citing *Willie Gary*, 906 A.2d at 79 ("Delaware arbitration law mirrors federal law"); *Pettinaro Const. Co., Inc. v. Harry C. Partridge, Jr., & Sons, Inc*., 408 A.2d 957 (Del. Ch. 1979) (citing federal policy favoring arbitration); *Action Drug Co. v. R. Baylin Co*., 1989 WL 69394 (Del. Ch. June 19, 1989) (citing the Supreme Court of the United States to emphasize policy on arbitration provisions); *City of Wilmington v. Wilmington Firefighters Local 1590, Int'l Ass'n of Firefighters*, 385 A.2d 720, 724 (Del. 1978) (looking to federal forums for guidance on dealing with arbitration provisions in labor disputes)).

*Morgan* traced the origins of the "prejudice" requirement to cases relying upon "an overriding federal policy favoring arbitration." *Morgan*, 596 U.S. at 417 (citations omitted). However, *Morgan* states that the policy "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Id*. at 418 (citations omitted). Thus, the policy was always intended merely to place arbitration agreements on equal grounds as other contracts.

Likewise, Delaware policy was also a response to the court's historical refusal to enforce agreements to arbitrate. *Pettinaro,* 408 A.2d at 961. Thus, even if Delaware policy applies, like the federal courts, such policy is to place arbitration agreements on the same footing as other contractual provisions, not favored above them.

Upshot points to two cases discussing a prejudice requirement for "retraction" of waiver. OB 44. But Upshot never argued to the trial court that it sought to revoke an (otherwise valid) waiver. Accordingly, it cannot make that argument on appeal. *DFC Glob. Corp. v. Muirfield Value Partners, L.P*., 172 A.3d 346, 363 (Del. 2017) (citing Sup. Ct. R. 8).

Even if it could make such argument, that argument must fail as its cases are inapt. *Amirsaleh v. Bd. of Trade of City of New York, Inc.*, 27 A.3d 522, 529 (Del. 2011) held a waiver of a deadline to elect stock or cash in a merger was not revoked because "reasonable notice" was not provided that the party intended to revoke its waiver. The court recognized that "[i]n other contexts, this Court has held that waivers cannot be revoked." *Id.* at 530, n.31 (citing *Harleysville Ins. Co. v. Church Ins. Co*., 892 A.2d 356, 364 (Del. 2005) (in the context of waiver of litigation defenses, the Court has found "[o]nce a right is waived, it is gone forever"). *Roam-Tel Partners v. AT&T Mobility Wireless Operations Holdings Inc*., 2010 WL 5276991, at *14 (Del. Ch. Dec. 17, 2010) held that a stockholder who waives its

right to an appraisal may rescind that waiver and perfect its right to an appraisal if, among other things, the demand is made within the statutory election period.

Neither case can be read as imposing a prejudice requirement on finding waiver, which is the issue before the Court.

Even if these cases applied, Upshot could not revoke its waiver under the circumstances here, where Gandhi litigated her entire case before Upshot sought another forum for this dispute. *See Amirsaleh*, 27 A.3d at 530 (waiving party may only retract waiver "by giving reasonable notice to the non-waiving party before that party has suffered prejudice or materially changed his position"); *Roam-Tel Partners*, 2010 WL 5276991, at *9 (same).

Upshot argues that "estoppel requires prejudice." OB 45. But as Upshot's own authority provides, waiver and estoppel are two different doctrines; and waiver does not look to prejudice. *See Bantum v. New Castle Cnty. Vo-Tech Educ. Ass'n*, 21 A.3d 44, 50 (Del. 2011) (distinguishing between waiver and estoppel).

**4. Even if prejudice were relevant, Gandhi would plainly be prejudiced from having to seek advancement all over again from an arbitrator.**

Even if prejudice were an element of the waiver analysis, Gandhi's prejudice from Upshot being given the "ultimate do-over" of her case, to have to return to square one and re-litigate everything against Upshot, is obvious. That is particularly true in an advancement action, where a party may be irreparably harmed by a delay

in advancement. *See* A406-15 (trial court ordered coercive sanction against Upshot due to potential "irreparable harm" to Gandhi from Upshot's delay in providing advancement); *see also Tafeen v. Homestore, Inc*., 2005 WL 1314782, at *2 (Del. Ch. May 26, 2005), *aff'd*, 886 A.2d 502 (Del. 2005) (advancement petitioner "would suffer severe and irreparable harm" if his right to receive advancement were delayed "because it would prevent [petitioner] from adequately defending himself in the numerous ongoing litigations in which [he] is a defendant").

Upshot (ironically) argues Gandhi "waived" any argument she was prejudiced by not arguing it below. But Gandhi distinguished the case Upshot foremost relied upon, *H&S Ventures, Inc. v. RM Techtronics, LLC*, 2017 WL 237623 (Del. Super. Jan. 18, 2017), as finding no "prejudice" because plaintiff's motion for summary judgment had not yet been heard by the court, "unlike this case." B175; *see also* A463 (Gandhi's counsel arguing the clear prejudice to Gandhi if she had to start her case over). Moreover, it would be unfair to preclude Gandhi from noting her obvious prejudice to a reversal of the trial court's ruling given Upshot's failure to reference waiver in its motion in more than a footnote such that its first reference to prejudice was in its reply, as well as its irrelevance to the current legal waiver standard.[21]

[21] Upshot argues lack of prejudice because an arbitrator's ruling "would likely be final and binding much sooner than waiting for a decision on appeal of the merits issue." OB 43-44. Reversing the trial court's order under which Gandhi is currently receiving advancement would cause her irreparable harm from losing funds for her defense of the ongoing California action. Advancement protects managers of

## CONCLUSION

For the foregoing reasons, the Court of Chancery's order denying Upshot's motion to dismiss should be affirmed.

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DATED: March 5, 2024

Delaware entities by promising they will not have to wait for a "decision on appeal of the merits issue" to get it. Moreover, Upshot's reference to when an arbitrator's ruling is "final and binding" is risible given there is every reason to expect it would flout such an order until enforced by a court (which presumably Upshot would seek to appeal).