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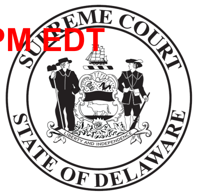

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Gandhi's answering brief ("Ans.Br. __") is flawed in many respects.[1]

Gandhi misstates Delaware law regarding (among other things) the effect of a valid arbitration provision on subject-matter jurisdiction, the element of prejudice in an arbitration-waiver analysis, Delaware's public policy in favor of arbitration, and the proper standard of review.

She misstates entirely the Fund's argument, arguing against a position that the Fund never took. The Fund never argued that "arbitration provisions are nonwaivable" (Ans.Br. 2); indeed, the Fund made clear that arbitration is waivable. Gandhi's first argument therefore fails entirely.

Gandhi fails to show that the Fund intentionally waived its right to arbitrate or that she will be prejudiced by arbitration.

She also misstates several facts, although they are largely irrelevant to the merits of this appeal. For example:

- Hone did not manage the Fund (Ans.Br. 5); the Fund "is a partnership between CSC Group and Huoy-Ming Yeh," who have the "*sole* right to manage, control and conduct the affairs of the [Fund]" (A188 ¶ 18; A372 ¶ 110 (emphasis added)).
- The Consolidated Action is not about Gandhi's "wrongdoings during her tenure relating to [the Fund]" (Ans.Br. 5); it targets Grandhi's wrongdoing relating to CSC Group's various investment projects to receive performance-based bonuses, none of which relate to the Fund (A189 ¶ 20).

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[1] Capitalized terms not defined herein have the meanings given them in the Fund's opening brief ("Op.Br. _")

- The Fund did not raise arbitration in response to a sanctions motion (Ans.Br. 2, 8). Rather, the Fund's current counsel raised arbitration immediately in the *Wu* action (before the sanctions motion was filed) but had to substitute as counsel before filing in the underlying action. A024-25, D.I. 64-65; A560, D.I. 6.
- The advancement carveout applies to Gandhi (Ans.Br. 7 n.3), since it covers disputes between "the General Partner . . . and [its] shareholders" (A164 § 15.4(a)).

The trial court's ruling should be reversed, and the Fund should be dismissed from the action.

ARGUMENT

I. THIS COURT'S HOLDING IN *ELF ATOCHEM* APPLIES HERE.

A. Gandhi misstates the Fund's argument.

Gandhi apparently could not contest the Fund's first argument, so she spent 14 pages of her answering brief arguing against a point that the Fund did not make.

The Fund argued that its "motion to dismiss correctly challenged the Court of Chancery's subject-matter jurisdiction, under *Elf Atochem*." Op.Br. 17.

Gandhi pretends that the Fund instead argued "arbitration provisions are non-waivable." Ans.Br. 10. That is incorrect. The Fund stated the opposite, specifically noting that "it has long been the law that a party to an arbitration agreement may waive its contractual right to arbitrate." Op.Br. 27; *see also* Op.Br. 30-31 (explaining how a party may waive its right to arbitrate).[2]

[2] Accordingly, Gandhi's argument that the Fund "seeks to eliminate waiver as to arbitration clauses only" (Ans.Br. 21) is incorrect.

Conversely, Gandhi's argument that the court "would need to make the threshold determination as to whether or not an enforceable arbitration clause exists or has been waived" (Ans.Br. 23) is correct. That has long been Delaware law. *See, e.g.*, *Jones v. 810 Broom St. Operations LLC*, 2014 WL 1347746, at *1 (Del. Super. Apr. 7, 2014) (stating that a court has the power to decide "whether a valid and enforceable arbitration agreement exists for purposes of determining whether it has subject matter jurisdiction"). Indeed, determining "whether a valid and enforceable arbitration agreement exists" is necessary "for purposes of determining whether [the court] has subject matter jurisdiction." *Id.*

B. *Elf Atochem* was correctly decided.

Gandhi has no answer to the Fund's actual argument. She does nothing (besides quoting from the Opinion) to address the Fund's arguments that *Elf Atochem* meant exactly what it said. *See* Ans.Br. 20.[3]

The Fund's opening brief cited decades of Delaware law stating that arbitration provisions deprive a court of subject-matter jurisdiction. Op.Br. 19-22. For 45 years—long before *Elf Atochem* was decided—Delaware courts have held that an arbitration provision "ousts" a court of its jurisdiction; Gandhi has no response.

In 1979, the Court of Chancery referenced Delaware's adoption of the Uniform Arbitration Act and—noting that "the public policy of this State is now to enforce agreements to arbitrate without regard to the justiciability of the underlying

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[3] Gandhi's arguments about stays (Ans.Br. 20 n.13) are meritless.

Trial courts may stay an action pending an arbitrability determination, because, if the arbitrator determines the claim is not arbitrable, the court may then have subject-matter jurisdiction. *See, e.g.*, *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 2011 WL 1348438, at *19 (Del. Ch. Apr. 8, 2011) ("I stay any further proceedings as to Count II pending the resolution of the arbitrator's decision on the arbitrability of that Count . . . .").

City of Wilmington v. Wilmington Firefighters Local 1590, 385 A.2d 720, 722, 725 (Del. 1978), held that the Court of Chancery was "correct in accepting jurisdiction while ordering the parties to arbitrate" because the action involved alleged violations of "both a State statute [non-arbitrable] and a labor relations contract [arbitrable]."

The stay stipulation in the *Wu* action (A433) merely reflects the fact that the motion to dismiss was never decided.

claims"—held it was "no longer of any consequence that a court, otherwise competent to hear the dispute, is ousted of its jurisdiction by the arbitration process." *Pettinaro Constr. Co. v. Harry C. Partridge, Jr. & Sons, Inc.*, 408 A.2d 957, 961 (Del. Ch. 1979). That precedent has been followed for decades. *See, e.g.*, *Salzman v. Canaan Cap. P'rs, L.P.*, 1996 WL 422341, at *4 (Del. Ch. July 23, 1996) ("[T]he arbitration process may oust a court of its jurisdiction although it is otherwise competent to hear the dispute."); *Nationwide Gen. Ins. Co. v. Estate of Truitt*, 1997 WL 524068, at *2 (Del. Super. June 27, 1997) ("The only question is whether the Court had jurisdiction over the declaratory judgment action once the arbitration process began. It did not because the parties, by contract, deprived this Court of jurisdiction of the matter."); *Johnson v. Foulk Rd. Med. Ctr. P'ship*, 2001 WL 1563693, at *2 (Del. Ch. Nov. 21, 2001) ("Delaware law favors the arbitration of disputes and 'the arbitration process may oust a court of its jurisdiction although it is otherwise competent to hear the dispute.'"); *KL Golf, LLC v. Frog Hollow, LLC*, 2004 WL 828377, at *2 n.11 (Del. Ch. Apr. 8, 2004) ("Although the Justice of the Peace Court has exclusive jurisdiction over claims for possession, that jurisdiction may be divested by an arbitration clause."); *cf. Rummel Klepper & Kahl, LLP v. Del. River & Bay Auth.*, 2022 WL 29831, at *4 (Del. Ch. Jan. 3, 2022) ("Delaware courts lack jurisdiction to resolve disputes that litigants have contractually agreed to arbitrate. A motion to dismiss for lack of subject matter jurisdiction will be granted

if the dispute is one that, on its face, falls within the arbitration clause of the contract." (cleaned up)).

Gandhi seeks to trash this precedent, revise *Elf Atochem*, and bestow the Court of Chancery with the discretionary power to treat a negotiated contractual arbitration provision as optional. But her position that arbitration provisions merely give the Delaware courts an *option* to exercise their subject-matter jurisdiction conflicts with long-standing Delaware law and policy. This Court held, more than 25 years ago, that "[c]ourts *may not consider* any aspect of the merits of the claim sought to be arbitrated, no matter how frivolous they appear." *SBC Interactive, Inc. v. Corp. Media P'rs*, 714 A.2d 758, 761 (Del. 1998) (emphasis added).

The trial court ignores this Court's holding, stating that an arbitration agreement merely "provides strong grounds for the court to decline to exercise the jurisdiction that it possesses." Op. 21. But that is not consistent with decades of Delaware law. Under this Court's long-standing precedents, the Court of Chancery does not possess the power to ignore an otherwise valid arbitration provision at its whim.[4] *See, e.g.*, *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 287 (Del. 1999)

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[4] Gandhi and the trial court contend that "subject matter jurisdiction refers to a court's 'authority to adjudicate the type of controversy involved.'" Ans.Br. 14 (quoting Op. 10). But if the trial court "may not consider" the merits in the face of an arbitration provision (*SBC Interactive*, 714 A.2d at 761), it hardly follows that the trial court has subject-matter jurisdiction if it lacks authority to adjudicate the merits and must "decline to exercise the jurisdiction" (Op. 21) every single time.

(holding that the arbitration provision "validly predetermined the fora in which disputes would be resolved, thus stripping the Court of Chancery of subject matter jurisdiction"). Such an interpretation would further defy the "fundamental public policy" of Delaware in upholding the freedom of contract and enforcing voluntary agreements of sophisticated parties. *NAF Hldgs., LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 n.14 (Del. 2015).

Elf Atochem was clear: because the LLC agreement contained an arbitration provision, the jurisdictional carveout in 6 *Del. C.* § 18-109 made inapplicable other provisions in the LLC Act—which otherwise would have provided subject-matter jurisdiction in the Court of Chancery. The same is true here.

In *Elf Atochem*, the plaintiff argued that "6 *Del. C.* §§ 18-110(a), 18-111 and 18-1001 vest the Court of Chancery with subject matter jurisdiction over this dispute." 727 A.2d at 295; *see also id.* ("Elf argues that the Act affords the Court of Chancery 'special' jurisdiction to adjudicate its claims, notwithstanding a clear contractual agreement to the contrary."). Here, Gandhi argues similarly that the trial court "has jurisdiction over Gandhi's claims under the statutory grant of authority in 6 *Del. C.* § 17-111." Ans.Br. 15. But *Elf Atochem* found "no reason why the members cannot alter the default jurisdictional provisions of the statute and contract

away their right to file suit in Delaware."[5] 727 A.2d at 295. Instead, because Delaware policy is to "give the maximum effect to the principle of freedom of contract and to the enforceability of LLC agreements, the parties may contract to avoid the applicability of Sections 18-110(a), 18-111, and 18-1001." *Id.* For the exact same reasons, the arbitration provision in the Fund's LP Agreement serves to avoid the applicability of Section 17-111. And without Section 17-111, the Court of Chancery lacks subject-matter jurisdiction to address this advancement action. *See* Op.Br. 24.

Gandhi makes much (too much) of the trial court's statement that "parties cannot alter [a court's subject-matter jurisdiction] by private ordering." Op. 11 (quoted in Ans.Br. 15). Parties may not *create* subject-matter jurisdiction by agreement where it does not otherwise exist. Op.Br. 27 n.13. But subject-matter jurisdiction may be created "by agreement of the parties" (Op. 11): parties may enter into a merger agreement or an LLC agreement, which then confers subject-matter jurisdiction on the Court of Chancery (in the absence of an arbitration provision). *See* 6 *Del. C.* § 18-111; 8 *Del. C.* § 111(a)(6). And parties certainly may *divest* a

[5] Gandhi suggests that the distinction regarding "limited partners" in Section 17-109(d) means that subsection addresses personal jurisdiction. Ans.Br. 23. That is nonsense. The General Assembly has decided to protect investors (as opposed to fiduciaries) from being forced into the exclusive jurisdiction of a non-Delaware court. *Cf.* 8 *Del. C.* § 115 (preventing corporations from adopting forum-selection bylaws that provide for exclusive jurisdiction in non-Delaware courts).

court of subject-matter jurisdiction by agreement. For example, the Delaware Rapid Arbitration Act (DRAA) expressly provides that the making of an arbitration agreement under its terms "confers jurisdiction on the Court of Chancery of the State only to" take five limited types of actions. 10 *Del. C.* § 5804(b). Under Gandhi's arguments and the trial court's Opinion, the DRAA would be invalid.

If a party filed suit seeking to enjoin a DRAA arbitration, the defendant raising the arbitration provision on a motion to dismiss would correctly be arguing that the Court of Chancery lacks subject-matter jurisdiction. *See id.* § 5804(b)(5) ("[N]o court has jurisdiction to enjoin an arbitration under this chapter."). Gandhi and the trial court would say that the Court of Chancery *does* have jurisdiction but gets to decide whether to "decline to exercise" that jurisdiction. *See* Op. 22-23; Ans.Br. 16. Delaware law says that they are wrong. A motion to dismiss an action brought improperly under the DRAA challenges the trial court's subject-matter jurisdiction. *See* 10 *Del. C.* § 5804(b)-(c). Just as *Elf Atochem* contemplates.

In short, a valid arbitration provision divests the Court of Chancery of subject-matter jurisdiction over LP advancement issues.

* * *

Gandhi's confusion (Ans.Br. 16 n.10) notwithstanding, the contractual right to arbitrate (which may be waived) is different from the defense of lack of subject-matter jurisdiction (which may not be waived). *See* Op.Br. 27. The latter may not

be waived because, by waiving, parties could force a court to accept subject-matter jurisdiction that it otherwise would not have. But parties can decide to forgo arbitration and instead pursue their dispute in court.

That is, contracting parties have the ability to alter their own contracts. They could choose to amend or alter their agreement to arbitrate. *See, e.g.*, *Friddle v. Moehle*, 2024 WL 493536, at *1 (Del. Ch. Feb. 8, 2024) ("It is axiomatic . . . that rights established by agreement may be waived by agreement as well."). Similarly, parties could waive the arbitration provisions and proceed with litigation in court (Op.Br. 27)—they are not forced to arbitrate if they are both willing to litigate in a judicial proceeding. *See, e.g.*, *Friddle*, 2024 WL 493536, at *4 (noting that parties mutually agreed to waive a mandatory arbitration provision and proceed before the Court of Chancery); *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245, 1260 n.39 (Del. Ch. 2004) (discussing ways that "a party may waive its right to arbitration"). The question *whether* the Fund waived its right to arbitrate is addressed next (and the Fund did not). But the question whether the Fund *could* waive its right to arbitrate should be undisputed.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE FUND WAIVED ITS RIGHT TO ARBITRATE.

A. Scope of Review

The Fund argues for *de novo* review. Op.Br. 27. Gandhi argues that the trial court's decision on waiver must be reviewed for plain error. Ans.Br. 25. She is wrong; her argument rests on an inapposite line of cases, and she ignores that this Court is reviewing a Rule 12(b)(1) ruling.

Gandhi's "plain error" cases did not involve motions to dismiss. *North American Leasing* addressed whether the Court of Chancery erred in entering a final judgment when it found that defendants had "waived their affirmative defense of set-off/recoupment." *N. Am. Leasing, Inc. v. NASDI Hldgs., LLC*, 276 A.3d 463, 470 (Del. 2022). It cited *Lougheed*, which addressed a failure to object to improper arguments during closing argument: "the failure to object generally constitutes waiver of the right subsequently to raise the issue. An exception arises, however, if plain error exists." *Med. Ctr. of Del., Inc. v. Lougheed*, 661 A.2d 1055, 1060 (Del. 1995) (citations omitted). For its part, *Lougheed* relied on *Mason*, which made a similar point:

> Generally, a defendant must timely object to improper statements made in closing argument to preserve his claim on appeal. If the defendant fails to object, he waives the right to raise the issue on appeal, and this Court will not review his claim unless "plain error" is shown. However, where substantial rights are jeopardized and the fairness of the trial imperiled, this Court will apply a plain error standard of review.

Mason v. State, 658 A.2d 994, 996 (Del. 1995) (citations and internal quotation marks omitted). This appeal does not address whether the Fund raised the arbitration provision in the court below; it clearly did.

This appeal addresses whether the trial court properly found—on a motion to dismiss—that the Fund had waived its contractual right to arbitrate. In such a context, this Court reviews the issue *de novo*. Op.Br. 27. The standard of review would be the same if the trial court had addressed the issue on summary judgment. *See, e.g.*, *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005) ("A trial court's decision [regarding contractual waiver] on a motion for summary judgment is subject to a *de novo* standard of review on appeal.").

De novo review—not "plain error" review—is the proper standard here.[6]

B. Merits of Argument

As to whether the Fund intentionally waived its right to arbitrate, Gandhi has little beyond quotations from the trial court's opinion. First, she points to the expedited nature of the underlying action and the fact that the trial court issued a merits ruling without a hearing, but Delaware law had never before rested an

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[6] Other courts have employed *de novo* review. *E.g.*, *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991) ("We do review the waiver finding itself, however, *de novo*."); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 544 S.E.2d 643, 645 (S.C. Ct. App. 2001) ("[T]he determination of whether a party 'waived its right to arbitrate is a legal conclusion subject to de novo review.'"); *Cooper Indus., LLC v. Pepsi-Cola Metro. Bottling Co.*, 475 S.W.3d 436, 442 (Tex. Ct. App. 2015) (similar).

arbitration waiver on such external factors. Second, she misstates Delaware law as to the need to show prejudice for an arbitration waiver, and she fails to establish that she would be prejudiced by a dismissal here.

1. Complying with the trial court's orders did not constitute intentional waiver of the Fund's arbitration rights.

Because Gandhi's "plain error" standard does not apply, this Court reviews the trial court's waiver decision *de novo*. As noted in the Fund's opening brief, the standards for proving waiver are "quite exacting," and the facts underlying the waiver must be "unequivocal." *AeroGlobal*, 871 A.2d at 444. Indeed, "the waiver of an arbitration provision requires clear and convincing evidence." *Friddle*, 2024 WL 493536, at *6 (cleaned up). Gandhi did not (and cannot) meet the necessary standard. The Fund did not intentionally waive its right to arbitrate.[7]

First, a "party may waive its right to arbitration by expressly waiving that right, actively participating in litigation as to an arbitrable claim, or otherwise taking action inconsistent with the right to arbitration." *Parfi*, 842 A.2d at 1260 n.39. It is undisputed that the Fund did not expressly waive its arbitration right. And the Delaware courts—until the trial court's ruling in this case—had universally found that the latter two types of waiver require the kinds of actions that the Fund did not

[7] The trial court stated that "Upshot did not act like a party intent on asserting a right to arbitrate." Op. 48. That is not the inquiry; the question is whether the Fund was intent on *waiving* its right to arbitrate. The Fund was not.

take here: affirmative discovery or affirmative claims. Op.Br. 31; Ans.Br. 27; *Friddle*, 2024 WL 493536, at *8 (stating that "implicit waiver is found only where '[arbitration is raised after the suit commenced] and when both parties had engaged in extensive discovery'"). The only substantive actions that the Fund took in the underlying litigation were those *ordered* by the trial court. Op.Br. 33-34. That sort of mere participation in litigation is insufficient to satisfy the "quite exacting" standards of waiver. *E.g.*, *Action Drug Co. v. R. Baylin Co.*, 1989 WL 69394, at *5 (Del. Ch. June 19, 1989).

Second, Gandhi's arguments are those created by the trial court: the Fund's delay was too long in the context of an expedited case,[8] and the Fund could not raise arbitration after a merits loss. Ans.Br. 29-30. No Delaware court had ever found arbitration waived on these grounds until the ruling below.[9]

A counter-example to Gandhi's argument is then-Vice Chancellor Berger's decision in *Anadarko*. The case was expedited; the court "heard and decided

[8] While advancement cases may often be "summary and expedited," the case below proceeded at a fairly deliberate pace. *See* A30, D.I. 46 (summary judgment order issued six months after case filing).

[9] *Perik v. Student Resource Center, LLC*, 2024 WL 181848 (Del. Ch. Jan. 17, 2024), is no support: it relied on the trial court's ruling below. Furthermore, the arbitration proponent took affirmative actions by moving to file (and then filing) a sur-reply, before the Court raised arbitration *sua sponte*. *Id.* at *2. In any event, *Perik*'s holding that a three-month delay (even in an expedited case) constitutes waiver represents a departure on this issue. *See, e.g.*, Op.Br. 35-39 (citing cases); *H&S Ventures, Inc. v. RM Techtronics, LLC*, 2017 WL 237623, at *3 (Del. Super. Jan. 18, 2017) (finding no waiver after an 11-month delay).

Anadarko's motions for a temporary restraining order, a preliminary injunction, and two motions to revise the injunctive order." *Anadarko Petrol. Corp. v. Panhandle E. Corp.*, 1987 WL 13520, at *1 (Del. Ch. July 7, 1987); *see also id.* at *6 (ruling on summary judgment as to two counts of the complaint). Regardless, one month after the court entered a preliminary injunction for the plaintiff, the defendant gave notice that it was invoking arbitration.

The court found no waiver of the defendant's right to arbitrate. It recognized Delaware's "strong public policy in favor of arbitration." *Id.* at *8. It noted that "waiver will not be lightly inferred" and that "[m]ere delay is not enough to sustain a claim of waiver." *Id.* "Rather, the party asserting waiver must demonstrate prejudice." *Id.* Furthermore, "[s]everal courts have held that the filing of an answer without raising the defense of arbitration does not operate as a waiver." *Id.* at *9.

The plaintiff argued that it would be "unjust to allow [defendant] to compel arbitration in this case where it did not demand arbitration until after suffering an adverse ruling." *Id.* at *8. But the court rejected this argument: "I do not see how [plaintiff] is being prejudiced. . . . Although it may be that [defendant] hopes for a more favorable result through arbitration than it anticipates obtaining in court, I am not persuaded that this motive, even in combination with the other factors discussed above, is sufficient to override the strong policy in favor of arbitration." *Id.* at *9. The same should apply here.

Finally, Gandhi purports to raise "all the indisputable factual support for the trial court's finding" (Ans.Br. 32) to argue that the Fund's waiver was intentional. But she has no support for that argument. The Fund merely complied with the trial court's orders—it took no other action inconsistent with its arbitration right, and it did nothing to evidence an *intentional* waiver of its arbitration right. Op.Br. 33-34.

Gandhi compares the Fund's actions with *Specialty Dx* and *Wilshire* (Ans.Br. 33-34), but that comparison fails. *Specialty Dx* found waiver where the defendant moved to dismiss in favor of arbitration as to Count V (but not Counts II-IV), supplemented its motion, filed an answer, obtained an opinion from the Court on the motion, and *then* moved to dismiss Counts II-IV in favor of arbitration—a year after its first motion and two years after litigation began. *Specialty Dx Hldgs., LLC v. Lab. Corp. of Am. Hldgs.*, 2020 WL 4581007, at *3 (Del. Super. July 27, 2020). *Wilshire* is even more extreme. Three days after sending an arbitration demand, the plaintiff "filed a Superior Court action for money damages" and "pursued extensive discovery in the Superior Court." *Wilshire Rest. Grp., Inc. v. Ramada, Inc.*, 1990 WL 195910, at *3 (Del. Ch. Dec. 5, 1990) (footnote omitted).

In short, Gandhi cannot make the showing necessary, under Delaware precedent, that the Fund *intentionally* waived its right to arbitrate.

2. The trial court's ruling should be reversed because Gandhi cannot demonstrate prejudice.

Prejudice is a component of Delaware's arbitration-waiver analysis, and Gandhi cannot demonstrate sufficient prejudice to overcome the Fund's right to arbitrate.

First, Gandhi misstates Delaware law when she claims that "Delaware law does not have prejudice as an element of waiver." Ans.Br. 34. She ignores decades of precedent, without citing or distinguishing it.

In 1987, then-Vice Chancellor Berger made clear that "the party asserting waiver must demonstrate prejudice." *Anadarko*, 1987 WL 13520, at *8. She repeated this ruling in 1989, finding that a party "ha[d] not satisfied its heavy burden of establishing that it was prejudiced by [the other party's] allegedly tardy effort to compel arbitration." *Action Drug*, 1989 WL 69394, at *5. Then-Vice Chancellor Steele found that "initiat[ing] a suit, generat[ing] discovery and respond[ing] to discovery in Superior Court prior to making written demand for arbitration . . . affirmatively constitutes an intention to waive the insured's right to demand arbitration and prejudices the insurer." *Russykevicz v. State Farm Mut. Auto. Ins. Co.*, 1994 WL 369519, at *2 (Del. Ch. June 29, 1994). Then-Vice Chancellor Strine rejected a party's belated attempt to invoke arbitration because it was "prejudicial to the plaintiffs." *Ballenger v. Applied Dig. Sols., Inc.*, 2002 WL 749162, at *8 (Del. Ch. Apr. 24, 2002) ("In these circumstances, the plaintiffs are

sufficiently prejudiced to bar Applied Digital from now changing its mind."). In 2004, the Court of Chancery found no arbitration waiver where "there is nothing in the record to suggest that the petitioners have been prejudiced by the respondents' failure to raise the issue of arbitrability sooner." *Town of Smyrna v. Kent Cty. Levy Ct.*, 2004 WL 2671745, at *3 (Del. Ch. Nov. 9, 2004); *see also Nutzz.com, LLC v. Vetrue Inc.*, 2006 WL 2220971, at *9 (Del. Ch. July 25, 2006) ("Nutzz cannot substantially invoke the judicial process as it has on counts 1-3 and then re-file the same claims before an arbitrator. To allow such action would substantially and unfairly prejudice Vertrue."). In 2012, the Court of Chancery made clear that "it is not merely the inconsistency of a party's actions, but the presence or absence of prejudice which is determinative of the issue of waiver." *Halpern Med. Servs., LLC v. Geary*, 2012 WL 691623, at *3 (Del. Ch. Feb. 17, 2012). President Judge Jurden made a similar point in 2017: "Courts generally look to whether the party opposing arbitration has suffered any prejudice as a result of the delay in demanding arbitration." *H&S Ventures*, 2017 WL 237623, at *3. Even Gandhi's case supports the Fund's position: "In determining whether one has waived such a right, Delaware courts also consider whether the actions of the arbitration proponent have prejudiced the other party." *Specialty Dx*, 2020 WL 4581007, at *3. And the Court of Chancery continues to employ the prejudice analysis, even after the trial court's ruling in this case: "When considering whether a party implicitly waived its right to arbitration,

the Court considers not merely the inconsistency of a party's actions, but the presence or absence of prejudice which is determinative of the issue of waiver." *Friddle*, 2024 WL 493536, at *8 (internal quotation marks omitted).

Furthermore, as the Fund made clear, prejudice is an element in determining whether a party can retract a waiver. Op.Br. 44. Gandhi argues that some waivers may never be retracted, but the case underlying her argument makes clear that a "waiver operates as an estoppel on the party who waives." *Hanson v. Fid. Mut. Ben. Corp.*, 13 A.2d 456, 460 (Del. Super. 1940). As the Fund noted, estoppel requires prejudice. Op.Br. 45.

<u>Second</u>, Gandhi asserts that—even if Delaware law has for decades considered prejudice in analyzing arbitration waiver—it should be ignored because (1) the Delaware courts are bound by the federal courts' rulings and (2) Delaware has no independent policy favoring arbitration. Both assertions are wrong.

Gandhi cites nothing that overrules or contradicts the Fund's argument that Delaware law applies here (Op.Br. 46-47). This has been the law for more than half a century. *See, e.g.*, *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A.2d 334, 338 (Del. Super. 1973) ("Congress had [not] preempted the field of contracts in interstate commerce to the extent that State courts are obliged to apply the federal law in such cases. That [this rule] will often result in different results between cases tried in federal courts and those tried in State courts may well be true, as defendant points

out, but this Court, not being required to apply the federal statute, must apply the law of Delaware.”); *Maloney-Refaie v. Bridge at Sch., Inc.*, 958 A.2d 871, 882 n.31 (Del. Ch. 2008) (“[E]ven though the employment agreement involves an arbitration agreement affecting interstate commerce, which normally implicates the Federal Arbitration Act, . . . state law applies in this case without any such presumption because the parties dispute the existence of an agreement to arbitrate, rather than the scope of an existing agreement to arbitrate.” (citation omitted)); *accord In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005) (“Generally under the FAA, state law governs whether a litigant agreed to arbitrate, and federal law governs the scope of the arbitration clause.” (footnote omitted)). No reason exists to change it now, to avoid settled Delaware law, as Gandhi requests.

Furthermore, the prejudice inquiry is separately supported by *Delaware's* public policy. Gandhi (and the trial court) ignore that policy, pretending that Delaware has no independent public policy favoring arbitration. Op. 49; Ans.Br. 36. As noted in the Fund's opening brief, Delaware made clear its independent policy favoring arbitration when adopting the Uniform Arbitration Act. Op.Br. 46. This policy—based on *Delaware's* statute, and not just the federal statute—was first recognized by the Court of Chancery in 1979. *Pettinaro*, 408 A.2d at 961. The Fund's opening brief mistakenly suggested that *Pettinaro* was decided by this Court (*see* Op.Br. 46); it was not. Regardless, the pertinent statements in *Pettinaro* were

adopted with full force by this Court in *Graham v. State Farm Mutual Automobile Insurance Co.*, 565 A.2d 908, 911 (Del. 1989) (emphasis added) (cleaned up):

> The Delaware version of the [Uniform Arbitration] Act provides that a written agreement to submit to arbitration any controversy existing at or arising after the effective date of the agreement is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. . . . 10 *Del. C.* § 5701. In short, *the public policy of this state* favors the resolution of disputes through arbitration.

Further supporting the existence of Delaware's independent public policy is the 2015 adoption of the Delaware Rapid Arbitration Act (10 *Del. C.* § 5801 *et seq.*), which has no federal analogue.

Gandhi's attempt to avoid this Court's holdings and decades of Delaware law should be rejected. In Delaware, the prejudice element of arbitration waiver survives the U.S. Supreme Court's holding in *Morgan*.[10]

Third, Gandhi fails to establish any prejudice. "Litigation may be prejudicial because of the unnecessary expense incurred before the demand for arbitration or because the party seeking arbitration has obtained discovery that would have been unavailable in arbitration." *Anadarko*, 1987 WL 13520, at *8 (citation omitted). Gandhi fears having to "return to square one and re-litigate everything against

[10] Indeed, Delaware courts have continued to recognize that "Delaware favors arbitration as a matter of public policy" even after *Morgan*. *See FeraDyne Outdoors, LLC v. Reaser*, 2023 WL 9094423, at *6 n.43 (Del. Super. Dec. 20, 2023).

Upshot" and that she may be "irreparably harmed by a delay in advancement."[11] Ans.Br. 38-39. But Gandhi did not incur any out-of-pocket expenses: she does not dispute that her advancement has been paid; she does not dispute that her fees-on-fees have been paid; she does not dispute that she has been paid interest; she does not dispute that she received a $90,000 fine on top of the fees and expenses that she has actually incurred (Op.Br. 43 n.16). Gandhi has received more than $1 million from the Fund. She has not been—and will not be—prejudiced by further delay: if she prevails in arbitration, she will again have her fees-on-fees paid.

Gandhi's argument is little different from the prejudice argument rejected by then-Vice Chancellor Berger in *Anadarko*: "To the extent that Panhandle is engaged in 'forum shopping,' I do not see how Anadarko is being prejudiced." 1987 WL 13520, at *9. Furthermore, to the extent that Gandhi ignored the arbitration provision in the Fund's LP Agreement (A232),[12] any prejudice through re-litigation is her own doing. In any event, an appeal of the trial court's merits ruling is potentially years away (*see* A538 ¶ 2), so any supposed delay from an arbitration should be discounted completely.

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[11] Gandhi did not argue that the Fund has obtained discovery that would have been unavailable in arbitration.

[12] Gandhi suggests that the Fund must have known about the arbitration provision (Ans.Br. 6, 31), but she does not explain—because she cannot—how the California lawyer who sent the email at A232 represented the Fund in these Delaware proceedings.

*   *   *

Because Gandhi cannot demonstrate the necessary prejudice, the Fund did not waive its right to arbitrate.

CONCLUSION

For the foregoing reasons, the trial court's order should be reversed, and the Fund's motion to dismiss should be granted.

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