IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

SOUTH MIAMI PHARMACY INC., a Florida Corporation d/b/a SOUTH MIAMI PHARMACY II,	DCA Case No. 3D23-1121 L.T. Case No. 2022-005838-CA-01

Appellant,

vs.

OPTUMRX, as successor by merger to Catamaran Corporation and OPTUMRX in its own right,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE, OPTUMRX

Appeal from a Final Order of the Circuit Court

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STATEMENT OF CASE AND FACTS[1]

Introduction

Appellant South Miami Pharmacy, Inc. refused to arbitrate its disputes with Appellee OptumRx, Inc. under the parties' arbitration agreements. OptumRx then filed a petition to compel arbitration under the Federal Arbitration Act ("FAA") and Florida Arbitration Code. Judge Ariana Fajardo Orshan granted OptumRx's petition and ordered the parties to arbitrate.

On appeal, South Miami argues the circuit court lacked jurisdiction to compel arbitration in California, and the arbitration agreements are unenforceable. South Miami's arguments fail.

First, there is no requirement under the FAA or Florida Arbitration Code that an arbitration take place in Florida. Each time a District Court of Appeal has addressed whether a Florida court can compel arbitration in another state under an agreement involving interstate commerce, it has held that it can. *See, e.g.*, *Trojan Horse v. Lakeside Games*, 526 So. 2d 194, 195 (Fla. 3d DCA 1988) (compelling arbitration in Minnesota). This Court should not break with that unanimous line of authority.

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[1] All record references are to page number (*e.g.*, [R1] references record page 1). Citations to the Initial Brief are also to page number (*e.g.*, [IB1] references page 1 of the Initial Brief).

Second, South Miami argues that OptumRx filed this case prematurely. But there are only two requirements for a petition to compel arbitration: a written arbitration agreement and an allegation that the other party "refused" to arbitrate. § 682.03(1), Fla. Stat. (2013); 9 U.S.C. § 4. Here, South Miami conceded below that it refused to arbitrate under the parties' agreement. That alone entitled OptumRx to file a petition to compel arbitration.

Third, the parties' arbitration agreements are enforceable. South Miami obtained more than $300,000 from OptumRx under its contracts in 2021 alone, and those contracts include arbitration clauses. South Miami cannot avoid its arbitration clauses after accepting contract benefits for many years. In any event, the arbitration agreements' delegation clauses require *an arbitrator*—not a court—to resolve all of South Miami's challenges to arbitration.

This Court should follow the numerous other Florida courts that have recently enforced OptumRx's arbitration agreements—including the Sixth District Court of Appeal last month, *see JC Resources v. OptumRx*, No. 6D23-1073, 2023 WL 8884507 (Fla. 6th DCA Dec. 26, 2023), which per curiam affirmed a circuit court's order compelling arbitration in a case concerning all the same arguments that South Miami makes here.

Factual Background

1. OPTUMRX'S RELATIONSHIP WITH SOUTH MIAMI

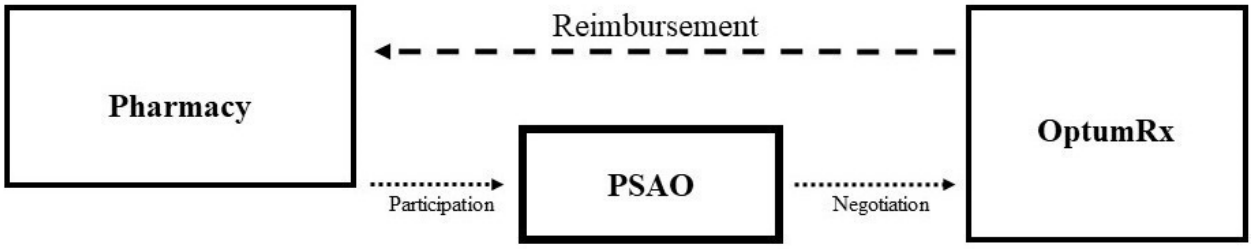
South Miami operates South Miami Pharmacy II, which fills prescriptions for customers covered by health plans. [R576 ¶ 22]

Pharmacies often choose to be "in-network" with health plans—which encourages customers to fill their prescriptions at those pharmacies, increasing the pharmacies' revenues. [R393, R517–18 ¶¶ 16–18] To be "in-network," pharmacies often contract with a pharmacy benefits manager—such as OptumRx—which contracts with pharmacies, on one end, and health plans, on the other. [R393, R517–18 ¶¶ 16–18]

Pharmacies leverage collective-bargaining power by joining pharmacy services administrative organizations ("PSAOs") and granting PSAOs authority to negotiate contracts on the pharmacies' behalf. [R519 ¶ 19] PSAOs represent thousands of member pharmacies. [R519 ¶ 19]

One of a PSAO's key responsibilities is to negotiate contracts, called Provider Agreements, with companies like OptumRx. The Provider Agreement gives pharmacies access to OptumRx's health plans and members, and includes the reimbursement rates that pharmacies will receive for particular drugs. [R525 ¶ 29] In negotiating these contracts with OptumRx, PSAOs exert significant bargaining power on behalf of their

member pharmacies. [R530–34 ¶¶ 37–45] The illustration below describes the relationship between these businesses.



Since 2010, South Miami has contracted with OptumRx and its predecessors through two large PSAOs. From 2010 through 2013, it was affiliated with Health Mart Atlas; since 2013, it has been affiliated with Leader Drug Stores Inc. [R576 ¶ 22]

2. SOUTH MIAMI'S ARBITRATION AGREEMENTS

South Miami has two arbitration agreements with OptumRx: (1) a Provider Agreement that states all disputes "shall" "be submitted to binding arbitration" [R867], and (2) the Provider Agreement incorporates OptumRx's Provider Manual, which lays out the specific terms of the relationship between OptumRx and South Miami. [R853, R860]

At all relevant times, the Provider Manual has required arbitration of all disputes. [R713–15; *see also* R775–77, R787–89, R799–801, R811–13, R823–24, R835–37] The arbitration clause in the 2022 Provider Manual broadly defines the scope of disputes subject to arbitration, states that disputes about arbitrability must be arbitrated (known as a "delegation

clause"), and states that the FAA governs. [R713–15] The arbitration agreement does not provide for the application of any particular state's laws.

The arbitration agreement also provides for a three-step process to raise and resolve disputes. *First*, "the party asserting the Dispute shall provide written notice to the other party identifying the nature and scope of the dispute." [R713] *Second*, the parties should attempt to resolve the dispute informally. [R713] *Third*, if the parties don't resolve their dispute, then either party may commence arbitration. [R713]

3. SOUTH MIAMI COLLECTS MONEY FROM OPTUMRX AND THEN REFUSES TO ARBITRATE UNDER ITS CONTRACTS

South Miami has contracted with OptumRx for years and received significant money from OptumRx. OptumRx paid South Miami $306,984 in 2021 alone. [R570 ¶ 6]

In December 2021, South Miami's counsel sent OptumRx a "Notification of Dispute" letter identifying the pharmacies he represented and describing eight disputes. [R424–25, R406] The letter alleged that OptumRx had breached the Provider Manual—one of the contracts that includes an arbitration agreement—and asked OptumRx to respond if it had "any interest in resolving these disputes." [R424–25]

The parties met and conferred but were unable to resolve their disputes. [R20–21 ¶ 29, R399–400] During the telephonic conference,

OptumRx stated that South Miami and the other pharmacies identified in the Notification of Dispute must arbitrate their disputes. [R399] OptumRx asked South Miami's counsel whether the pharmacies would arbitrate. South Miami's counsel stated that the pharmacies would *not* arbitrate and would only litigate the parties' disputes in court. [R400]

Procedural History

In March 2022, after South Miami refused to arbitrate, OptumRx filed a petition and motion to compel arbitration. [R14–197, R198–390]

South Miami admitted in its answer that "Pharmacy's counsel was asked if the 500+ pharmacies identified on the list ... would be willing to arbitrate, and he advised Optum's counsel that they would not do so[.]" [R1170–71] South Miami contested OptumRx's motion, arguing the court lacked jurisdiction under the Florida Arbitration Code and FAA, and that the delegation clause and arbitration agreement as a whole were unconscionable. [R1319–62]

The circuit court heard argument on OptumRx's motion to compel arbitration. [R1746] The court later held a status conference to determine whether an evidentiary hearing was required. [R1873] The parties agreed an evidentiary hearing was unnecessary. [R1880–81] After the hearing, South Miami sent a letter to the court stating an evidentiary hearing might be

appropriate if the court reached the merits of the arbitration agreement, but did not explain what additional evidence it would offer. [R1867] OptumRx filed a response reaffirming that an evidentiary hearing was unnecessary. [R1869–70]

The circuit court issued an order compelling arbitration. It found it had jurisdiction under the FAA and that the FAA's requirements were met. *First*, "South Miami Pharmacy does not dispute that the Provider Manual contains a written arbitration Agreement." [R1893] *Second*, "OptumRx was a 'party aggrieved'" because the "Notification of Dispute specifically discussed the 'subject matter of the dispute,' and in the subsequent phone call attorneys for South Miami Pharmacy stated that all of the pharmacies referenced in the letter—including South Miami Pharmacy—refused to arbitrate." [R1894]

The court also found it had jurisdiction under the Florida Arbitration Code because there was "an agreement to arbitrate" and "OptumRx has alleged, and Respondent has not disputed, that Respondent refused to arbitrate the disputes identified in the 'Notification of Dispute.'" [R1894] The court found that *Damora v. Stresscon International*, 324 So. 2d 80 (Fla. 1975), did not prevent it from compelling arbitration in another state because "*Damora* relied on the original statutory language" which "was repealed in 2013." [R1895] And, "even before 2013, the *Damora* rule did not apply to

contracts involving interstate commerce and therefore governed by the FAA." [R1895–96, citing *Mintz v. Beta Drywall*, 59 So. 3d 1173, 1175 (Fla. 4th DCA 2011)]

The court then found that "[t]he delegation clause in the 2022 Provider Manual is clear and unmistakable" and not unconscionable. [R1896] It therefore concluded that South Miami's challenges to the arbitration agreement must be made to the arbitrator. [R1897] The court alternatively found that the arbitration agreement was neither procedurally nor substantively unconscionable. [R1897–99]

Prior Litigation Regarding OptumRx's Arbitration Agreements

South Miami falsely suggests that OptumRx has lost most of the previous cases involving its arbitration agreements. [*E.g.*, IB3–7, IB37–38]

As an initial matter, a case that South Miami relied heavily on in the circuit court, *Copper Bend Pharmacy v. OptumRx*, No. 20 L 396 (Ill. Cir. Ct. Mar. 28, 2022), was **reversed on appeal**. The appellate court rejected many of the same arguments made by South Miami here and compelled 48 pharmacies to arbitration. *Copper Bend Pharmacy v. OptumRx*, No. 5-22-0211, 2023 WL 2964485 (Ill. App. Ct. Apr. 14, 2023).[2]

[2] The decision "may be cited for persuasive purposes" under Illinois Supreme Court Rule 23.

Further, over the past decade, courts have overwhelmingly enforced OptumRx's arbitration agreements. *See Paduano v. Express Scripts*, 55 F. Supp. 3d 400, 425 (E.D.N.Y. 2014) (enforcing OptumRx's arbitration agreement and rejecting unconscionability challenges); *AAMH Pharm. v. OptumRx*, 2019 WL 13152208, at *5 (Cal. Super. Ct. Apr. 22, 2019) (enforcing OptumRx agreement and finding pharmacies must raise all challenges to agreement to arbitrator); *MHA v. UnitedHealth Group*, 2017 WL 1095036, at *5 (D.N.J. Mar. 23, 2017) (enforcing identical agreement in contract with OptumRx's parent company); *Chickasaw Nation v. Caremark PHC*, 2022 WL 4624694, at *5 (E.D. Okla. Sept. 30, 2022) (enforcing OptumRx arbitration agreement).

In 2021, one California court declined to enforce OptumRx's arbitration agreement because it found an ambiguity in the 2015 Provider Manual's delegation clause. *Prescription Care Pharm. v. OptumRx*, No. G057279, 2020 WL 4932554 (Cal. Ct. App. Aug. 24, 2020). Another court did not enforce the 2020 arbitration agreement because, among other reasons, the court found the agreement did not provide for enough discovery. *Platt, LLC v. OptumRx*, No. RG20074100, 2021 WL 2766274 (Cal. Super. Ct. June 16, 2021), *aff'd* Cal. Ct. App. Mar. 15, 2023 (unpub.).

OptumRx promptly corrected those issues. It updated the Provider Manual to eliminate the allegedly ambiguous delegation clause, and to provide more discovery. Those new provisions appear in the 2021 and 2022 versions of the Provider Manual. [R713–15, R775–77] South Miami has continued to do business with OptumRx under those agreements, accepting over $300,000 in 2021 alone, and more money in 2022. [R570]

In this case, OptumRx moved to compel *all* of the parties' disputes to arbitration under the 2022 Provider Manual. South Miami's brief refers to arbitration clauses in old contracts and invents terms such as the "90% Clause" and "2021 Clause." [IB9–11] But those clauses are irrelevant. The 2022 Provider Manual's arbitration agreement is broad and applies to *all* claims that accrued at any point in time.

South Miami also points to *OptumRx v. A&S Drugs*, 2023 WL 6170802, at *5 (C.D. Cal. Sept. 20, 2023), which found that OptumRx failed to present evidence "demonstrating full compliance with the procedural requirements of the second paragraph of the ADR Provision." That paragraph states that "either party may request in writing a meeting or telephone conference," at which "both parties shall have presented its President, Vice President, Chief Financial Officer or Chief Officer." *Id.* at *2. The court denied OptumRx's

petition to compel arbitration **without prejudice** and permitted OptumRx to refile with evidence related to the parties' meet-and-confer efforts. *Id.* at *5.

Whether OptumRx demonstrated compliance with the arbitration agreement's meet-and-confer requirement is not at issue here. South Miami never argued below that OptumRx failed to comply with any meet-and-confer requirement. "A party cannot raise an issue before this court in the first instance." *Allied Prop. Grp. v. Micor*, 338 So. 3d 1024, 1026 (Fla. 3d DCA 2022); *see also Reddy v. Zurita*, 172 So. 3d 481, 484 n.5 (Fla. 5th DCA 2015) (issue not raised in circuit court is waived on appeal).

Every Florida court to decide whether the 2022 Provider Manual's arbitration agreement is enforceable has enforced it. In addition to the court below, the courts in *OptumRx v. JC Resources*, No. 22-CA-521, 2022 WL 17098619 (Fla. 20th Cir. Ct. Nov. 15, 2022), *OptumRx v. VistaCare Pharmacy Services 2*, No. 22-001478-CI, 2023 WL 1766097 (Fla. 6th Cir. Ct. Feb. 2, 2023), and *OptumRx v. Atlantis Pharmacy*, No. 50-2022-CA-002939, 2023 WL 5277214 (Fla. 15th Cir. Ct. Aug. 8, 2023) granted OptumRx's motions to compel arbitration and rejected all of the arguments South Miami raises here. Just last month, the Sixth District Court of Appeal

per curiam affirmed the order compelling arbitration in the *JC Resources* case. *See JC Resources v. OptumRx*, 2023 WL 8884507.[3]

Similarly, the court in *OptumRx v. Odedra Enterprises*, No. 30-2022-01252611-CU-PT-CJC, 2023 WL 377318 (Cal. Super. Ct. Jan. 20, 2023), *order stayed pending writ proceedings*, Cal. Ct. App. No. G062698, enforced the 2022 Provider Manual and found that ten pharmacies must bring their challenges to the arbitration agreement to an arbitrator.

Thus, in most cases, courts have enforced the 2022 Provider Manual's arbitration agreement.

SUMMARY OF ARGUMENT

The circuit court properly granted OptumRx's motion to compel arbitration under the 2022 Provider Manual.

First, the court had jurisdiction. South Miami argues Florida courts cannot compel arbitration in another state. But *all* seven times a District Court of Appeal addressed the issue, it held that a Florida court may compel arbitration outside of Florida. *See, e.g.*, *Trojan Horse*, 526 So. 2d at 195

[3] The only Florida courts *not* to compel arbitration under the 2022 Provider Manual did so on jurisdictional grounds. *OptumRx v. King's Drugs*, Lead Case No. 2022-CA-002627 (Fla. 13th Cir. Ct. Dec. 15, 2022); *OptumRx v. Bay Pharmacy*, Case No. 25-2022-CA-000554 (Fla. 5th Cir. Ct. Dec. 21, 2022). Those cases are on appeal in the Second and Fifth District Courts of Appeal, respectively. Case Nos. 2D23-96, 5D23-652.

(compelling arbitration in Minnesota). This Court should not be the first to hold otherwise.

Second, South Miami claims OptumRx prematurely filed its motion. But to obtain an order compelling arbitration, all that is required is (1) a written arbitration agreement, and (2) an allegation that the other party has refused to arbitrate. *See* § 682.03(1), Fla. Stat. (2013); 9 U.S.C. § 4. Here, the circuit court properly found that the parties had multiple written arbitration agreements and South Miami conceded below that it had refused to arbitrate. South Miami's subsequent conduct—opposing arbitration below and filing this appeal—confirms its refusal to arbitrate.

OptumRx and South Miami have a live dispute over the substantial money OptumRx pays South Miami each year. OptumRx is entitled to arbitrate that dispute *now*, before it pays South Miami more money. The circuit court correctly found that OptumRx's motion was not premature.

Third, South Miami and OptumRx are parties to a binding contract (the Provider Manual) that includes an arbitration agreement. For the first time, South Miami argues the Provider Manual is not binding. South Miami forfeited this challenge and is wrong regardless.

Fourth, the Provider Manual includes a delegation clause that requires the parties to bring any challenges to the arbitration agreement *to the*

arbitrator. South Miami argues the delegation clause is unconscionable, but that claim is meritless. The delegation clause is a single sentence and applies equally to both parties. Every Florida court to analyze the delegation clause has enforced it. Thus, South Miami must bring its challenges to the arbitration agreement to the arbitrator.

This Court should affirm the circuit court's order granting OptumRx's motion to compel arbitration.

STANDARD OF REVIEW

Although review of the "trial court's construction of the arbitration provision" is *de novo*, this Court reviews underlying questions of fact for "substantial, competent evidence." *MetroPCS Commc'ns v. Porter*, 273 So. 3d 1025, 1027 (Fla. 3d DCA 2018). Whether parties have a valid arbitration agreement is a question of fact. *Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1156 (Fla. 2014). District Courts of Appeal may affirm on any basis appearing in the record, "mindful of the policy favoring arbitration and recogniz[ing] that doubts" "should be resolved in favor of arbitration." *Morales v. Perez*, 952 So. 2d 605, 607 (Fla. 3d DCA 2007).

South Miami argues that because there was no evidentiary hearing, "it is inappropriate to consider any argument based upon the court's factual findings underlying its conclusions." [IB25 (citing *Bueno v. Workman*, 20 So.

3d 993, 998 (Fla. 4th DCA 2009))] South Miami misrepresents *Bueno*, which refused to affirm based on a fraud claim because the lower court made *no findings* on the fraud claim; *Bueno* then noted that, on remand, proving fraud by clear and convincing evidence "will almost always require an evidentiary hearing." 20 So. 3d at 998.

Evidentiary hearings are not required for arbitration motions where a party "identifie[s] no issue to the circuit court that require[s] an evidentiary hearing." *Wallshein v. Shugarman*, 50 So. 3d 89, 92 (Fla. 4th DCA 2010); *see also CT Miami v. Samsung Elecs. Latinoamerica Miami*, 201 So. 3d 85 (Fla. 3d DCA 2015) (no entitlement to evidentiary hearing after failing to identify disputed evidence). In this case, the circuit court made factual findings based on the parties' written evidence. [R1903–15] It held a conference about whether an evidentiary hearing was necessary, and South Miami never identified (at that conference or in its subsequent letter) any evidentiary disputes requiring a hearing. [R1873–81, R1867, R1869–70]

ARGUMENT

I. THE CIRCUIT COURT HAD JURISDICTION OVER THIS CASE.

South Miami frames its arguments in terms of "jurisdiction." [*E.g.*, IB16–17] The circuit court indisputably had jurisdiction over this case.

Circuit courts are courts of general jurisdiction. They have jurisdiction over all cases at law and equity, subject to exceptions not applicable here. § 26.012(2), Fla. Stat. (2021). OptumRx pleaded the parties' controversy exceeded $30,000 [R15], which was the applicable jurisdictional threshold. § 34.01(c)(2), Fla. Stat. (2021). South Miami did not allege otherwise.

South Miami's counsel has argued in similar cases that the circuit court lacked jurisdiction because *some* (but not all) of the parties' contracts include California choice-of-law clauses. But a foreign choice-of-law clause does not oust Florida courts of jurisdiction. *See Cordis Corp. v. O'Shea*, 24 So. 3d 576, 578 (Fla. 4th DCA 2009). Florida courts often resolve cases where the parties' contract designates a different state's laws. *See Briceno v. Sprint Spectrum*, 911 So. 2d 176, 179 (Fla. 3d DCA 2005) (Kansas law).

II. THE CIRCUIT COURT HAD STATUTORY AUTHORITY TO COMPEL ARBITRATION.

Although framed in terms of jurisdiction, South Miami's argument is that the circuit court lacked *statutory authority* under the Florida Arbitration Code or FAA to compel arbitration in California. That argument fails.

The Florida Arbitration Code and FAA both authorize courts to enforce arbitration agreements. The Florida Arbitration Code states that *all* agreements to arbitrate are "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."

§ 682.02(1), Fla. Stat. (2013). If a party files a petition "showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement," then the court "shall order the parties to arbitrate." *Id.* § 682.03(5). Likewise, the FAA states that all arbitration agreements are enforceable and permits parties to obtain court orders enforcing those agreements. 9 U.S.C. §§ 2–4.

South Miami argues that Florida courts lack authority to enforce contracts that call for arbitration in another state. It is wrong for three reasons. *First*, Florida appellate courts have repeatedly held that where, as here, a contract involves interstate commerce and is governed by the FAA, Florida courts must enforce the contract no matter where arbitration is to take place.

Second, South Miami's reliance on *Damora*, 324 So. 2d 80, is misplaced. *Damora* doesn't apply to contracts involving interstate commerce, and it relied on a statute that was repealed in 2013.

Third, the FAA's reference to a "United States district court" does not strip state courts of their authority to compel arbitration. The FAA's substantive provisions apply equally in federal and state court.

a. The District Courts of Appeal have held in seven cases that a Florida court must compel arbitration in another state.

Seven times, a District Court of Appeal has addressed whether a Florida court can enforce an arbitration agreement that calls for arbitration in a different state. All seven times, the District Court of Appeal held that if a contract involves interstate commerce (and is therefore subject to the FAA), the Florida court *must* compel arbitration.

For example, in *Jensen v. Rice*, 809 So. 2d 895, 897–98 (Fla. 3d DCA 2002), a contract required arbitration in New York, and the circuit court stayed proceedings pending arbitration. This Court affirmed because "Florida courts must enforce arbitration agreements that are valid and enforceable under the [FAA]," even where they "provide[] for arbitration in a foreign jurisdiction" and "under the laws of another state[.]" *Id.* at 898–99.

Likewise, in *Trojan Horse*, 526 So. 2d at 195, the circuit court compelled arbitration where the contract called for arbitration in Minnesota, under Minnesota law. This Court affirmed. Because the contract involved interstate commerce, the FAA superseded inconsistent Florida law and required the court to compel arbitration in Minnesota. *Id.*

In *AMS Staff Leasing v. Taylor*, 158 So. 3d 682, 685–86, 688 (Fla. 4th DCA 2015), the Fourth District Court of Appeal held it was reversible error to deny a motion to compel arbitration because the arbitration would take place

in another state. The court ordered the circuit court to compel arbitration in Texas. *Id.*

In addition to *Jensen*, *Trojan Horse*, and *AMS Staff*, in four other cases a District Court of Appeal has held that when a circuit court is faced with a contract involving interstate commerce, it must compel arbitration. *See Default Proof Credit Card Sys. v. Friedland*, 992 So. 2d 442, 444 (Fla. 3d DCA 2008) (arbitration in Illinois); *Eastern Funding v. Roman*, 882 So. 2d 1059, 1060–61 (Fla. 4th DCA 2004) (arbitration in New York); *Mintz*, 59 So. 3d at 1175 (same); *Coastal Health Care v. Schlosser*, 673 So. 2d 62, 65 (Fla. 4th DCA 1996) (arbitration in North Carolina).

Here, the circuit court found "no dispute that the parties' agreements involve interstate commerce." [R1896] It was correct. The parties' contracts involve insurance benefits and reimbursement payments across state lines [R14–15], which constitutes interstate commerce, *see Summit Health v. Pinhas*, 500 U.S. 322, 329 (1991). South Miami conceded below that the FAA applies. [R1319–35]

Because the parties' contracts involve interstate commerce, a Florida court must compel arbitration, regardless of where the arbitration takes place. This Court should not create an unnecessary intra-district conflict with

Jensen, *Trojan Horse*, and *Default Proof*,[4] and an unnecessary split with *AMS Staff*, *Eastern Funding*, *Mintz*, and *Coastal Health*, by holding that a Florida court lacks the power to enforce a contract calling for arbitration in another state.

b. South Miami's reliance on *Damora* is unavailing.

South Miami argues that, under *Damora*, Florida courts can't compel arbitration in another state. [IB36] South Miami is wrong for two reasons.

First, *Damora* never applied to contracts involving interstate commerce. That's because the FAA requires courts to enforce *all* arbitration agreements, regardless of where the arbitration takes place. *Damora* was based on a Florida rule that made certain arbitration agreements "voidable." 324 So. 2d at 82. But federal law requires the enforcement of all arbitration agreements, and "any inconsistency between [the Florida Arbitration Code] and the [FAA] must be resolved in favor of federal law." *Trojan Horse*, 526 So. 2d at 196; *Merrill Lynch, Pierce, Fenner & Smith v. Melamed*, 405 So. 2d 790, 791 (Fla. 4th DCA 1981) (FAA "supersedes inconsistent provisions of … Florida Arbitration Code"). Accordingly, *Damora* is irrelevant when a contract involves interstate commerce. *See Trojan Horse*, 526 So. 2d at 196;

[4] Departing from these precedents would require rehearing *en banc*. *Shufflebarger v. Galloway*, 668 So. 2d 996, 997 (Fla. 3d DCA 1995), *on reh'g* (Feb. 14, 1996); Fla. R. App. P. 9.331(a).

Mintz, 59 So. 3d at 1175 (compelling arbitration in New York because "as an exception to the [*Damora* rule], Florida courts may enforce an arbitration clause contained within an agreement governed by the [FAA]"); *Coastal Health*, 673 So. 2d at 65 ("the *Damora* principle does not apply to valid and enforceable agreements to which the [FAA] applies").

Here, the parties' contracts involve interstate commerce, *supra* at 19, so *Damora* is inapplicable.

Second, *Damora* relied on an earlier version of the Florida Arbitration Code, which stated that the Code "shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply." § 682.02, Fla. Stat. (1967); *Damora*, 324 So. 2d at 82. *Damora* held that this statutory provision meant that where a contract is governed under another state's law, "Florida courts have no statutory authority under Chapter 682 to compel arbitration in another jurisdiction." 324 So. 2d at 82; *see also Trojan Horse*, 526 So. 2d at 195 & n.1 (stating *Damora* was based on the prior version of "Florida Arbitration Code, § 682.02").

But in 2013, the Legislature passed the Revised Florida Arbitration Act. Section 682.02 was completely rewritten, and the language *Damora* relied upon was deleted, including the provision stating that "this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that

this law shall not apply." § 682.02, Fla. Stat. (1967). The revised Florida Arbitration Code now states that *all* arbitration agreements are "valid, enforceable, and irrevocable"—*full stop*. § 682.02(1), Fla. Stat. (2013).[5]

c. The FAA's reference to a "United States district court" does not make the FAA inapplicable in state court.

South Miami argues the FAA is inapplicable because of its reference to a "United States District Court." [IB30] That argument is meritless. The FAA requires both state and federal courts to enforce its provisions, and no court has ever adopted South Miami's interpretation.

Congress enacted the FAA to ensure that courts enforced arbitration agreements. *McKenzie Check Advance v. Betts*, 112 So. 3d 1176, 1180–81 (Fla. 2013). The FAA's "primary substantive provision" is Section 2, which requires all courts to "enforce [arbitration agreements] according to their terms." *Id.*

FAA Sections 3 and 4 describe how to enforce the FAA, and procedures for doing so in federal court. Section 3 states that when a lawsuit

[5] South Miami argued below that the repealed provision pertained only to interlocal water agreements. [R1338] South Miami abandoned this argument on appeal. Regardless, South Miami was wrong. The interlocal-water-agreement language was added 23 years after *Damora*. § 682.02, Fla. Stat. (1998). In 2013, the Legislature repealed the language *Damora* relied on (while leaving intact the irrelevant interlocal-water-agreement language). § 682.02, Fla. Stat. (2013).

is pending in a "court[] of the United States," a party may move to stay the lawsuit pending arbitration. Section 4 states that parties aggrieved by refusals to arbitrate may petition a "United States district court" for an order compelling arbitration.

South Miami argues that because Section 4 refers to a "United States district court," it is inapplicable in state court. South Miami is incorrect for several reasons.

First, the FAA applies in both federal and state court. As the Fifth District Court of Appeal explained, "the FAA, 9 U.S.C. §§ 1 to 16, creates a body of federal substantive law that is applicable in both state and federal courts." *Grant v. Rotolante*, 147 So. 3d 128, 131 (Fla. 5th DCA 2014); *see also Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (the FAA "supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration").

Second, FAA Section 4's reference to a "United States district court" does not strip state courts of jurisdiction to enforce Section 4. There is a "presumption that state courts enjoy concurrent jurisdiction" over federal statutes, and the Supreme Court has held that statutory references to federal courts do *not* strip state courts of concurrent jurisdiction. *Gulf Offshore Co.*

v. Mobil Oil, 453 U.S. 473, 478–79 (1981); *see also State v. Stepansky*, 761 So. 2d 1027, 1033 (Fla. 2000) ("It is black letter law ... that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction[.]").

In *Gulf Offshore*, the Outer Continental Shelf Lands Act provided for jurisdiction and venue in a particular "United States district court[]." 43 U.S.C. § 1349(b)(1) ("Proceedings … may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose"); *id.* § 1349(b)(2) ("Any resident of the United States who is injured … may bring an action for damages … only in the judicial district having jurisdiction under paragraph (1)").[6] Those provisions did not strip state courts of jurisdiction to resolve claims under the Act.

Similarly, in *Tafflin v. Levitt*, 493 U.S. 455, 460–61 (1990), the Court held that state courts have concurrent jurisdiction over RICO claims despite the statute's providing that a party may sue in a "United States district court."

[6] In *Gulf Offshore*, the Court cited 43 U.S.C. § 1333(b), an earlier version of the statute, which Congress amended in 1978 "without effecting any change that casts light on the issue of exclusive federal-court jurisdiction." 453 U.S. at 479 & n.5.

Here, FAA Section 4's reference to a "United State district court" does not strip state courts of jurisdiction. Several courts—including the Florida Supreme Court—have held that state courts have authority to enforce FAA Section 4. *See Basulto*, 141 So. 3d at 1154–55 (FAA Section 4 "empowered" trial court to analyze the parties' arbitration agreement, and District Court of Appeal erred by issuing an order "contrary to Section 4"); *Fahnestock v. Dean Witter Reynolds*, 691 So. 2d 509, 510 (Fla. 4th DCA 1997) (affirming, in part, order compelling arbitration under Section 4); *Sharp v. Merrill Lynch, Pierce, Fenner & Smith*, 1991 WL 370121, at *2, *5 (Fla. 9th Cir. Ct. Oct. 7, 1991) (compelling arbitration under Section 4); *OptumRx v. Atlantis*, 2023 WL 5277214, at *2–3 (same); *Merrill Lynch, Pierce, Fenner & Smith v. McCollum*, 666 S.W.2d 604, 610 (Tex. App. 1984) (state court "had the power to compel arbitration under" Section 4).

If this Court adopted South Miami's argument that Section 4 does not apply in state courts because it references a "United States district court," then dozens of other federal statutes, including RICO and the Outer Continental Shelf Lands Act, would likewise not apply in state court, violating well-established Supreme Court jurisprudence.

Third, South Miami argues that only the federal court in the district where the arbitration will take place (here, the Central District of California)

can order arbitration. [IB30] That question of *federal-court* venue is currently the subject of a federal circuit split.[7] But that issue is irrelevant to whether *state courts* can enforce FAA Section 4. The language cited by South Miami concerns which federal court can order arbitration. It doesn't limit state-court jurisdiction. South Miami has not cited a case holding that FAA Section 4 limits which state courts can compel parties to arbitrate, since no case has *ever* said that.

Fourth, FAA Section 3 "appli[es] to Florida state courts," *Melamed*, 405 So. 2d at 793, and South Miami concedes as much [IB27], forcing it to take the bizarre position that Section 3's reference to "courts of the United States" does *not* preclude state-court jurisdiction, but Section 4's reference to "United States district court" *does*. There is no basis for distinguishing between those two references to United States courts. Courts have repeatedly held that *both* Sections 3 and 4 apply in state court. *See supra* at 23, 25.

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[7] *Compare Ansari v. Qwest Commc'ns*, 414 F.3d 1214, 1220 (10th Cir. 2005) (only federal court in district where arbitration will take place can compel arbitration), *with Textile Unlimited v. A..BMH & Co.*, 240 F.3d 781, 783 (9th Cir. 2001) (FAA "does not require venue in the contractually-designated locale"). In 1975, the Fifth Circuit (then comprising the current Eleventh Circuit) suggested that a federal court may compel arbitration in a different district. *Dupuy-Busching Gen. Agency v. Ambassador Ins.*, 524 F.2d 1275, 1278 (5th Cir. 1975).

Fifth, even if FAA Section 4 doesn't apply in state court, the circuit court still correctly compelled the parties to arbitrate. That's because the Florida Arbitration Code likewise requires courts to enforce arbitration agreements when one party has refused to arbitrate, and permits parties to petition for orders compelling arbitration even when there is no "claim ... pending in court." § 682.03(1), (5), Fla. Stat. (2013). Thus, there were *two* statutory grounds for the circuit court to compel arbitration.

South Miami suggests that only the FAA *or* the Florida Arbitration Code can apply in a particular case. [IB36–37] But where, as here, a case is filed in state court and the contract involves interstate commerce, *both* the FAA and Florida Arbitration Code play a role. As the Florida Supreme Court has held, "In Florida, an arbitration clause in a contract involving interstate commerce is subject to the Florida Arbitration Code (FAC), to the extent the FAC is not in conflict with the FAA." *Shotts v. OP Winter Haven*, 86 So. 3d 456, 463–64 (Fla. 2011).

This Court explained the FAA/Florida Arbitration Code interplay in *CT Miami*: "To the extent [a] contract affects interstate commerce in Florida, it is governed by **both the FAC and the FAA**.... [and] the FAC governs the proceedings to the extent it does not directly conflict with the FAA." 201 So. 3d at 90 n.3 (emphasis added).

Here, the only arguable conflict between the FAA and the Florida Arbitration Code is the *Damora* rule. Even if *Damora* survived the 2013 code revisions (*see supra* at 21–22), the FAA would govern and require Florida courts to compel arbitration in another state. *Trojan Horse*, 526 So. 2d at 195 (FAA supersedes *Damora* rule).

Both the FAA and Florida Arbitration Code authorized the circuit court to order arbitration here. And there's no basis to interpret the statutes otherwise. OptumRx filed this petition in Florida because South Miami is a Florida business that contracted with OptumRx for services in Florida and received payments on those contracts in Florida. [R1682–83] A Florida business should not be allowed to enter into an arbitration agreement in Florida and then claim a Florida court has no power to order it to comply with its contract. No statute, case, or policy justifies such an anomalous result.

III. OPTUMRX PROPERLY ALLEGED A REFUSAL TO ARBITRATE UNDER BOTH THE FLORIDA ARBITRATION CODE AND FAA.

Under the Florida Arbitration Code, a court "shall order the parties to arbitrate" if a party files a motion "showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement." § 682.03(1), Fla. Stat. (2013). Accordingly, there are only two requirements to obtain an order to arbitrate: the party must (i) file a motion showing an agreement to arbitrate, and (ii) allege another party's refusal to arbitrate.

FAA Section 4 similarly states that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" may obtain an order compelling arbitration. 9 U.S.C. § 4.

Here, the circuit court correctly found that OptumRx met both requirements under Section 682.03(1): OptumRx showed the parties had an agreement to arbitrate, and OptumRx alleged South Miami's refusal to arbitrate. OptumRx likewise established it was "aggrieved" by South Miami's refusal to arbitrate under the FAA.

First, the circuit court correctly found an agreement to arbitrate. [R1894 ("There is no dispute that the relevant agreements contain an arbitration agreement.")] Every relevant version of the Provider Manual includes an arbitration agreement. *Supra* at 4. Plus, South Miami is bound to its Provider Agreements, which also contain arbitration agreements. *Supra* at 4.

Second, the court correctly found that "OptumRx has alleged, and Respondent has not disputed, that Respondent refused to arbitrate the disputes identified in the 'Notification of Dispute' that Respondent's counsel sent OptumRx." [R1894]

South Miami contests this finding on appeal. But South Miami never argues that OptumRx didn't satisfy the two requirements under Florida law—

nor could it. OptumRx plainly *showed* an agreement to arbitrate and *alleged* a refusal to arbitrate. [R17, R19–21]

Rather, South Miami argues OptumRx didn't prove it was "aggrieved" under the FAA. In support, South Miami invents a new legal standard: it claims OptumRx wasn't aggrieved because OptumRx "has not been *obstructed* from proceeding with arbitration" by South Miami. [IB33, 35 (emphasis added)]

Neither the Florida Arbitration Code nor the FAA requires a finding that the opposing party "obstructed" the arbitration. Rather, courts have held that a party is "aggrieved" when the opposing party "unequivocally refuses to arbitrate, either by failing to comply with an arbitration demand *or by otherwise unambiguously manifesting an intention not to arbitrate* the subject matter of the dispute." *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1066 (3d Cir. 1995) (emphasis added); *see also Smith Barney Shearson v. Berman*, 678 So. 2d 376, 377 (Fla. 3d DCA 1996) (same).

Cases hold that a party is aggrieved by a failure to arbitrate when the opposing party refused to arbitrate on a phone call. In *ACE American Insurance v. Guerriero*, 2017 WL 3641905, at *6 (D.N.J. Aug. 24, 2017), the defendant's stating on a phone call that he "would not agree to arbitrate"

alone "constitute[d] an unequivocal refusal to arbitrate." *Id.*[8] The Third Circuit affirmed, holding that the defendant "had refused to arbitrate" by "communicat[ing]" he "had no intention of submitting to arbitration." 738 F. App'x 72, 77 (3d Cir. 2018).

A refusal to arbitrate can also occur in a letter, *see Community State Bank v. Strong*, 651 F.3d 1241, 1256 (11th Cir. 2011), and South Miami never explains why a call is different from a letter where, as here, the call's substance is uncontroverted. There's no requirement in the Florida Arbitration Code or FAA that a refusal be in writing.

A party can also refuse to arbitrate by opposing arbitration in court. In *Discover Bank v. Vaden*, 489 F.3d 594, 607 n.20 (4th Cir. 2007), *rev'd on other grounds*, 556 U.S. 49 (2009), the plaintiff participated in two appeals "to avoid arbitration." The Fourth Circuit held that appealing an order compelling arbitration constituted a refusal to arbitrate, as "reversing a motion to compel arbitration against a party who argues that she never refused to arbitrate in the first place" would be "an absurd result." *Id.* Another court similarly "fail[ed] to see" how a defendant that "vigorously opposed

[8] Although the defendant also sent the plaintiff a demand letter with a draft complaint, *id.* at *2, the court held the "telephone conversation" would, by itself, "constitute an unequivocal refusal to arbitrate," *id.* at *6. The court then noted "[a]dditional circumstances" including the defendant's draft complaint "lend credence to Plaintiff's version of events." *Id.*

plaintiffs' motion to refer [a] case to arbitration" "was not thereby 'refus[ing] ... to arbitrate[.]'" *Jock v. Sterling Jewelers*, 564 F. Supp. 2d 307, 311 (S.D.N.Y. 2008); *see also Jones v. Gen. Motors*, 640 F. Supp. 2d 1124, 1145 (D. Ariz. 2009) (by opposing motion, plaintiff "resisted arbitration and unambiguously manifested an intention not to arbitrate").

Even *ignoring* a request to arbitrate can constitute a refusal. In *Zibo Zhongshi Green Biotech v. Pacific Chemical International*, 2013 WL 3872090, at *1 (C.D. Cal. July 24, 2013), by "not respond[ing]" to communications demanding arbitration, a party "manifested an intention not to arbitrate." *Id.* at *2; *see also Crystal Pool v. Trefin Tankers*, 2014 WL 1883506, at *3 (S.D.N.Y. May 9, 2014) (ignoring a request to arbitrate constitutes a "refusal").

Here, South Miami raised eight live disputes with OptumRx, and then refused to arbitrate those disputes. [R20–21, R399–400, R424–25] In the Notification of Dispute, its counsel asserted that OptumRx had breached and continues to breach the parties' Provider Manual by reimbursing it below the contract requirements. [R424–25] OptumRx's counsel participated in a phone call with South Miami's counsel, as the letter requested, to resolve the disputes. [R10–11, R399–400] On the call, OptumRx stated that the pharmacies must arbitrate their disputes and asked South Miami's counsel

whether the pharmacies he represented would abide by their arbitration agreements. [R399–400] South Miami's counsel stated unequivocally that they would not. [R20–21, R400]

This conversation established South Miami's "unambiguous[] manifest[ation]" of its intention not to arbitrate. *PaineWebber*, 61 F.3d at 1066. Below, South Miami didn't dispute it refused to arbitrate—in fact, it *conceded* its "refusal to participate" [R1331 n.16]—which conclusively established this fact. *See ACE Am.*, 2017 WL 3641905, at *6 (compelling arbitration in part because defendant submitted no evidence refuting evidence of refusal to arbitrate). And on these same facts, other Florida courts have concluded that OptumRx was entitled to compel arbitration. *OptumRx v. Atlantis*, 2023 WL 5277214, at *3; *OptumRx v. VistaCare*, 2023 WL 1766097, at *1–2.

Here, for the first time, South Miami contests OptumRx's allegation that it refused to arbitrate. [IB34–35] South Miami waived the argument by not raising it below. *Reddy*, 172 So. 3d at 484 n.5. In any event, its new argument is frivolous. Its Answer conceded that its "counsel was asked if the 500+ pharmacies identified on the list to his letter would be willing to arbitrate, and he advised Optum's counsel that they *would not do so* under a clause which has already been declared unconscionable and

unenforceable by three courts." [R1170–71, emphasis added] The parties disagree whether their arbitration clause is enforceable—but there's *no disagreement* South Miami's counsel refused to arbitrate under that clause.

Since the phone call, South Miami has doubled down on its refusal to arbitrate by opposing OptumRx's motion to compel arbitration and then filing this appeal—acts that constitute independent refusals to arbitrate. [R1340–62, R1887]; *Vaden*, 489 F.3d at 607 n.20.

South Miami's cases are unavailing because they do not involve unequivocal refusals to arbitrate. [IB32] For example, South Miami cites *Merrill Lynch, Pierce, Fenner & Smith v. King*, 812 F. Supp. 1217, 1218 (M.D. Fla. 1993), but the defendant in that case moved to compel arbitration before the American Arbitration Association, or alternatively before NASD, and the plaintiff only agreed to arbitrate before NASD. The court's finding that there was no refusal to arbitrate makes sense because the plaintiff *agreed to arbitrate* before NASD.

A/S Ganger Rolf v. Zeeland Transp., 191 F. Supp. 359 (S.D.N.Y. 1961) [IB32] is inapposite because it involved a request to *appoint an arbitrator*; it didn't involve a refusal to arbitrate. *Magnolia Health Plan v. Carecentrix*, 2012 WL 12874576, at *2 (S.D. Miss. Feb. 24, 2012) [IB32] is also inapposite because, as the defendant's brief explained, the defendant "ha[d] neither

refused (nor agreed)" to arbitrate. 2012 WL 6728823 (S.D. Miss. Feb. 22, 2012).

South Miami describes *PaineWebber* as holding that a "litigant [was] not a party aggrieved when [its] adversary filed a writ of summons and provided opposing counsel a draft complaint." [IB32] But that's consistent with *PaineWebber*'s rule that a party must "unambiguously manifest[] an intention not to arbitrate the subject matter of the dispute." 61 F.3d at 1066. The writ "was silent as to the subject matter of the dispute," and "a draft complaint which has not been filed" does "not rule out a willingness to arbitrate." *Id.*

South Miami also asserts that its invented "obstruction" standard was "recently confirmed" in *A&S Drugs*. [IB34] That is false. As discussed above, *supra* at 10–11, *A&S Drugs* found that OptumRx failed to prove "full compliance with the procedural requirements of the second paragraph of the ADR Provision." 2023 WL 6170802, at *5. The decision was about *contractual* requirements; the court never addressed the FAA's "refusal" standard.

South Miami downplays its Notification of Dispute as "concerns" in "one-sentence bullet points" that "were not attributed to any specific pharmacy." [IB34] But the Provider Manual requires parties to initiate the

dispute-resolution process by sending a dispute letter, which South Miami did. [R713 ("the party asserting the Dispute shall provide written notice … identifying the nature and scope of the Dispute"); R424–25, R436 (letter stating "[we] are writing to provide written notice of disputes these Pharmacies have with ... OptumRx")] The letter did not merely describe "concerns"—it claimed OptumRx violated the Provider Manual and state law. It's also irrelevant whether the letter identified which claims belonged to which pharmacies. What matters is the letter discussed the "subject matter of the dispute," *PaineWebber*, 61 F.3d at 1066, and South Miami admitted that *all* "500+ pharmacies" refused to arbitrate under their contract. [R1170–71]

South Miami claims that under OptumRx's reasoning, "every time a lawyer [writes] to opposing counsel regarding a potential contractual dispute, one party [can] run to court for an order compelling arbitration." [IB35] But that mischaracterizes what happened. South Miami's counsel sent a formal Notification of Dispute alleging contractual and statutory violations. It then expressly refused to arbitrate those disputes. [R19–21, R399–400] In those circumstances, both Florida and federal law allow OptumRx to obtain an order requiring South Miami to comply with its arbitration agreement.

South Miami is also wrong that OptumRx is trying to arbitrate "future" claims. [IB32] The Notification of Dispute alleges that OptumRx breached the Provider Manual regarding reimbursements that OptumRx "made." [R424–25] South Miami and OptumRx disagree about whether OptumRx's payments comply with their contracts. OptumRx makes substantial payments to South Miami each month—$306,984 in 2021 alone. [R570 ¶ 6] South Miami may not want to resolve that dispute now. *But OptumRx does*. OptumRx cannot continue paying South Miami tens of thousands of dollars each month and allow potential liability to accrue. It is therefore aggrieved by South Miami's refusal to arbitrate. Even if the only claim brought in arbitration is a declaratory-relief claim to determine whether OptumRx's monthly payments are correct, OptumRx has a right to arbitrate that dispute *now*. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 27 (1983) (without the power to compel arbitration, "the recalcitrant party [is] free to sit and do nothing—neither to litigate nor to arbitrate").

South Miami next claims OptumRx was required to arbitrate "in *absentia*." [IB33] Essentially, South Miami argues OptumRx is required to initiate an *ex parte* arbitration, pay filing fees, pay for an arbitrator to resolve the parties' dispute, obtain a ruling in its favor, and then go to court to enforce that *ex parte* ruling. But neither the Florida Arbitration Code nor FAA requires

that pointless exercise, nor has any court ever required it. In fact, if parties were required to arbitrate "in *absentia*" before seeking judicial relief, it's hard to see how a party could ever make use of Florida Statute Section 682.03 or FAA Section 4.

Lastly, South Miami argues that OptumRx's petition "cannot be adjudicated without a factual 'Record,'" and "no such record exists." [IB40–41] South Miami cites no legal authority requiring any particular type of "record" to compel arbitration. Further, because the parties' contracts require them to arbitrate "all" their disputes, and it delegates all disputes over the scope of the agreement to an arbitrator, no additional "record" is necessary. [R713]

IV. THE CIRCUIT COURT PROPERLY ENFORCED THE PARTIES' ARBITRATION AGREEMENTS.

OptumRx and South Miami are parties to two binding contracts—the Provider Manual and Provider Agreement—that include arbitration agreements. Those agreements also contain delegation clauses, meaning that all of South Miami's challenges to the arbitration agreements must be presented to an arbitrator.

A. The Provider Manual and Provider Agreement are valid contracts.

Below, OptumRx presented evidence of the parties' two contracts: the Provider Manual and Provider Agreement. This included sworn testimony from OptumRx's Director of Network Contracting, Johana Arita. Ms. Arita explained that OptumRx heavily negotiates its Provider Agreements with PSAOs, and that South Miami has been a member of two PSAOs that signed Provider Agreements on its behalf. [R575–76] Ms. Arita also explained that OptumRx always sends Provider Manual updates to PSAOs and all network pharmacies. [R575] Further, South Miami received significant money from OptumRx under the Provider Manual in 2021 and 2022. [R570]

In response, South Miami did not offer any affidavits from anyone at South Miami. Rather, South Miami relied on attorney argument and conclusory assertions, such as "the Manuals are not contracts." [R1341] But in its Answer, South Miami *admitted* the "Provider Manual sets forth the terms of [the] pharmacy's relationship with Optum" [R1166], "[t]he relationship between Optum and the Pharmacy is governed by ... a Provider Manual" [R1165], and it submitted reimbursements for payment under the Provider Manual [R1167]. South Miami also claimed that OptumRx makes "[r]eimbursements to Pharmacies for prescription drugs below the

contractual requirements set forth in OptumRx's Provider Manual." [R424 (emphasis added)]

In light of South Miami's concessions and its failure to offer any admissible evidence, there's no basis to conclude South Miami is not bound to the Provider Manual and Provider Agreement.

1. *Provider Manual*

South Miami is estopped from denying the Provider Manual as a binding contract because it has received benefits under the Manual. A party that seeks contract benefits is estopped from claiming the contract is non-binding. *See Allied Pros. Ins. v. Fitzpatrick*, 169 So. 3d 138, 142 (Fla. 4th DCA 2015). This rule applies to arbitration agreements. *Id.*; *Kakawi Yachting v. Marlow Marine Sales*, 2014 WL 12650701, at *4 (M.D. Fla. Oct. 3, 2014) ("[A] party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause."); *Physician Consortium Servs. v. Molina Healthcare*, 414 F. App'x 240, 242 (11th Cir. 2011) (similar). This is true even if the party never signed the contract. *Allied Pros.*, 169 So. 3d at 142; *CT Miami*, 201 So. 3d at 96 ("[A] contract is binding, despite the fact that one party did not sign the contract, where both parties have performed under the contract.").

Here, the circuit court found South Miami had notice of the Provider Manual, continued to submit reimbursement claims under the Manual, and was paid under the Manual. [R1904, R1913]

South Miami disputes none of that, nor could it. OptumRx offered into evidence the notice it sent all participating pharmacies informing them of the 2022 Manual. [R579–80] South Miami didn't dispute that. [R1300–62] South Miami's Notification of Dispute claimed OptumRx breached the Provider Manual—making it ludicrous for South Miami to claim it lacked notice of the Manual. [R424]

OptumRx also has paid South Miami substantial money under the Manual. [R570 ¶ 6] And, in its Notification of Dispute, South Miami asserts a right to even *more* money under the same contract. [R424–25] South Miami cannot claim entitlement to those benefits and simultaneously avoid the contract's burdens. *Allied Pros.*, 169 So. 3d at 142.

South Miami never addresses estoppel in its brief, thereby conceding the issue. Rather, South Miami claims it never "ratified" the Manual. But the case cited by South Miami makes clear that ratification and estoppel are different doctrines. *See Pillar Project AG v. Payward Ventures*, 64 Cal. App. 5th 671, 676–80 (2021) [IB43]. In *Pillar Project*, estoppel didn't apply because the plaintiff didn't "receive[] a benefit that flowed directly from the

agreement." *Id.* at 680. Here, by contrast, South Miami undisputedly received and continues to receive benefits under the Provider Manual.

2. *Provider Agreement*

South Miami is bound to the Provider Agreements signed by its PSAOs, and its arguments to the contrary fail.

First, South Miami argues it doesn't have an agency relationship with its PSAOs. But the evidence established otherwise. The contracts themselves state that PSAOs are agents for their member pharmacies. [R850 (PSAO has "authority to enter into this Agreement as the agent for and on behalf of Pharmacy"); R854 (PSAO is "agent for and on behalf of each Pharmacy")] Further, OptumRx demonstrated it's well-established in the industry that PSAOs are pharmacies' agents. [R519 ¶ 19][9]

In response, South Miami did not offer any *evidence*—for example, an affidavit from someone at South Miami—contesting its agency relationship with its PSAOs.

[9] South Miami quibbles that OptumRx's evidence is insufficient without "Exhibit A" to the Provider Agreement. [IB61; R1355] Exhibit A is unnecessary because Provider Agreements apply to pharmacies later added to a PSAO. [R856] *Park Irmat Drug v. OptumRx*, 152 F. Supp. 3d 127, 133–34 (S.D.N.Y. 2016) (rejecting same argument). South Miami admits it was a member of Leader Drug Stores or Health Mart Atlas at all relevant times. [R1165]

Second, South Miami argues it cannot be bound by contracts it did not review. [IB64–65] But South Miami didn't offer any evidence saying it did not review its own contracts. And South Miami never offered evidence that it even *tried* to see its Provider Agreement.

In any event, under black-letter agency law, it's irrelevant whether South Miami reviewed contracts signed by agents acting within the scope of their authority. Principals are bound by their agents' contracts—including arbitration agreements. *Fi-Evergreen Woods v. Est. of Robinson*, 172 So. 3d 493, 497 (Fla. 5th DCA 2015). And it's irrelevant whether the principal reviewed the contract first. *Gay v. Ass'n Cas. Ins.*, 103 So. 3d 1028, 1031 (Fla. 5th DCA 2012) ("notice to one's agent is notice to the principal"). The court in *Park Irmat* rejected the same argument, finding that while the pharmacy claimed it "had no notice of [the agreement]," the pharmacy was still bound by the agreement negotiated by its PSAO because "a principal need not have notice to be bound by his agent." 152 F. Supp. 3d at 133–35.[10]

South Miami is bound to both its Provider Manual and Provider Agreements.

[10] South Miami's cases [IB64] do not hold otherwise. Four of the cases do not involve agreements negotiated by agents *at all*, and the fifth, *Suh v. Superior Court*, 181 Cal. App. 4th 1504 (2010), found no agency.

B. The agreements delegate all arbitrability disputes to an arbitrator.

When an arbitration agreement clearly and unmistakably delegates arbitrability disputes to an arbitrator, the court's only role is to compel arbitration; all challenges to the agreement must be brought in arbitration. *Henry Schein v. Archer & White Sales*, 139 S. Ct. 524, 529 (2019); *Mercedes Homes v. Rosario*, 920 So. 2d 1254, 1256 (Fla. 2d DCA 2006) (under delegation clause, "the question of the scope of the agreement should have been left to the arbitrator").

Here, the parties' contracts delegate all arbitrability disputes to an arbitrator in two ways. *First*, they incorporate the AAA rules [R713, R867], which "clearly and unmistakably evidences the parties' intent to empower an arbitrator to resolve questions of arbitrability." *Airbnb v. Doe*, 336 So. 3d 698, 704 (Fla. 2022). *Second*, the Provider Manual says the parties will resolve "any and all issues" in arbitration "including, but not limited to all questions of arbitrability." [R713]

South Miami doesn't contend the language of the 2022 Provider Manual is unclear. [IB47 (arguing that "all the PMs from 2015 through 2020" contained "ambiguous" delegation language)] Its only response is to manufacture a purported conflict between the Provider Agreement's and Provider Manual's delegation clauses. [IB46–49] But no such conflict exists.

Both the Provider Manual and the Provider Agreement include delegation clauses and incorporate the AAA rules. Even if there were a conflict (and there's not), South Miami concedes the Provider Manual "supersedes" the Provider Agreement if "there is a conflict." [IB11] In similar circumstances, courts have found no conflict to exist. *See Mohamed v. Uber Techs.*, 848 F.3d 1201, 1209 (9th Cir. 2016) (alleged conflict between delegation clauses was "artificial" where one clause trumped the other); *Arnold v. Homeaway*, 890 F.3d 546, 554 (5th Cir. 2018) (rejecting similar challenge after finding plaintiff couldn't point to existence of two separate arbitration clauses to claim that delegation provision was unclear). Further, Florida courts are "required to read the two arbitration clauses in a complementary fashion in an attempt to resolve any conflict so as to give effect to each term in the parties' written agreements and to uphold their agreement to arbitrate." *Kendall Imports v. Diaz*, 215 So. 3d 95, 102 (Fla. 3d DCA 2017).

South Miami is also wrong that *Prescription Care* estops OptumRx from enforcing its delegation clause. [IB47] Under either California or Florida law, collateral estoppel applies only if "the issue sought to be precluded" is "identical to that decided in a former proceeding." *Kerner v. Superior Court*, 206 Cal. App. 4th 84, 124 (2012); *Gentile v. Bauder*, 718 So. 2d 781, 783 (Fla. 1998) (same).

Collateral estoppel does not apply because the issue in *Prescription Care* is not "identical" to the issue here. *Prescription Care* involved different provider manuals, different delegation provisions, and different parties. Further, the governing law is different. Florida law governs South Miami's challenges to the arbitration agreement in the 2022 Provider Manual,[11] but *Prescription Care* was decided under *California* law. *B & B Hardware v. Hargis Indus.*, 575 U.S. 138, 154 (2015) (issues are "not identical" if second action "involves application of a different legal standard").

Collateral estoppel also doesn't apply when *other* courts have ruled in *favor* of the party to be estopped. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979). Here, numerous courts have enforced OptumRx's delegation clauses. *AAMH Pharm.*, 2019 WL 13152208, at *5; *Paduano*, 55 F. Supp. 3d at 425; *OptumRx v. Atlantis*, 2023 WL 5277214, at *5; *OptumRx v. VistaCare*, 2023 WL 1766097, at *2.

[11] The 2022 Provider Manual does not include a choice-of-law provision, so Florida law applies. *See Sturiano v. Brooks*, 523 So. 2d 1126, 1130 (Fla. 1988) (law of state where contract was "executed" applies); *Prime Ins. Syndicate v. B.J. Handley Trucking*, 363 F.3d 1089, 1092–93 (11th Cir. 2004) (contract "executed" when "last act necessary to complete the contract [is] done"). Here, the "last act necessary" occurred when notice of the 2022 Provider Manual was communicated to South Miami in Florida and the contract was therefore executed in Florida. *Id.*; [R575 ¶ 16 ("OptumRx sends a fax directly to all participating pharmacies[.]")]. And even if the location of execution were ambiguous, Florida law should apply. *See Doe v. OneBeacon Am. Ins.*, 2014 WL 5092258, at *9 (N.D. Fla. Oct. 9, 2014).

Prescription Care is not even persuasive.[12] Contrary to *Prescription Care*, numerous courts have concluded that references to a "court" in a severability clause don't render delegation clauses unclear. *E.g.*, *B.D. v. Blizzard Ent.*, 76 Cal. App. 5th 931, 958–59 (2022); *Bayer v. Comcast Cable Commc'ns*, 2013 WL 1849519, at *3 (N.D. Ill. May 1, 2013). Even if the prior delegation clause was unclear (it wasn't), OptumRx's clarifying the clause does not create a conflict or render the 2022 clause ambiguous.

South Miami's cases do not change this analysis. [IB48] In both cases, the parties "executed a subsequent agreement" that "depart[ed] from the broad grant of arbitrability in prior provisions," and the court determined that the subsequent contract's "anti-arbitration language" showed "that the parties *revoked* the delegation clause." *PoolRe Ins. Corp. v. Organizational Strategies*, 2013 WL 3929077, at *7–8 (emphasis added) (S.D. Tex. July 29, 2013); *Scott Env't Servs. v. Newfield Expl.*, 2019 WL 5393989, at *3–4 (E.D. Tex. Oct. 22, 2019) (similar).

In *OptumRx v. Odedra*, 2023 WL 377318, at *1, South Miami's counsel made the same argument about a purported conflict between the Provider

[12] Nor is it citable under California rules. *Prescription Care* is unpublished and "must not be cited or relied on by a court or a party in any other action." Cal. Rules of Court, rule 8.1115; *see Seminole Tribe v. Houghtaling*, 589 So. 2d 1030, 1031 (Fla. 2d DCA 1991) (withdrawing decision citing California case "ordered not published" under California rules).

Manual and Provider Agreement. The court rejected that argument, finding no conflict because the Provider Manual "supersede[s]" the Provider Agreement. *Id.*

Because the 2022 Provider Manual clearly and unmistakably delegates all arbitrability disputes to an arbitrator, South Miami is required to bring all of its arbitration challenges to an arbitrator.

C. The arbitrator, not the court, must decide retroactivity.

South Miami next disputes which version of the Provider Manual governs. [IB43–45] It contends that "[u]nder California law ... an arbitration clause unilaterally amended cannot be applied retroactively to any claim that accrued *prior to the effective date of the amendment*." [IB44 (citing *Avery v. Integrated Healthcare Holdings*, 218 Cal. App. 4th 50 (2013))] This is an issue for the arbitrator to decide; regardless, South Miami is wrong about California law.

First, because the 2022 Manual includes a delegation clause, only an arbitrator can decide which claims are covered by that agreement. [R1897]

In *Henry Schein*, 139 S. Ct. at 528, the parties agreed to arbitrate all disputes, except for actions seeking injunctive relief. The defendant argued it was not bound to arbitrate a lawsuit that sought injunctive relief in part. *Id.* The Supreme Court held that only an arbitrator could interpret the

agreement's scope, even if the plaintiff's basis for arbitration was "wholly groundless." *Id.* at 529.

The same rule applies to disputes over an arbitration clause's temporal scope. In *Greene v. Jeffry Knight*, 2021 WL 2871199, at *2–3 (M.D. Fla. Jan. 11, 2021), the plaintiff's retroactivity argument was a "challenge of the arbitration clause's scope" to be decided by the arbitrator. *See also Jones v. Waffle House*, 866 F.3d 1257, 1271 n.1 (11th Cir. 2017); *R & B Contracting v. Argos Ready Mix*, 2020 WL 6749925, at *1–2 (N.D. Fla. Aug. 25, 2020); *Moorman v. Charter Commc'ns*, 2019 WL 1930116, at *7 (W.D. Wis. May 1, 2019) ("[T]he question of whether the Arbitration Agreement covers any claims pre-dating its effective date is for the arbitrator to consider in the first instance.").

South Miami has never cited a case holding that a delegation clause does not require *an arbitrator* to resolve disputes over an agreement's retroactivity.

Second, South Miami is wrong on the law. Under both Florida and California law, arbitration agreements that cover "any and all" claims apply retroactively. *See Donado v. MRC Express*, 2018 WL 318473, at *1–2 (S.D. Fla. Jan. 4, 2018) ("Where an arbitration agreement is not expressly limited to disputes arising out of that agreement, courts generally hold that it applies

retroactively."); *Salgado v. Carrows Restaurants*, 33 Cal. App. 5th 356, 361 (2019) (similar).

South Miami relies on *Avery*, 218 Cal. App. 4th at 61–63, but that case involved a narrow exception to the rule that arbitration agreements apply retroactively. In *Avery*, after the employee filed a class action against her employer, the employer added an arbitration agreement and class-action waiver to the contract, effectively destroying the pending lawsuit. That contract update violated the implied covenant of good faith and fair dealing. *Id.*

Nothing like that occurred here. The Provider Manual has always included an arbitration agreement, which courts regularly enforced. When one court found the delegation clause ambiguous, OptumRx posted a clarifying revision 24 days later. [R1703] OptumRx sent notice of that update, and South Miami continued to submit hundreds of thousands of dollars in reimbursement claims to OptumRx under the new Provider Manual. Analyzing these same facts, the *Odedra* court found OptumRx did not breach the implied covenant of good faith by making the clarifying edit, and pharmacies accepted the clarifying edit when they continued to do business with OptumRx under the updated Manual. 2023 WL 377318, at *2; *see also Copper Bend v. OptumRx*, 2023 WL 2964485, ¶¶ 42–53.

D. The delegation clause is not unconscionable.

The circuit court properly rejected South Miami's argument that the Provider Manual's delegation clause is unconscionable, because South Miami's "unconscionability arguments are not specific to the one-sentence delegation clause, but are 'based on the very grounds asserted to support the claim of unconscionability.'" [R1911 (quoting *ATP Flight Sch. v. Sax*, 44 So. 3d 248, 252 (Fla. 4th DCA 2010)); *see also Rent-A-Center, W. v. Jackson*, 561 U.S. 63, 72 (2010) (parties must "challeng[e] the delegation provision specifically"); *OptumRx v. Atlantis*, 2023 WL 5277214, at *5 (same)]

Even if South Miami properly directed its challenges to the delegation clause specifically (it did not), it would still need to prove the delegation clause is *both* procedurally and substantively unconscionable. *Basulto*, 141 So. 3d at 1158. It didn't prove either.

1. *The delegation clause is not procedurally unconscionable.*

First, the delegation clause is not "[o]ppressive." [IB50] South Miami claims that pharmacies lack sufficient time to review the Provider Manual, the Manual is lengthy, and pharmacies lack meaningful choice in contracting with OptumRx. [IB50–52] Those challenges are not specific to the delegation clause; they are "based on the very grounds asserted to support

the claim of unconscionability" of the entire contract, so they must be made to the arbitrator. *ATP Flight*, 44 So. 3d at 252. South Miami does not contend, for example, that the *delegation clause* is too lengthy. And regardless, South Miami ignores evidence that pharmacies can choose how to contract with OptumRx, whether individually or as a PSAO member. [R522 ¶ 23]; *Copper Bend v. OptumRx*, 2023 WL 2964485, ¶ 64 ("the PSAOs negotiated on behalf of [pharmacies] and those negotiations were incorporated into the [Provider Agreements]," "undermin[ing] any alleged lack of negotiation"). In fact, the circuit court addressed this issue at the hearing, and South Miami conceded it could leave OptumRx's network at any time. [R1792–95, R1889]

Second, South Miami challenges OptumRx's ability to update the Provider Manual. [IB51] But "the provision governing amendments, located on Pg. 3 of the Provider Manual, is found outside of the arbitration provision, and, as such, has no bearing on the otherwise valid agreement to arbitrate or the delegation clause." *OptumRx v. Odedra*, 2023 WL 377318, at *2; *see also Paduano*, 55 F. Supp. 3d at 426–27. Further, OptumRx's ability to update the Manual is governed by the implied covenant of good faith, and South Miami has not shown any updates made in bad faith. To the contrary, OptumRx notifies pharmacies when it updates the Manual. [R575 ¶ 16];

Copper Bend v. OptumRx, 2023 WL 2964485, ¶ 52 ("Considering the notice provided" along "with the lack of evidence indicating awareness of any accrued claim, or pending litigation, at the time the announcement regarding the new [Manual] was issued, we cannot find any breach of the implied covenant of good faith and fair dealing.").

Third, the delegation clause is not "confusing" because OptumRx filed petitions in court. [IB53] That argument is "unavailing as both the FAA and California law provide that where a party refuses to arbitrate, the party wishing to arbitrate can petition to compel in court." *OptumRx v. Odedra*, 2023 WL 377318, at *3. Indeed, a "party often files a § 4 petition to compel arbitration precisely because it does not want to bring suit." *Vaden*, 556 U.S. at 63 n.13. Nor has OptumRx taken inconsistent positions regarding retroactivity. [IB53] As *Copper Bend* held, OptumRx simply followed *Prescription Care*'s ruling that updated arbitration agreements apply retroactively. 2023 WL 2964485, ¶ 43 n.3.

Fourth, the delegation clause is not "surpris[ing]." [IB49] South Miami complains the arbitration agreement did not "include a copy of the applicable arbitration rules or fee schedule" or "call attention to the three-arbitrator requirement." [IB49–50, IB54–55] Yet again, South Miami improperly looks to provisions outside the delegation clause. And regardless, OptumRx was

not required to "call attention to" specific provisions or provide copies of the AAA rules, particularly in the commercial context here. *OptumRx v. Odedra*, 2023 WL 377318, at *3 ("Respondents were represented by PSAOs, a sophisticated entity, and fail to point to a provision of the AAA rules that would have led it to receive a 'nasty shock' upon 'discovering' that they applied to any disputes."); *Kendall Imports*, 215 So. 3d at 110 (company was "not required to explain" contract in Spanish).

South Miami's only attack on the delegation clause itself is that it allegedly conflicts with the Provider Agreement. [IB53] But as explained above, no conflict exists, and the Provider Manual supersedes the Provider Agreement. *Supra* at 44–45, 48.

2. *The delegation clause is not substantively unconscionable.*

"Substantive unconscionability requires an assessment of whether the contract terms are 'so outrageously unfair' as to 'shock the judicial conscience.'" *12550 Biscayne Condo. Ass'n v. NRD Invs.*, 336 So. 3d 750, 755 (Fla. 3d DCA 2021). South Miami fails to make that showing.

First, South Miami recycles its challenge to the Provider Manual's modification provision. [IB56] But that challenge is not specific to the delegation clause, *Rent-A-Center*, 561 U.S. at 72, and OptumRx's ability to modify the Manual does not make it unconscionable, *supra* at 49–50, 52.

South Miami's cases do not hold otherwise. [IB56] In both cases, the challenged provision applied solely to the arbitration clause itself, which allowed the employer to "change the terms of the agreement to its benefit when it anticipated a particular claim would be filed," and the employer violated "the covenant of good faith and fair dealing." *Moua v. Optum Servs.*, 320 F. Supp. 3d 1109, 1114 (C.D. Cal. 2018); *compare Mikhak v. Univ. of Phoenix*, 2016 WL 3401763, at *10 (N.D. Cal. June 21, 2016). Here, the provision is outside the arbitration agreement, and OptumRx did not update the Provider Manual in bad faith. *Supra* at 50.

Second, South Miami argues the agreement is unconscionable because it calls for three arbitrators with ten years of health-law experience. [IB57–58] But one hallmark of arbitration is that parties can agree "that the decisionmaker be a specialist in the relevant field[.]" *AT&T Mobility v. Concepcion*, 563 U.S. 333, 345 (2011). Thus, a "requirement for the arbitrator to have knowledge and experience in postsecondary education administration" is not unconscionable. *Rosendahl v. Bridgepoint Educ.*, 2012 WL 667049, at *9 (S.D. Cal. Feb. 28, 2012).

South Miami argues that health-law experience is irrelevant to resolving gateway arbitration issues like unconscionability. [IB57] But it's easy to see how health-law experience would help arbitrators resolve

gateway issues here. For example, South Miami challenges the agreement's discovery limitations. [IB58–60] But the limitations are tailor-made for the parties' disputes, which turn on expert testimony regarding complex "Maximum Allowable Costs" prescription-drug formulas, not fact-witness testimony. [R424 (claiming OptumRx reimbursed "below the wholesale prescription drug pricing benchmarks"), R641 (Manual's pricing benchmarks)] An arbitrator with health-law experience might resolve that issue more efficiently. Further, arbitrators are assigned for all purposes, and South Miami doesn't dispute that health-law experience would help arbitrators resolve the *merits* of the parties' dispute. *OptumRx v. Odedra*, 2023 WL 377318, at *4.

Third, South Miami speculates about arbitration costs. [IB57] But it never explains why the parties couldn't submit their existing briefs and evidence to the arbitrators, what additional briefing is required, and what that briefing would cost. *See Zephyr Haven Health & Rehab Ctr. v. Hardin*, 122 So. 3d 916, 922 (Fla. 2d DCA 2013) (plaintiff failed to prove unconscionable costs since submitted invoices did "not establish what she could expect to incur if forced to arbitrate"); *Catastrophe Servs. v. Fouche*, 145 So. 3d 151, 156 (Fla. 5th DCA 2014) (reversing circuit court because plaintiff's arbitration-cost evidence was too speculative).

Further, an agreement by *businesses* to split costs is not unconscionable. A fee-splitting provision like the one here—which states that "each party shall be responsible for its own fees and expenses" [R714]—is not per se unconscionable. *Zephyr Haven*, 122 So. 3d at 922.

South Miami's cases don't support its position. [IB58] For example, *Subcontracting Concepts v. De Melo*, 34 Cal. App. 5th 201 (2019), did not find that requiring a party to pay half the cost of three arbitrators was unconscionable as a general rule. The rule applied in that case is limited to the employment context. *Sanchez v. Valencia Hold.*, 61 Cal. 4th 899, 918–19 (2015). South Miami's other cases also arise in the inapposite employment context.

Fourth, the discovery provisions (which allow expert reports, expert depositions, exhibit exchanges, five interrogatories, and five document requests) don't render the delegation clause unconscionable. [IB58–60] It's "entirely permissible for an arbitration agreement to limit the scope of discovery." *Bhim v. Rent-A-Center*, 655 F. Supp. 2d 1307, 1314 (S.D. Fla. 2009). In *Caremark v. Chickasaw Nation*, 43 F.4th 1021 (9th Cir. 2022), pharmacies argued that discovery restrictions made arbitration unconscionable. The Ninth Circuit rejected that argument because, as here, the pharmacies never explained why they needed discovery to arbitrate the

agreement's *enforceability*—and thus the arbitrator could resolve challenges to the discovery restrictions. *Id.* at 1034 n.13.

South Miami notes that in a different case its counsel served more than five discovery requests. [IB59–60] But that case is "distinguishable as [it is] currently being litigated in *court*, not arbitration, and ha[s] no limitations on discovery." *OptumRx v. Odedra*, 2023 WL 377318, at *5. Further, that case involved 250 pharmacies, making it vastly different from the individualized arbitration contemplated here. South Miami "fail[s] to explain or present any evidence as to why [it] need[s] discovery to arbitrate the agreement's enforceability, or why the written discovery in addition to the other discovery is insufficient." *Id.*; *Copper Bend v. OptumRx*, 2023 WL 2964485, ¶ 79 (similar). And Florida courts have held there's nothing unconscionable about arbitration clauses that preclude fact-witness depositions. *FL-Carrollwood Care v. Gordon*, 72 So. 3d 162, 166 n.4 (Fla. 2d DCA 2011).

V. THE ARBITRATION AGREEMENTS AS A WHOLE ARE NOT UNCONSCIONABLE.

Even if the Court looks past the delegation clause and considers the enforceability of the parties' arbitration agreements, it should find them enforceable.

South Miami claims the Provider Agreements' arbitration provisions are procedurally unconscionable. [IB63–66] But these claims fail for similar

reasons as stated above. For example, South Miami argues it's unconscionable to bind South Miami to a Provider Agreement it supposedly never reviewed, but South Miami submitted no evidence it couldn't see its Provider Agreements and, in any event, principals are bound to contracts signed by their agents. *Supra* at 42–43.

South Miami claims the Provider Manual is procedurally unconscionable because pharmacies are not provided Manuals to review before they join OptumRx's network. [IB65] But the Provider Manual is incorporated into the *negotiated* Provider Agreement. [R853] Further, the Manual is publicly available online. [R574 ¶ 10]

VI. SOUTH MIAMI CITES INAPPOSITE CASES THAT INVOLVED *PRIOR VERSIONS* OF THE PROVIDER MANUAL, BUT EVERY COURT THAT HAS ANALYZED THE *2022* MANUAL'S DELEGATION PROVISION HAS ENFORCED IT.

South Miami argues that three state courts have found "the same arbitration clauses at issue in this appeal" unenforceable. [IB3–4 (citing *Prescription Care*, No. 30-2018-01014006-CU-BC-CJC, 2021 WL 785433 (Cal. Super. Feb. 22, 2021) (2015 Provider Manual); *Platt*, 2023 WL 2507259 (2020 Manual); *Copper Bend*, Case No. 20 L 396 (2015–2020 Manuals))] That is a bald misstatement because those cases analyzed **prior versions** of the Provider Manual.

Here, the circuit court compelled arbitration under the 2022 Provider Manual, which differs significantly from the agreements in those other cases, including because it allows additional discovery, adds an unambiguous delegation clause, specifies an arbitration-selection process, and removes the California choice-of-law provision. [R713–14] South Miami concedes the arbitration agreement in the 2022 Manual differs from the prior versions in those other cases. [IB13]

In any event, the cases do not help South Miami.

Copper Bend was reversed on appeal, and the appellate court rejected the same unconscionability challenges South Miami makes here. *Supra* at 8.

Prescription Care is a trial court order that analyzed a different Provider Manual—from 2015.

Platt also involved a different Provider Manual (from 2020) and didn't address whether the parties had delegated all unconscionability challenges to an arbitrator. 2023 WL 2507259, at *2. Further, *Platt* didn't address PSAOs' substantial bargaining power on pharmacies' behalf (*id.* at *5 n.2); unlike in *Platt*, that issue was preserved here.

In its Reply, South Miami will likely rely on a decision issued by a Wisconsin trial court. *OptumRx v. Marinette-Menominee Prescription Center*

(Wis. Cir. Ct. June 30, 2023). But that decision is inapposite for several reasons. *First*, that court expressly relied on Wisconsin law to determine unconscionability. Slip. op. at *5. *Second*, the Wisconsin court acknowledged that it was out-of-step with cases from other jurisdictions (including Florida, Illinois, and California) that have enforced OptumRx's arbitration agreement. Slip op. at *6. *Third*, that court erred by finding the delegation clause "appropriate" yet not enforcing it. Slip op. at *8. The delegation clause requires an arbitrator (*not* a court) to address unconscionability challenges. *Supra* at 48–49.

Every Florida court that has addressed the **2022** Provider Manual's arbitration clause has enforced it. [R1902–15; *OptumRx v. Atlantis*, 2023 WL 5277214; *OptumRx v. VistaCare*, 2023 WL 1766097[13]; *OptumRx v. JC Resources*, 2022 WL 17098619] And in *JC Resources*, the District Court of Appeal per curiam affirmed the order compelling arbitration. In the process, it necessarily rejected all of the same jurisdictional and unconscionability

[13] South Miami claims *VistaCare* "was predicated upon a citation to the dissenting opinion in *Shotts v. OP Winter Haven*, 86 So. 3d 456 (2012)." [IB19] The *VistaCare* court cited the *Shotts* dissent only for the *undisputed* point that "[t]he issue of 'who decides' should be governed by federal substantive law rather than Florida law." *VistaCare*, 2023 WL 1766097, at *2. *VistaCare* was correct. *See Airbnb*, 336 So. 3d at 703.

challenges that South Miami (which shares JC Resources' counsel) made in that appeal.

CONCLUSION

OptumRx respectfully requests that the Court affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January 2024 a true and correct copy of the foregoing has been served to all parties listed on the ePortal service list and furnished by E-Mail to all parties below.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation and font requirement set forth in Rules 9.045(b), Florida Rules of Appellate Procedure. This brief contains 12,984 words. It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Arial font.

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