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Court of Appeals
Division III
State of Washington

No. 33242-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

GORDON SCHUSTER, on behalf of himself, individually, and on behalf of the Estate of RONALD SCHUSTER; DIANA YECKEL, individually; PAT SCHUSTER, individually; KARL W. LAMBERT, ARNP; REDIMEDI CLINIC; and HOUSECALL, PLLC,

Respondents/ Cross-Appellants.

vs.

PRESTIGE SENIOR MANAGEMENT, L.L.C., et al, Defendants

vs.

LA VIDA COMMUNITIES, INC.; LSREF GOLDEN OPS 14 (WA), LLC; SERVCO OPERATING LLC; SRG LAVIDA OPPS NW SERIES; and SRG SERVCO LLC,

Appellants/ Cross-Respondents.

LA VIDA'S APPELLANTS/ CROSS-RESPONDENTS' BRIEF

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I. INTRODUCTION

Despite agreeing to arbitrate any disputes arising out of the memory care provided to their patient, the Schuster family seeks to ignore this contractual promise and force an expensive, time consuming trial.

In a series of five amended complaints, the Schuster family asserts claims for the wrongful death of their father/husband Ronald Schuster. The Schusters allege Mr. Schuster died because of the medical mis-management of independent contractor, Karl Lambert, ARNP, and the neglect of his caretakers at LaVida's Blossom Creek facility.[1] Mr. Lambert was not a party to the Resident Contract signed by the Schusters and is not an Appellant in this appeal – only LaVida.[2]

Wenatchee County Superior Court does not issue case schedules. Following a basic exchange of discovery, LaVida answered the Fourth Amended Complaint and asserted the right to have the evolving dispute arbitrated. Prior to a failed mediation attempt in the winter of 2014, LaVida moved to compel arbitration. In an effort to meet its heavy burden of defeating LaVida's right to enforce the arbitration clause, the Schusters presented evidence that LaVida had only passively engaged in discovery,

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[1] Fortunately, the merits of the Schusters' claims are not the subject of this appeal – only the enforceability of the parties' agreement to arbitrate.

[2] "LaVida" refers to the group of defendants who owned and operated the Blossom Creek facility at the time of Mr. Schuster's residence.

attending depositions noted by co-defendant. LaVida also responded to motions for default or motions to compel so that it could protect its basic rights in litigation.

The Schusters opposed arbitration, arguing they were "prejudiced" by having to sue Mr. Lambert separately – a position they occupied whether arbitration was enforced at day 1 or day 1000. The trial court denied LaVida's Motion to Compel Arbitration, citing LaVida's participation in discovery and the prejudice to the Schusters in having to separately litigate one claim in arbitration and one in state court. It also partially denied LaVida's Motion for Reconsideration on the same issue.[3]

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding LaVida waived its right to arbitrate because LaVida never submitted an arbitrable issue to the trial court.

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[3] The trial court did rule correctly on a separate issue during reconsideration, which the Schusters bring on cross-appeal. The Schusters will argue that the arbitration agreement included a mandatory provision that arbitration be performed by the National Arbitration Forum ("NAF"), a group which has fallen into disgrace after some litigation, and which may not, pursuant to consent decree, arbitrate cases such as this one. It is true that the NAF is unavailable to handle this matter. But the arbitration agreement provided for an alternative method to seek an arbitrator, rendering NAF non-essential to the agreement. Thus, the trial court correctly found that the arbitration agreement is still enforceable despite NAF's unavailability, and this finding should, respectfully, be affirmed.

2. The trial court erred by finding the Schusters were prejudiced where the only evidence of "harm" was that they would have to separately litigate claims against Mr. Lambert in state court.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Whether LaVida's response to a motion to compel and its attendance at depositions noted by co-defendant constitutes waiver of the right to arbitrate?

2. Whether the Schusters can be prejudiced by parallel discovery being obtained in the state court action before the right to arbitrate is asserted?

IV. STATEMENT OF THE CASE

Ronald Schuster sadly contracted Lewy Body Dementia and Alzheimer's disease. Even taken separately either disease is as cruel to the family and caretaker as they are to the afflicted patient.

The Schusters allege wrongful death actions against all Defendants, claiming that the unfortunate, natural decline of Ronald Schuster and his ultimate death were by-products of the Defendants' actions. Specifically, the Schusters allege negligent care and monitoring by LaVida. They also question the medication and medical care decision of Karl Lambert, ARNP. All Defendants strongly contest the allegations.

The Arbitration Clause.

By March, 2009, the Schuster family was concerned about the progression of Ronald Schuster's dementia-related diseases and placed him in an assisted living facility. They chose Blossom Creek because it was close in proximity to his son's house, and because the facility only had one floor, which they believed would be less confusing to him.

On April 15, 2009, Gordon Schuster, Ronald's son and power of attorney[4] executed the Residence and Care Agreement finalizing the terms of Ronald Schuster's stay at Blossom Creek.[5] It included the following optional arbitration clause:

> **Arbitration**
>
> BOTH PARTIES UNDERSTAND THAT AGREEING TO ARBITRATION IS NOT A CONDITION OF YOUR ADMISSION TO THE COMMUNITY. By initialing the line at the end of this paragraph, however, **you[6] agree that any and all claims and disputes arising from or related to this agreement or to your residency, care or services at the Community, whether made against us or any other individual or entity, shall be resolved by submission to neutral binding arbitration in accordance with the Federal Arbitration Act**.... Both parties give up their constitutional rights to have any such dispute decided in a court of law before a jury, and instead accept the use of arbitration. Arbitrations shall be issued by the National Arbitration Forum under the Code of Procedure then in

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4 CP 837-38. Mr. Schuster is an insurance agent and registered representative with New York Life Ins. Co. Securities. CP. 1018-19.

5 CP 813-35.

6 The definition of "you" includes Ronald and Gordon Schuster. CP 815.

> effect. Arbitrations shall be conducted by a single arbitrator agreed to by the parties.... The dispute will be governed by the laws of Washington.... Any award by the arbitrator may be entered as judgment in any court having jurisdiction.... This arbitration clause binds all parties to this Agreement and their spouse, heirs, representatives, executors, administrators, successors, and assigns, as applicable. After termination of this Agreement, the arbitration clause shall remain in effect for the resolution of all claims and disputes that are unresolved as of that date.

(Caps in original, remaining emphasis added).[7] Gordon Schuster initialed the arbitration provision and signed the entire agreement, thereby electing to include the arbitration clause within the agreement.[8]

LaVida's Passive Involvement in this Suit.

Ronald Schuster died in May, 2010.[9] The Schusters quickly filed a claim. The focus at the time was on settlement.[10] As seen from the Schusters' counsel's August, 2010, correspondence, initial allegations related to the medications that were administered to Mr. Schuster – medications that LaVida did not prescribe – leading LaVida to believe that a low-value early settlement was feasible.[11]

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[7] CP 831.

[8] CP 831, 33.

[9] CP 811. Ronald Schuster's death certificate listing the cause of death as Alzheimer's, CAD (coronary artery disease), and HTN (hypertension).

[10] CP 966-984, 1323.

[11] CP 966-67, 971-72, 1323. Allegations continued to fluctuate throughout the life of this matter, causing a total of five complaints to be filed, and resulting in many entities which are either non-existent or completely unrelated to this case to continue to hang from the caption.

It was not. Suit was filed on February 15, 2013,[12] only naming Appellant LSREF Golden Ops 14 (WA), the owner of Blossom Creek.[13] It appeared, but only answered on April 2, 2013 to protect its interests after plaintiffs filed a motion for default judgment.[14] LSREF Golden Ops 14 (WA) was also subjected to discovery, but initially did not respond. Only when facing a motion to compel did it supply the following response to the large majority of discovery requests: "[D]efendant did not operate Blossom Creek during Mr. Schuster's residency and does not have information responsive to this request."[15]

The remaining Appellants/LaVida entities were named in the First Amended Complaint on April 30, 2013.[16] They appeared in late May, 2013. They did not file an answer for some time, in part because of the continually shifting allegations that occurred over the course of plaintiffs' four amended complaints. LaVida was also subjected to discovery requests – 65 interrogatories and 69 requests for production – which were

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[12] CP 4.

[13] CP 4-30.

[14] CP 31-59.

[15] CP 272-322.

[16] CP 154-179.

also only answered to protect its interests upon facing a motion to compel discovery.[17]

LaVida's attorneys also attended the five depositions noted by defendant Lambert.[18] LaVida did not file motions in court and did not take discovery.

Assertion of Arbitration Rights.

Allegations appeared solidified in the spring of 2014, and Defendant Lambert – who is not a party to the arbitration clause, and has not asserted a right to arbitration – began requesting trial setting. Mediation was also discussed as a substitute for trial setting. In the midst of these discussions, LaVida made clear that the Schusters' claims were subject to the arbitration clause, but they would still participate in mediation.[19]

Mediation took months to organize, not least in part due to the difficulties in arranging a place suitable to all parties, especially as time wore on and inclement weather began to play a role. In the fall, Defendant Lambert made clear he would not engage in mediation, and again

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[17] CP 226-252; 329-380.

[18] CP 1023-1030.

[19] CP 809.

submitted a note for trial setting. On September 17, 2014, LaVida and the now-dismissed Prestige entities[20] collectively objected to trial setting.[21]

It was not until October 10, 2014 that LaVida filed an Answer, and did so primarily to preserve its right to arbitration.[22] In that Answer, LaVida asserted as an affirmative defense, "**Responding Defendants are entitled to binding arbitration pursuant to a contract entered into by Gordon Schuster, as Ronald's power of attorney, and Blossom Creek.**"[23] (emphasis in original). In addition, under the Reservation portion, it stated, "**Responding Defendants do not waive any rights they have regarding arbitration.**" (emphasis in original).[24]

LaVida repeated its intention to pursue arbitration in a telephone hearing on October 30, 2014.[25] Noting the mediation scheduled for the week of Thanksgiving, the Court set a date of December 9, 2014 for a hearing on arbitration should the mediation be unsuccessful. The court did

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[20] For an explanation of parties involved in the trial court matter, please see CP 739-41.

[21] CP 614-637.

[22] CP 696-735. La Vida answered the Third Amended Complaint, despite the Fourth Amended Complaint having been filed on September 26, 2014. No Defendants received notice of Plaintiffs' intent to file a Fourth Amended Complaint, nor did they receive notice of Plaintiffs' motion to file the same. Anticipating that this improperly noted Complaint would be stricken, La Vida responded to the most recent viable Complaint.

[23] CP 733.

[24] CP 734.

[25] CP 809.

not set the matter for trial. Mediation was unsuccessful, and the motion was heard on December 9, 2014.

The Schusters' Opposition to Motion to Compel Arbitration.

The Schusters produced evidence demonstrating that the "NAF" (National Arbitration Forum), pursuant to a consent decree was unable to administer claims such as the Schusters'. Because NAF could not accept the case, the Schusters argued, the clause was unenforceable.[26] Citing numerous and often-conflicting cases from across the nation, many of which were from non-binding state courts and federal district courts, the Schusters asked the trial court to adopt a three-part test to determine the NAF provision was "integral" to the arbitration agreement. No court had adopted such a test.

The Schusters also argued waiver, citing LaVida's year delay in asserting arbitration,[27] but produced no evidence that LaVida had asked the trial court to decide an arbitration issue. While agreeing that federal law was the appropriate standard for analysis of this issue, they produced no federal case where waiver was found <u>without the submission of an arbitrable issue</u> to a court. Instead, Plaintiffs cited state and federal law

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[26] CP 792-843.

[27] The delay was documented by a series of correspondence which demonstrates the attempts by the parties to seek settlement before litigation and mediation before noting this case for trial setting, demonstrating an alternative intent for delaying in filing a motion to compel: to achieve a quicker, less expensive, resolution to this case. CP 966-985.

interchangeably, arguing that a time delay and minimal discovery participation[28] equated to "active litigation." The Schusters also argued without citation to any authority that arbitration would cost more than a trial and that it would be difficult to litigate against Defendants Lambert and the Redi-Medi entities in trial court while arbitrating this matter against LaVida. They did not present any evidence that the delay made the matter more expensive to arbitrate, or that the split forums for this matter were more challenging to manage because arbitration was asserted in 2014 rather than 2013.[29]

The Trial Court's Rulings on the Motion to Compel Arbitration.

The Court denied the right to arbitration for two reasons.[30] First, it found that language requiring that the NAF serve as the arbitration forum was integral to the arbitration agreement. This finding rendered the arbitration clause unenforceable because NAF was no longer able to arbitrate this type of claim.

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[28] The Schusters hammered on the participation of LaVida's attorneys at depositions which were noted by Defendant Lambert. LaVida's attorneys also represented Defendants who were not protected by the arbitration clause and who have since been dismissed. The Schusters cannot expect to find a litigation waiver in the actions of attorneys who were required to be at discovery which they did not initiate in order to protect the interests of clients who are not asserting arbitration clause privileges.

[29] Indeed, the Schusters have benefited from only litigating in one forum for the first year of this case, although they may attempt to continue to assert that fallacy that the discovery accomplished in state court (which was predominately initiated by themselves and Defendant Lambert) will somehow not be usable in arbitration.

[30] CP 1497-98, RP 58-66.

Second, the Court found that LaVida waived its right to arbitrate and was prejudiced by the delay The trial court found LaVida waived its right to arbitrate because it did not file an answer until after Mr. Lambert moved for trial-setting (even though Defendants immediately objected to trial-setting when Mr. Lambert noted the same in September, 2014). The trial court also found support for litigation waiver because counsel for LaVida attended depositions noted by other parties and responded to discovery requests before asserting arbitration as an affirmative defense. The trial court found LaVida's delay harmed the plaintiffs because it presumed the delay increased costs of litigation.[31] The Order denying arbitration was entered on January 12, 2015.[32]

The Trial Court's Ruling on Reconsideration.

LaVida moved for reconsideration and the trial court partially granted it, finding that the NAF provision was not integral to the agreement.[33] The trial court held that what was "integral" was the clause that "any and all claims and disputes...shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration

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[31] In making this finding, the presiding judge cited to his memory from litigating cases prior to his 23 years on the bench, as well as to his perception of the lack of personal knowledge which Justice Johnson, Justice Fairhurst, Justice Gonzalez, and Justice Yu would have regarding the costs of case preparation and litigation.

[32] CP 1334-35.

[33] CP 1364-73.

Act."[34] Accordingly, where binding arbitration is to be governed by the FAA, which provides an alternate method for choosing an arbitrator, the arbitration clause was not fatally flawed. The Schusters will apparently cross-appeal this issue.

The trial court also denied part of the motion for reconsideration, finding that LaVida waived its right to arbitration. In clarifying its ruling that LaVida's actions amounted to a waiver, the trial court noted that over eighteen months passed between the filing of the first complaint and a formal objection, presented to the court, requesting arbitration.[35] It also noted that five depositions which were noted by Defendant Lambert were attended by LaVida's defense counsel, who also represented the now-dismissed Prestige entities. Finally, it noted that because the numerous interrogatories which the Schusters submitted were higher in number than those permitted by NAF rules (which the trial court noted may not even apply)[36], and because LaVida responded to them (pursuant to a motion to compel and court order)[37], LaVida's conduct demonstrated conduct

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[34] CP 1367.

[35] In so doing, the trial court respectfully lengthened the actual time boundaries on both sides: LaVida did not appear until May, 2013, three months after the first complaint was filed, and LaVida informally discussed an intent to pursue arbitration in July, 2014, two months before the a formal objection was filed.

[36] CP 1402.

[37] CP 515-20; 1370-72.

inconsistent with the intent to arbitrate.[38] The trial court also clarified its ruling that the Schusters were prejudiced by LaVida's delay by citing the purpose of arbitration as "normally allowing quick settlement of claims at less expense than litigation."[39] The court noted how much money the Schusters claimed to have spent to date in litigation (the Schusters did not produce invoices). Noticeably absent from the trial court's ruling was any consideration of 1) how much the Schusters would have spent in pursuing discovery through arbitration and 2) how much of the money the Schusters claimed to have spent in two forums because the Schusters' claims against Mr. Lambert always requested a state court action. In short, the trial court only considered harm from engaging in the litigation, rather than harm due to any alleged delay in placing the case into arbitration to initiate the arbitration process sooner.

In support of its conclusion the Schusters had been prejudiced, the trial court speculated about how much money the Schusters would need to pay an arbitrator above and beyond the tax-funded trial court.[40] The trial court also noted that arbitration would not be more speedy than trial because a trial date has been set, and it was unlikely that arbitration could

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[38] CP 1370-72.

[39] CP 1372.

[40] CP 1372, fn 7.

occur before that trial date.[41] This matter, however, was not set for trial until after LaVida demanded arbitration.[42] Finally, when considering prejudice to the Schusters, the trial court ruled that LaVida offered no reason for its delay in asserting arbitration, thus shifting Schusters' burden of disproving a right to arbitration to LaVida. LaVida respectfully asserts the trial court erred by not granting all of LaVida's motion to reconsider.

V. ARGUMENT

A. Law Regarding Arbitration and Litigation Waiver.

Federal law controls the interpretation of arbitration clauses where, as here, they affect interstate commerce or evoke the Federal Arbitration Act ("FAA"). Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185, 1187 (9th Cir. 1986); Kinsey v. Bradley, 53 Wn. App. 167, 169, 765 P.2d 1329, 1331 (1989). Review of denial of arbitration, and of arbitration waivers are de novo. Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 693 (9th Cir. 1986); Rush v. Oppenheimer & Co., 779 F.2d 885, 887 (2d Cir.1985).

Waiver is not favored and should not be inferred. Furthermore, the presumption towards arbitration can only be overcome by the satisfaction by the opponents of the arbitration by satisfying a heavy burden of proof. Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25

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[41] CP 1372-73.

[42] CP 1499.

(1983); Van Ness Townhouses v. Mar Indus. Corp., 862 F.2d 754, 756, 759 (9th Cir. 1988); Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473, 1477 (9th Cir. 1984); Fisher, 791 F.2d at 694; Shinto Shipping Co. v. Fibrex & Shipping Co., 572 F. 2d 1328, 1330 (9th Cir. 1978). Plaintiffs must establish that there was (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts. Letizia, 802 F.2d at 1187. LaVida appeals the trial court's finding of the second and third elements.

B. The Plaintiffs Did Not Demonstrate That, Under the Federal Test, LaVida Waived Its Right to Arbitration.

To prove waiver, the Schusters needed to prove that LaVida demonstrated a clear intent to utilize the judicial process rather than seek non-judicial resolution of arbitrable claims. Otis Housing Ass'n v. Ha, 165 Wn.2d 582, 588-92, 201 P.3d 309 (2009); Verbeek Prop., LLC v. GreenCo Envt'l, 159 Wn. App. 82, 90-92, 246 P.3d 205 (2010); Ives v. Ramden, 142 Wn. App. 369, 383, 174 P.3d 1231 (2008); Lake Wash. School. Dist. No. 414 v. Mobile Modules NW, Inc., 28 Wn. App. 59, 62-64, 621 P.2d 791 (1980). Respectfully, the Schusters did not meet this burden.

Waiver is established by the "conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable claims." Van Ness, 862 F.2d at 756 (emphasis added); see also United Computer Systems, Inc. v. AT&T Corp. 298 F.3d 756, 765 (9th Cir. 2002) (submitting action for declaratory relief to court is a waiver). Inconsistent acts are demonstrated when a party demonstrates "a clear intent to utilize the judicial process rather than seek non-judicial resolution of arbitrable claims." Kinsey, 53 Wn. App. at 171-172 (applying federal law); Brown v. Dillard's, Inc., 430 F.3d 1004, 1012 (9th Cir. 2005) (refusal by a party to engage in arbitration when demanded demonstrates a clear intent to utilize judicial process rather than arbitrate); Riverside Publishing Co. v. Mercer Publishing LLC, 829 F. Supp. 2d 1017, 1020 (W.D. Wash. 2011). The Schusters cannot point to a single action by which LaVida offered up an arbitrable issue for the trial court's consideration.

The Schusters' argument that LaVida participated in discovery or that non-arbitrable issues were presented (by the Schusters) via motion, do not relieve them of this failed burden. Van Ness, 862 F.2d at 756. In Kinsey, the Court found waiver when "extensive" motion practice submitted arbitrable issues to the Court, resulting in the dismissal of several claims based on substantive arguments. Kinsey, 53 Wn. App. at 171-172. Similarly, in Riverside, the submission of requests for injunctive

relief, an issue reserved for arbitration, constituted an arbitration waiver. Riverside Publishing Co., 829 F. Supp. 2d at 1020.

Here, there was no "extensive motion practice" by LaVida. It only responded to motions to compel discovery or to compel an answer to the complaint. Similarly, there is no dispute that LaVida only attended depositions noted by Mr. Lambert's attorney and asked a few questions at the end to preserve its rights. LaVida did not waive arbitration; it dedicated its resources to the pursuit of gathering facts to try to resolve the case through mediation instead of litigating issues in court. Pursuing facts to enable the parties to mediate is not contrary to pursuing arbitration.

Without taking into account the confusion and delay associated with the Schusters' five amended complaints, changing parties and theories, the Schusters also bemoan the time delay in asserting arbitration. However, even if LaVida was responsible for every day of delay, delay in assertion of arbitration does not equate to waiver. Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473, 1477 (9th Cir. 1984); see also Van Ness, 862 F.2d at 756 (9th Cir. 1988) (more than two-year delay in addition to submission of arbitrable issues to the court via a motion to dismiss and other motions, was a waiver). LaVida did not attempt to utilize the judicial process to resolve its claims, and never submitted an arbitrable issue to the trial court. The trial court respectfully erred in finding that

LaVida acted to as to waive its right to litigation, and the finding should be reversed.

C. The Schusters Did Not Demonstrate Prejudice under Federal Law.

The law is clear: speculation cannot establish prejudice, and the "self-inflicted wound" of plaintiffs who choose to pursue litigation instead of complying with an arbitration clause cannot establish prejudice. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90-92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000); Fisher, 791 F.2d at 698. Here, the Court found the Schusters were harmed by relying on speculation regarding the costs of litigating and litigation strategy, strengthened by the trial court's own unilateral beliefs regarding choices in litigation and discovery. While the trial court on reconsideration minimized the concept of "self-inflicted harm," it was unable to distinguish what harm was caused because of the failure to immediately assert a right to arbitration, as opposed to the Schusters' months earlier. The Schusters' decisions, made without reliance of a presumed abandonment of arbitration, are the types of "self-inflicted harms" which Green Tree condemns.

1. The Schusters did not prove they were harmed by their choice to engage in discovery on a wider scope than they may have had in an arbitration forum.

The trial court found that the Schusters were prejudiced by engaging in state court discovery. But all discovery considered by the trial

court was either pursued by Mr. Lambert or by the Schusters. Neither category of discovery appropriately establishes the waiver of the arbitration clause.

The trial court cited to five depositions that were noted by Mr. Lambert and attended by LaVida. However, discovery that includes non-arbitrable issues cannot establish prejudice. Fisher, 791 F.2d at 697. Depositions which include non-parties to the arbitrable litigation cannot establish prejudice. Shinto Shipping Co., 572 F.2d at 1330. Thus, depositions taken by Mr. Lambert – who is not a party to the arbitration clause – which included significant discussions on the allegations regarding Mr. Lambert's treatment of Mr. Schuster cannot establish prejudicial harm for the Schusters when they would always need to take those depositions to establish Mr. Lambert's alleged fault.

Even engaging in discovery which is related to arbitrable issues is not prejudicial because the discovery is still available in an arbitration forum. Fisher, 791 F.2d at 697; Van Ness, 862 F.2d at 759. It is true that the trial court speculated that, if NAF rules applied, then the Schusters may have gotten more access to discovery in the first year of litigation than they would have been entitled to under NAF rules. (How access to added information is considered "harm" to the Schusters is still unclear.) But the mere need for the Court to speculate about the NAF rules reveals

the true issue – that the Schusters did not meet their burden of showing that they were harmed by availing themselves of rules of discovery which enabled a fishing expedition of over 130 discovery requests and thousands of pages of information.

Discovery expenses are not prejudicial when the party claiming prejudice failed to limit the discovery known to be outside the arbitration clause. Shinto Shipping Co., 572 F.2d at 1330 (appellant should have sought protective orders rather than scheming to void the entire arbitration process). Here, the Schusters were not only failing to limit the discovery, they were the ones pursuing the requests. They simply cannot claim harm from discovery they pursued. It was an error for the trial court to find that the discovery amounted to prejudice.

2. The Schusters did not prove the costs of arbitration due to the delay in asserting arbitration were prejudicial.

While the re-litigation of arbitrable issues submitted to court can establish prejudice, the "self-inflicted wound" of expenses from the Schusters' conscious decision to file suit despite an arbitration clause cannot establish harm. Compare Riverside Publishing Co., 829 F. Supp. 2d at 1022 (W.D. Wash. 2011); Fisher, 791 F.2d at 697. Thus, under federal law, the Schusters' deliberate choice to engage in litigation instead of complying with the contractual duty to arbitrate is insufficient to

establish harm. Similarly, the desire to avoid paying for an arbitrator, when one is contractually obligated to do so, cannot establish harm. Evidence that arbitration may cost the Schusters $100,000, when presented with no other information such as what arbitration would have cost if it was demanded in 2013, is not enough to establish prejudice or harm because of the delay in asserting arbitration.

Additionally, the U.S. Supreme Court has already held that speculative allegations of the "risk" of increased costs and the possibility of uncomfortable positions for a plaintiff is insufficient evidence to establish Plaintiffs' burden to prove why an arbitration clause should not be enforced. Green Tree, 531 U.S. 79[43]; see also Fisher, 791 F.2d at 698. The Schusters' vague speculation that their trial strategy would have been different does not satisfy this burden. Respectfully, without the Schusters meeting their evidentiary burden, the trial court erred in finding that they were prejudiced by the delay in demanding arbitration.

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[43] The trial court faulted LaVida's citation of Green Tree, claiming that because it discussed enforceability for reasons other than waiver, it was inapplicable to this case. Respectfully, LaVida disagrees. The reason for unenforceability, in this instance, is not the point. The purpose of citing this case is to address the Schusters' failure to meet their burden to disprove enforceability by more than mere speculation.

D. The Trial Court Correctly Ruled That the NAF Provision Was Not Integral to the Arbitration Clause.

The Schusters have signaled their intent to cross-appeal the Court's finding that the NAF provision was not integral to the arbitration agreement; but the trial court correctly granted reconsideration on this issue.

A written agreement to arbitrate shall be enforceable "save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. The parties and the trial court agree that Reddam v. KPMG, LLP, 457 F.3d 1054, 1060 (9th Cir. 2006) (abrogated on other grounds), is instructive for this case.[44] That Reddam court considered an arbitration clause that dictated that arbitration should be "according to" the rules of the NASD, although it did not expressly require that the NASD administer the arbitration. The court found a lack of evidence that naming the NASD was "so central to the arbitration agreement that the unavailability of that arbitrator brought the agreement to an end." Reddam, 457 F.3d at 1061.

The Reddam court continued by analogizing the scenario to forum selection clause cases, noting:

> There we have not treated the selection of a specific forum as exclusive of all other fora, unless the parties have expressly stated that it was. Compare Pelleport Investors,

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[44] While the trial court noted that Reddam was not binding precedent, it then continued to be guided by it in formulating its opinion. CP 1366-69.

> 741 F.2d at 275, 280 (holding remand required where contract provided that "disputes ... **shall be litigated** only in the Superior Court for Los Angeles, California **(and in no other)**"), with N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1036–37 (9th Cir. 1995) (holding remand not proper where contract provided that decisions "**shall be** enforceable by a petition ... filed in the Superior Court of the City and County of San Francisco" because that language "**is permissive**."), and Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 76-78 (9th Cir. 1987) (holding remand not proper where contract provided that "[t]he courts of California, County of Orange, **shall have** jurisdiction over the parties"). In referring to those cases, we do not suggest that other arbitral fora can be utilized when the one selected by the parties is itself available. But here, of course, the selected forum was not available.

Reddam, 457 F.3d at 1061 (bold emphases added).

In other words, the use of "shall," in this context, is "permissive" (unless possible other forums are expressly discluded). As the trial court found in this case, the integral portion was that controversies were to be resolved by neutral binding arbitration.[45] Entities other than NAF were not expressly discluded. Instead, the FAA was cited, providing an alternate method for arbitrator selection.[46] The court correctly found that the NAF provision was not integral in this case.

Moreover, the court did not err in being guided by Reddam or its Ninth Circuit progeny. A strong collection of cases marches with the

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[45] CP 1368.

[46] 9 U.S.C. § 5, Appointment of Arbitrators or Umpire.

Ninth Circuit, supporting LaVida's position and the trial court's ruling. Green v. U.S. Cash Advance Illinois, LLC, 724 F.3d 787, 789 (7th Cir. 2013) (reference to NAF Code of Procedure indicated that NAF was not exclusive arbitrator; fact that NAF Procedure required it be enforced solely by NAF did not render the procedure unavailable to other arbitration forums so long as patent and copyright laws were not violated); Khan v. Dell Inc., 669 F.3d 350, 356 (3d Cir. 2012) (language "SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM" was ambiguous and therefore must be resolved in favor of arbitration, which is the presumed outcome); Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1222 (11th Cir. 2000) (language that arbitration "shall" be done by NAF was not integral to the agreement and allowed for Section 5 of the FAA to fill in); Meskill v. GGNSC Stillwater Greeley LLC, 862 F. Supp. 2d 966, 973-77 (D. Minn. 2012); Levy v. Cain, Watters & Assocs., P.L.L.C., No. 2:09–cv–723, 2010 WL 271300, at *6 (S.D. Ohio Jan. 15, 2010); Adler v. Dell Inc., No. 08–cv–13170, 2009 WL 4580739, at *3 (E.D. Mich. Dec. 3, 2009); Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 742 F. Supp. 1359, 1362–65 (N.D. Ill. 1990); Wright v. GGNSC Holdings LLC, 808 N.W.2d 114 (S.D. 2011).

Importantly, the U.S. Supreme Court has already outlined how a NAF arbitration clause impacts the enforcement of such claims. In CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 677, 181 L. Ed. 2d 586 (2012), the Court upheld the enforceability of an agreement which specified NAF as the arbitration forum, despite the Court's knowledge of the Minnesota settlement and consent decree. Id. at 677, n. 2 (contained in the dissent, but as a notation of fact). The NAF issue was not one that was litigated by the parties. But, as the Seventh Circuit noted, the Supreme Court's finding of enforceability implicitly notes the non-integral nature of the arbitrator forum. Green, 724 F.3d at 790.

The setting of NAF as the arbitration forum is not integral to the arbitration agreement, and the trial court correctly in found that the arbitration clause was not rendered unenforceable by the NAF consent decree.

VI. CONCLUSION

LaVida respectfully requests that this Court reverse the findings of the trial court regarding litigation waiver. Specifically, the Schusters have failed to show LaVida acted inconsistently with the intent to preserve a right to arbitration and have failed to show harm from the delay in asserting a right to arbitration. LaVida requests that it be allowed to arbitrate this matter pursuant to the FAA. LaVida also respectfully

requests the Court affirm the trial court's ruling that the NAF provision is not an integral portion of the agreed-upon arbitration clause.

DATED this 8th day of June, 2015.

FORSBERG & UMLAUF, P.S.

By:_____

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing BRIEF OF APPELLANTS on the following individuals in the manner indicated:

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SIGNED this 8th day of June, 2015, at Seattle, Washington.

Shawn G. Menning