
**IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

MARK J. EAVENSON, D.C. d/b/a)	
EAVENSON CHIROPRACTIC, individually)	
and on behalf of others similarly situated,)	
)	Appeal from the Circuit Court of Cook
Plaintiff-Appellant,)	County, County Department, Chancery
)	Division
v.)	
)	No. 05-CH-10191
STATE FARM MUTUAL AUTOMOBILE)	
INSURANCE COMPANY and STATE)	Hon. Martin S. Agran
FARM LIFE INSURANCE COMPANY,)	
)	
Defendants-Appellees.)	

BRIEF OF DEFENDANTS-APPELLEES

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

This is an appeal from an interlocutory order lifting a stay of judicial proceedings pending arbitration and requiring Plaintiff Mark J. Eavenson (“Plaintiff”) to respond to the motion to dismiss of Defendants State Farm Mutual Automobile Insurance Company and State Farm Life Insurance Company (collectively, “State Farm”).¹ 12/7/06 Order (R. C1929-30; DA 178-79).² The interlocutory order is based on the Circuit Court’s express finding that Plaintiff waived his right to demand arbitration and that State Farm was entitled to do the same. 12/7/06 Hrg. Tr. at 6-7 (1st Supp. R. 83-84; DA 185-86). There is no jury verdict or question on the pleadings. For the reasons explained below, the Circuit Court did not abuse its discretion in returning the parties’ dispute to litigation. Affirmance thus is in order.

¹ Although the two defendants are separate companies with different involvement in this case, the differences between the two are not material to this appeal. Solely for purposes of this appeal, therefore, we refer to them jointly as “State Farm.”

² In citing to the record on appeal, State Farm has used the following conventions. The original record on appeal, filed March 14, 2007, is cited as “R.,” the first supplemental record on appeal, filed April 13, 2007, is cited as “1st Supp. R.,” and the second supplemental record on appeal, filed May 11, 2007, is cited as “2d Supp. R.” Citations to “DA” refer to State Farm’s Supplemental Separate Appendix filed with this brief. That appendix includes, among other things, an index to the first supplemental record on appeal, which Plaintiff omitted from his appendix. *See* DA 292.

ISSUE PRESENTED

Whether the Circuit Court abused its discretion in lifting a stay of judicial proceedings pending arbitration after finding that Plaintiff waived his right to demand arbitration and that State Farm could likewise waive its right to demand arbitration.

JURISDICTION

In his statement of jurisdiction, Plaintiff correctly identifies Supreme Court Rule 307(a)(1) as the basis for the Court's jurisdiction over this appeal. Pl.'s Br. 4. Plaintiff's statement omits that this appeal is from an order entered December 7, 2006 and that Plaintiff filed his notice of interlocutory appeal on January 5, 2007. 12/7/06 Order (R. C1929-30; DA 178-79); Pl.'s 1/5/07 Notice of Appeal (R. C1935).

STATUTES INVOLVED

This case involves the construction of not only the statute identified by Plaintiff (Pl.'s Br. 5) but also sections 1 and 2 of the Uniform Arbitration Act (710 ILCS 5/1 and 710 ILCS 5/2) and section 2-619(a)(3) of the Civil Practice Law (735 ILCS 5/2-619(a)(3)). The texts of these additional statutes are set forth at pages DA 293-95 of State Farm's Separate Supplementary Appendix.

STATEMENT OF FACTS

Supreme Court Rule 341(i) provides that an appellee need not include a Statement of Facts unless "the presentation by the appellant is deemed unsatisfactory." Because of its many errors and omissions, we deem Plaintiff's statement of facts unsatisfactory and set forth the following statement of facts.

A. Plaintiff's Complaint.

Plaintiff, a chiropractor, alleges that in 1997 he treated Steven Miller (“Miller”) for injuries sustained in an automobile accident. 1st Am. Compl. ¶¶ 12-15 (2d Supp. R. C13-14; DA 39-40). Plaintiff (as Miller’s assignee) sought payment from State Farm under a policy that allegedly covered Miller’s injuries. *Id.* ¶ 15 (2d Supp. R. C14; DA 40). State Farm paid some but allegedly not the “full amount” of the submitted charges, relying on the policy provision limiting State Farm’s reimbursement obligation to reasonable and necessary charges. *Id.* ¶¶ 16-18 (2d Supp. R. C14-15; DA 40-41).

More than five years later, in 2003, plaintiff filed this putative class action against State Farm. Compl. (2d Supp. R. C435-59).³ Plaintiff’s suit alleges that, by failing to pay the full amount of the charges, State Farm breached the insurance policy at issue, obtained unjust enrichment, and violated the Illinois Consumer Fraud and Deceptive Business Practices Act. 1st Am. Compl. ¶¶ 53-77 (2d Supp. R. C24-30; DA 50-56). Plaintiff purports to bring this claim on behalf of a class of insureds and medical

³ Plaintiff’s initial complaint named State Farm Life Insurance Company as the sole defendant. *Eavenson* Compl. (R. C435-62). State Farm Life promptly moved to dismiss, showing that it had absolutely nothing to do with Plaintiff’s claim. *See* Defs.’ 8/27/04 Mot. at 2 (2d Supp. R. C42; DA 61). Plaintiff acknowledged that he sued State Farm Life “erroneously” (*see id.* at 3 (2d Supp. R. C43; DA 62)), but then filed an amended complaint that named *both* State Farm Mutual Automobile Insurance Company (which issued the applicable insurance policy) *and* State Farm Life as defendants. 1st Am. Compl. (2d Supp. R. C8-33; DA 34-59).

providers (the latter acting under assignments) who were paid less than the full amount of their claims. *Id.* ¶ 36 (2d Supp. R. C19-20; DA 45-46). State Farm categorically denies Plaintiff’s claims, including the assertion that his claims are suitable for class action treatment.

B. The Efforts Of Plaintiff’s Lawyers To Secure A Madison County Forum For “MedPay” Litigation Against State Farm.

Plaintiff filed this suit in Madison County. On State Farm’s motion, however, the Illinois Supreme Court transferred this case to Cook County pursuant to Supreme Court Rule 384. Indeed, this is one of four putative “MedPay” class action cases that Plaintiff’s lawyers filed against State Farm in Madison County between 1999 and 2007, all of which the Supreme Court ordered transferred to Cook County pursuant to Rule 384.⁴ In order to fully understand the context of this appeal, it is important to know the circumstances that led the Supreme Court to transfer all of these cases to Cook County.

In 1999, a putative class action called *Snead v. State Farm Mutual Automobile Insurance Co.*, was filed in the Circuit Court of Cook County. *Snead* Compl. (R. C194-214). A so-called “MedPay” case because it is based on insurance policies covering payments for medical treatment, *Snead* alleged that State Farm systematically denies medical treatment claims as unreasonable or unnecessary. *Id.* ¶ 9 (R. C196).⁵

⁴ This Court may take judicial notice that Plaintiff himself is the named plaintiff in more than 20 Madison County “Med Pay” class action suits filed against various insurers by Plaintiff’s lawyers. See DA 296 (listing cases); n. 6. *infra* (on judicial notice materials).

⁵ As with *Eavenson*, State Farm categorically denies the allegations in *Snead* and other MedPay cases. We note that, in *Snead*, the circuit court has dismissed with prejudice all

In the eight years since *Snead* was filed, a group of lawyers led by Freed & Weiss LLC of Chicago and The Lakin Law Firm, P.C. of Madison County have been trying to secure a Madison County forum for a copycat MedPay case.⁶ Plaintiff's lawyers filed their first Madison County copycat MedPay case, *Siler v. State Farm Mutual Automobile Ins. Co.*, shortly after *Snead* was filed in 1999. *Siler* Compl. (R. C305-21). In light of the prior pending *Snead* case in Cook County, State Farm moved pursuant to Supreme

but one of the claims and has before it a pending motion to strike the already-once-stricken class allegations. *See* 1/26/01 Order (R. C287); 6/14/02 Order (R. C288-89); 7/24/02 Order (R. C290); 6/13/03 Order (R. C292-301); 4/27/04 Order (R. C302); 1/18/05 Order (R. C303-04); 12/7/06 Order (R. C1929-30; DA 178-79).

⁶ Plaintiff's lawyers eventually had a falling out and, in 2007, commenced litigation against each other. The pleadings in the litigation confirm that the Freed & Weiss and Lakin firms formed a "Partnership for the purposes of filing, prosecuting and settling or trying class action cases in Southern Illinois." *Freed* Compl. ¶ 21 (DA 247); *see also Lakin Law Firm* Compl. ¶¶ 3-4 (DA 194) (alleging agreement to prosecute class actions). Although not part of the appellate record, such pleadings and other court documents are subject to judicial notice. *See Metro. Life Ins. Co. v. Am. Nat'l Bank & Trust Co.*, 288 Ill. App. 3d 760, 764 (1st Dist. 1997) ("This court may take judicial notice of public documents that are included in the records of other courts."); *see also Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 71 (1992) (taking notice of orders by two other courts); *King v. N. Ind. Commuter Transp. Dist.*, 337 Ill. App. 3d 52, 56 n.2 (1st Dist. 2003) (taking notice of filings in different case).

Court Rule 384 to transfer *Siler* to Cook County (7/3/00 Mot. (R. C370-75)) and the Supreme Court granted State Farm's motion (8/25/00 Order (R. C418)). Rather than litigate in Cook County, Plaintiff's lawyers promptly dismissed the *Siler* case *with prejudice*, after being rebuffed in their effort to obtain a dismissal without prejudice while a potentially dispositive State Farm motion was pending. 5/31/01 Mot. (R. C425-28); 8/3/01 Agreed Order (R. C429).

Plaintiff's lawyers waited almost four years. Then, in 2003, Plaintiff's lawyers filed two more copycat MedPay class action complaints in Madison County: *Jones v. State Farm Fire & Casualty*, and the instant case, *Eavenson v. State Farm Mutual Automobile Ins. Co.* See *Eavenson* Compl. (R. C435-62); *Jones* Compl. (R. C535-59). State Farm filed another Rule 384 motion seeking transfer of the cases to Cook County. Defs.' 2/23/05 Mot. (R. C155-61). State Farm argued, among other things, that "in light of [the Supreme] Court's prior Rule 384 order transferring *Siler* to Cook County . . . if *Eavenson* and *Jones* were allowed to proceed in Madison County, it would suggest that class action lawyers can evade [the Supreme] Court's orders simply by waiting until the dust settles and then trying again." Defs.' 2/23/05 Explanatory Suggestions at 15 (R. C178). In April 2005, the Supreme Court granted State Farm's motion and transferred both *Jones* and *Eavenson* to Cook County. 4/6/05 Order (R. C1570-71; DA 71A-71B).

In the wake of that transfer order, *Jones* and *Eavenson* were consolidated with *Snead* in the Circuit Court of Cook County before Judge Martin Agran. 7/26/05 Order (R. C1815; DA 72); 9/2/05 Order (R. C1922; DA 73). On State Farm's motion, Judge Agran dismissed *Jones* with prejudice. 5/1/06 Order (DA 90); see n. 6, *supra* (citing authorities allowing judicial notice of non-record court orders). In *Eavenson*, Judge

Agran ultimately found that both parties waived their right to arbitration, and ordered Plaintiff to respond to State Farm's long-pending dismissal motion, precipitating this appeal. 12/7/06 Order (R. C1929-30; DA 178-79); 12/7/06 Hrg. Tr. at 6-7 (1st Supp. R. 83-84; DA 185-86).

With *Jones* dismissed and *Eavenson* going badly for them, in early 2007 Plaintiff's lawyers filed yet another putative medical payments class action against State Farm in Madison County, styled *Bemis v. State Farm Fire & Casualty Co.* *Bemis* Compl. (DA 217-40). As it had with *Siler*, *Jones*, and *Eavenson*, State Farm filed a Rule 384 motion to transfer *Bemis* to Cook County. 5/30/07 Mot. (DA 283-89). Less than two weeks ago, the Supreme Court granted State Farm's motion. 6/26/07 Order (DA 290-91); *see n. 6, supra* (citing authorities allowing judicial notice of non-record court orders and filings).

With this background concerning Plaintiff's lawyers' four attempts to bring a MedPay class action against State Farm in Madison County, and the Supreme Court's repeated Rule 384 orders transferring those cases to Cook County, we return to a chronological history of the proceedings in this case.

C. Plaintiff's Efforts To Resist Arbitration Pursuant To The Terms Of The Applicable Insurance Policy.

In 2004, while this case still was pending in Madison County, State Farm responded to Plaintiff's amended complaint by moving to compel arbitration and, in the alternative, to dismiss. Defs.' 8/27/04 Mot. (2d Supp. R. C41-47; DA 60-66). The arbitration portion of the motion argued that under the applicable State Farm insurance policy, disputes concerning "the amount due shall be decided by arbitration upon written request of the person making the claim or [State Farm]." Defs.' 8/27/04 Mem. at 4-5 (2d

Supp. R. C51-52) (*quoting* Krause Policy at 10 (2d Supp. R. C78; DA 11)). The dismissal portion of the motion showed that Miller had released State Farm from “any and all claims” related to the accident for which Plaintiff supposedly treated him (thereby releasing Plaintiff’s claims as an assignee), that the applicable statutes of limitations barred Plaintiff’s consumer fraud and unjust enrichment claims, and that Plaintiff did not (and could not) adequately plead the requirements for an unjust enrichment or consumer fraud claim. *Id.* at 7-16 (2d Supp. R. C54-63).

1. Plaintiff pursued discovery to support his contention that the arbitration provision was unenforceable.

Even though State Farm offered to pay “any filing, administration, and reasonable arbitrator fees, including plaintiff’s share under the insurance policy” and further offered to cover Plaintiff’s reasonable attorney fees if Plaintiff prevailed in the arbitration, Plaintiff refused to arbitrate. 2/22/05 Ltr. (2d Supp. R. C149-50; DA 67-68); 3/7/05 Ltr. (2d Supp. R. C151; DA 69). Plaintiff also refused to respond to State Farm’s motion to compel arbitration or dismiss the complaint. Instead, Plaintiff served a raft of discovery requests supposedly intended to support Plaintiff’s position that the arbitration provision in the insurance policy was unconscionable and unenforceable. *See* Pl.’s 1st Req. for Admis. (R. C502-05); Pl.’s 1st Set of Interrogs. (R. C506-17); Pl.’s 1st Req. for Produc. (R. C518-22); Pl.’s 2d Req. for Produc. (R. C523-29); Pl.’s Supp. Reqs. for Produc. (R. C530-33); 1st Am. Compl. ¶¶ 7-9 (2d Supp. R. C11-12; DA 37-38) (alleging that the arbitration clause is part of State Farm’s “fraudulent scheme”).

State Farm answered Plaintiff’s discovery requests (Defs.’ Answers to 1st Set of Interrogs. & 1st Req. for Produc. (2d Supp. R. C331-47); Defs.’ Answers to 2d & Supp. Reqs. For Produc. (2d Supp. R. C349-59)), but Plaintiff still did not respond to State

Farm's pending motion. Plaintiff instead moved to compel further discovery responses. Pl.'s 2/16/05 Mot. (2d Supp. R. C107-10). The Madison County circuit court denied Plaintiff's motion, rejected Plaintiff's demand for additional discovery, and ordered Plaintiff to answer State Farm's motion to compel arbitration or dismiss the complaint. 3/23/05 Order (R. C1520; DA 71).

Shortly thereafter, the Supreme Court granted State Farm's Rule 384 motion and transferred this case to Cook County. 4/6/05 Order (R. C1570-71; DA 71A-71B).⁷ Notwithstanding the court order rejecting further discovery and directing Plaintiff to answer State Farm's pending motion, Plaintiff decided to ignore the court order and treat the transfer to Cook County as an opportunity to serve still more discovery requests, falsely labeled as "First" discovery requests. *See* Pl.'s 1st Set of Reqs. for Admis. (2d Supp. R. C376-85); Pl.'s 1st Set of Interrogs. (2d Supp. R. C387-94); Pl.'s 1st Req. for Produc. (2d Supp. R. C396-400).

In response, State Farm sought a protective order quashing the new discovery and requiring Plaintiff to finally answer State Farm's long-pending motion to compel arbitration or dismiss the complaint. Defs.' 10/21/05 Mot. (2d Supp. R. C274-78). Plaintiff opposed State Farm's motion, asserting that he needed more discovery to prove

⁷ Plaintiff's statement of facts incorrectly says (at 8) that State Farm's transfer and consolidation motion was "heard and appealed." In reality, there was no appeal. Rather, pursuant to Supreme Court Rule 384, State Farm's motion was submitted to and decided by the Supreme Court. Defs.' 2/23/05 Mot. (R. C155-61); 4/6/05 Order (R. C1570; DA 71A-71B).

his contentions that “the arbitration clause will not permit resolution of Plaintiff’s claims” and that “the arbitration clause is an unconscionable attempt to limit coverage.” Pl.’s 11/14/05 Mem. at 3 (2d Supp. R. C441; DA 76). On February 24, 2006, Judge Agran granted State Farm’s motion for a protective order, quashed Plaintiff’s new discovery, and ordered Plaintiff to respond to State Farm’s motion. 2/24/06 Order (2d Supp. R. C518; DA 84).

2. Plaintiff did not consent to arbitration pursuant to the terms of the applicable insurance policy.

Plaintiff still did not respond to State Farm’s motion to compel arbitration or dismiss the complaint. Instead, on March 16, 2006, Plaintiff filed a purported “Consent to Arbitration.” Pl.’s 3/16/06 Consent (2d Supp. R. C519-20; DA 86-87). The relevant insurance policy provides for binding arbitration of only a single narrow issue: “whether or not the medical expenses were reasonable and necessary, with the amount due being equal to the reasonable and necessary medical expenses only.” Krause Policy at 10 (2d Supp. R. C78; DA 11). Plaintiff’s “Consent to Arbitration,” however, did *not* consent to arbitration of that narrow issue. Rather, the “Consent to Arbitration” specifically “consented” only to “arbitration of the claims herein” (Pl.’s 3/16/06 Consent (2d Supp. R. C519; DA 86))—the very claims that Plaintiff expressly argued “the arbitration clause will *not* permit resolution of” (Pl.’s 11/14/05 Mem. at 3 (2d Supp. R. C441; DA 76)). The Consent to Arbitration further stated that Plaintiff’s “consent” was “without any prejudice to any other rights he may have.” Pl.’s 3/16/06 Consent (2d Supp. R. C519; DA 86). And finally, the Consent to Arbitration did not propose a stay of litigation pending arbitration. *Id.*

3. Plaintiff opposed a stay of litigation pending arbitration pursuant to the terms of the applicable insurance policy.

In describing the issue presented for review, Plaintiff asserts that “the parties had previously entered into an agreed order to stay pending arbitration in accordance with the contract entered into by the parties.” Pl.’s Br. 4.⁸ In reality, Plaintiff actively opposed any such order. After Plaintiff served his “Consent to Arbitration,” State Farm (on April 11, 2006) moved for an order staying litigation pending arbitration of the narrow issue subject to arbitration under the policy: the reasonableness and necessity of the claimed medical expenses. Defs.’ 4/11/06 Mot. (2d Supp. R. C555-73). Plaintiff strongly objected. Pl.’s 5/19/06 Resp. (2d Supp. R. C574-79; DA 91-96). It was only after full briefing and argument that, on June 29, 2006 (not June 20, as Plaintiff asserts), Judge Agran overruled Plaintiff’s objections and stayed the case. 6/29/06 Order (2d Supp. R. C622; DA 97). The resulting order stayed proceedings in *Eavenson* pending arbitration and limited the arbitration to the single issue identified in the applicable policy. *Id.* (“The arbitrators’ decision shall be limited to whether or not the medical expenses were reasonable and necessary, with the amount due being equal to the reasonable and necessary medical expenses only.”).

⁸ Plaintiff’s brief (at 4) asserts that “[a]n agreed order to stay the judicial proceedings was entered on March 8, 2005 so the parties could proceed with arbitration.” That is not true. The cited March 8, 2005 order, which did not even involve Plaintiff’s counsel, was an agreed order staying the *Snead* litigation pending the Supreme Court’s ruling on State Farm’s Rule 384 motion to transfer *Jones* and *Eavenson* to Cook County. 3/8/05 Order (R. C1516; DA 70). The order had nothing to do with arbitration.

D. The Failure Of Plaintiff's Arbitrator To Participate In The Arbitrator Selection Process.

The arbitration provision of the applicable insurance policy states, "Each party shall select a competent and impartial arbitrator. These two shall select a third one." Krause Policy at 10 (2d Supp. R. C78; DA 11). The insurance policy does not impose a deadline for the selection of the party arbitrators. But once the parties have selected their arbitrators, the insurance policy requires the two party-selected arbitrators to "agree on the third one within 30 days." *Id.*

On August 1, 2006—one month after Judge Agran stayed judicial proceedings pending arbitration, over Plaintiff's objections—State Farm selected former Illinois Supreme Court Justice Benjamin Miller as its arbitrator. 8/1/06 Ltr. (2d Supp. R. C642; DA 98). In connection with his "Consent to Arbitration," Plaintiff already had selected an attorney named Bob Perica as his arbitrator. 3/16/06 Ltr. (2d Supp. R. C641; DA 85).

On August 2, 2006, immediately after he was selected, Justice Miller telephoned Mr. Perica to discuss selection of the third arbitrator. 8/30/06 Miller Aff. ¶ 7 (2d Supp. R. C643; DA 99). Mr. Perica said that he would send to Justice Miller a list of potential third arbitrators within two days. *Id.* ¶ 8 (2d Supp. R. C643; DA 99).

On August 8, 2006, not having received the promised list or heard from Mr. Perica in any fashion, Justice Miller again telephoned Mr. Perica. *Id.* ¶ 9 (2d Supp. R. C643; DA 99). Mr. Perica said that an unspecified "they" had not supplied him with names yet, but he would contact "them" that afternoon and send the list to Justice Miller as soon as possible. *Id.* ¶ 10 (2d Supp. R. C643; DA 99).

By August 18, Justice Miller still had not received the twice-promised list or otherwise heard from Mr. Perica. *Id.* ¶ 11 (2d Supp. R. C644; DA 100). Justice Miller therefore sent to Mr. Perica (by e-mail and letter) a list of four proposed arbitrators, requesting that he choose one or more from the list. *Id.*; 8/18/06 E-mail (2d Supp. R. C649; DA 105); 8/18/06 Ltr. (2d Supp. R. C651-52; DA 107-08). Justice Miller also noted that “[t]he 30 days within which we are to appoint a third arbitrator is passing.” 8/18/06 E-mail (2d Supp. R. C649; DA 105); 8/18/06 Ltr. (2d Supp. R. C651; DA 107).

On August 25, 2006, Justice Miller sent to Mr. Perica another note (by e-mail and letter) expressing concern that Mr. Perica still had not joined the arbitrator selection process despite his promises to do so. 8/30/06 Miller Aff. ¶ 12 (2d Supp. R. C644; DA 100); 8/25/06 E-mail (2d Supp. R. C650; DA 106); 8/25/06 Ltr. (2d Supp. R. C653; DA 109). Justice Miller also reminded Mr. Perica, “We have until August 31 to make a selection.” 8/25/06 E-mail (2d Supp. R. C650; DA 106); 8/25/06 Ltr. (2d Supp. R. C653; DA 109). Mr. Perica maintained complete silence through the August 31 deadline. 8/30/06 Miller Aff. ¶ 14 (2d Supp. R. C644; DA 100); 11/27/06 Miller Aff. ¶ 2 (2d Supp. R. C768; DA 146).

E. State Farm’s Motion To Lift The Stay And Plaintiff’s Responses.

By August 31, 2006—after Plaintiff’s arbitrator refused to participate in the selection process for the entire 30-day period allowed by the governing arbitration provision—State Farm had come to the view that arbitration was not going to expeditiously resolve the parties’ dispute but rather would embroil the parties in litigation of a wide array of collateral issues. Defs.’ 8/31/06 Mot. at 5 (2d Supp. R. C628; DA 114). Disputes over who would appoint a third arbitrator, who should be the third

arbitrator, and the scope of the arbitration loomed. *Id.* On August 31, State Farm therefore withdrew its arbitration request and asked the Circuit Court to lift the litigation stay and compel Plaintiff to respond to the pending dismissal motion. *Id.* at 5-6 (2d Supp. R. C628-29; DA 114-15). State Farm contended that Plaintiff had waived his right to arbitration and that it was free to do the same under the circumstances. *Id.* at 6-8 (2d Supp. R. C629-31; DA 115-17); *see also* Defs.’ 10/16/06 Reply at 1-5 (2d Supp. R. C713-17).

Plaintiff delayed his formal written response to State Farm’s motion until October 13, 2006. Pl.’s 10/13/06 Opp’n (2d Supp. R. C665-79). He then proceeded to use the intervening period to make two strategic moves. First, Mr. Perica tried to restart the arbitrator selection process, despite having completely refused to participate in the arbitrator selection process during the entire 30-day period allowed for that process. 9/1/06 Ltr. (2d Supp. R. C782; DA 160). Surprisingly, in light of Justice Miller’s repeated written warnings to him about the 30-day deadline, Mr. Perica claimed that he “was totally unaware of any time limit or deadlines related to the subject arbitration.” 9/7/06 Ltr. (2d Supp. R. C785; DA 163). On that basis, Mr. Perica belatedly proposed three potential arbitrators—including, most prominently, former Supreme Court candidate and Fifth District Appellate Court Justice Gordon Maag. *Id.* Mr. Perica said nothing about the four potential arbitrators whom Justice Miller had previously proposed. 9/1/06 Ltr. (2d Supp. R. C782; DA 160); 9/7/06 Ltr. (2d Supp. R. C785; DA 163). Justice Miller responded that Mr. Perica had failed to take any action during the 30-day period allowed for selecting a third arbitrator, that it would be inappropriate to proceed with the selection process under the circumstances, and that none of the suggested

arbitrators were acceptable in any event. 9/5/06 Ltr. (2d Supp. R. C783-84; DA 161-62); 9/13/06 E-mail (2d Supp. R. C786; DA 164).

Second, on September 14, 2006, Plaintiff filed a new suit in Madison County demanding that a Madison County judge appoint the third arbitrator. Pl.'s 9/14/06 Pet. (2d Supp. R. C677-79; DA 118-20). Without disclosing that Plaintiff's arbitrator had simply failed to participate in the arbitrator selection process for the entire 30-day period, Plaintiff's Madison County petition asserted that a Madison County judge should select the third arbitrator because the parties had been "unable to agree" on a candidate. *Id.* ¶ 7 (2d Supp. R. C678; DA 119). Ultimately, the Madison County court dismissed Plaintiff's petition, reasoning that any such petition "should have been filed in the pending matter in Cook County." 1/10/07 Order (DA 197); 1/10/07 Hrg. Tr. at 17 (DA 214); *see n. 6, supra* (citing authorities allowing judicial notice of non-record court orders). Plaintiff has appealed that decision to the Fifth District Appellate Court.

F. Plaintiff's Response After The Circuit Court Offered A Second Chance To Reach Agreement On Selection Of The Third Arbitrator.

Plaintiff's brief asserts that the Circuit Court allowed the party arbitrators an additional 14 days to choose the third arbitrator, but that despite good faith discussions, with "both parties ha[ving] suggested possible arbitrators," "no final agreement was reached by December 7, 2006." Pl.'s Br. 9. Once again, Plaintiff's account of the facts is incorrect and incomplete.

It is true that after a hearing on State Farm's motion to lift the litigation stay (10/23/06 Hrg. Tr. (1st Supp. R. 31-54)), Judge Agran on November 8, 2006 ordered the party arbitrators to take an additional 14 days to select a third arbitrator for the *Eavenson* arbitration. 11/8/06 Order (2d Supp. R. C739; DA 121); 11/8/06 Hrg. Tr. at 5-7 (1st

Supp. R. 59-61; DA 126-28). Judge Agran's order provided, "If a third arbitrator is not selected within that time, State Farm's motion will be granted (absent exigent circumstances)." 11/8/06 Order (2d Supp. R. C739; DA 121).

On November 9, Mr. Perica faxed a note to Justice Miller again proposing the three potential arbitrators Justice Miller previously rejected. 11/9/06 Fax (2d Supp. R. C787; DA 165). At the same time, Justice Miller sent to Mr. Perica an e-mail and a letter reaffirming his rejection of those three individuals on the ground that they may not be neutral in light of their background and experiences. 11/9/06 E-mail (2d Supp. R. C788; DA 166). Justice Miller also reoffered the four individuals he had previously proposed and Mr. Perica had never addressed. *Id.* Those four individuals included a former general counsel of Southern Illinois University, a former Madison County judge whom Mr. Perica had used as an arbitrator in other cases, and an attorney that now represents Plaintiff's former Freed & Weiss attorneys in their litigation against Plaintiff's current Lakin attorneys. 8/18/06 Ltr. (2d Supp. R. C652; DA 108); 11/27/06 Miller Aff. ¶ 16 (2d Supp. R. C770; DA 148); 2/23/07 Mot. (DA 280-82); *see n. 6, supra* (citing authorities allowing judicial notice of non-record court filings).

On November 16, having received no response to his November 9 e-mail and letter, Justice Miller sent Mr. Perica another letter and e-mail asking Mr. Perica to respond to his arbitrator proposals. 11/16/06 Ltr. (2d Supp. R. C789; DA 167). The next day, Mr. Perica faxed to Justice Miller the names of three new potential arbitrators. 11/17/06 Fax (2d Supp. R. C790; DA 168). He still did not comment on the individuals Justice Miller had proposed. *Id.* Justice Miller telephoned Mr. Perica that same day, November 17, 2006. 11/27/06 Miller Aff. ¶ 9 (2d Supp. R. C768-69; DA 146-47).

Justice Miller rejected two of the newly proposed individuals because of doubts about their ability to be impartial, taking the third individual under advisement. *Id.* Mr. Perica rejected the former Madison County judge he had used in other cases, because of some unidentified objection from Plaintiff's lawyers. *Id.* ¶ 10 (2d Supp. R. C769; DA 147). Justice Miller urged Mr. Perica to consider the other three individuals he had proposed, and he offered two more potential arbitrators, former Chief Judge of the Cook County Circuit Court Donald O'Connell and former Appellate Court Justice Mel Jiganti. *Id.* ¶ 11 (2d Supp. R. C769; DA 147).

On November 21, 2006, after again receiving no response from Mr. Perica, Justice Miller sent him an e-mail and letter. 11/21/06 Ltr. (2d Supp. R. C791-92; DA 169-70). Justice Miller rejected Mr. Perica's remaining candidate because his investigation indicated that the candidate might be less than neutral in the circumstances of the case. *Id.* at 1 (2d Supp. R. C791; DA 169). Justice Miller asked Mr. Perica to select from among the five remaining potential arbitrators he had proposed, before the time within which to select a third arbitrator expired on November 22. *Id.* at 2 (2d Supp. R. C792; DA 170).

At 3:30 p.m. on November 22, 2006—which was not only the deadline for selecting the third arbitrator but also the day before Thanksgiving—Mr. Perica finally responded to Justice Miller with a fax. 11/22/06 Fax Ltr. (2d Supp. R. C793; DA 171). Regarding all six potential arbitrators proposed by Justice Miller, he stated without any further elaboration:

So far I have rejected all of your potential arbitrators for the following reasons: One, I do not know them and no one I know knows them.

Second, I am aware of one potential conflict, and third, all of your submissions have done exclusively defense work.

Id. Although the deadline had been reached, Mr. Perica then proposed four new potential arbitrators. *Id.* The following Monday, five days after the end of the allowed period, Mr. Perica suggested still another new potential arbitrator. 11/27/06 Miller Aff. ¶ 15 (2d Supp. R. C769; DA 147). Given the timing of Mr. Perica's proposals, Justice Miller did not respond to the proposals before the parties returned to Court, but he did conclude that none of the final five late-proposed potential arbitrators would have been suitable. *Id.* ¶¶ 14-15 (2d Supp. R. C769; DA 147).

G. Plaintiff's Short-Lived Agreement To A Third Arbitrator.

On November 28, the parties appeared before Judge Agran to report on whether the party-selected arbitrators had chosen a third arbitrator. When State Farm's counsel related that Mr. Perica had rejected Judge O'Connell and Justice Jiganti because he did not know them and no one he knew knew them, Plaintiff's lawyers immediately interjected that *they* knew Judge O'Connell and Justice Jiganti and that either of those former judges was acceptable as the third arbitrator.⁹

[MR. ROIN:] Two of Justice Miller's suggested arbitrators were former Judge Donald O'Connell, Former Appellate Justice Mel Jiganti. And they were apparently rejected because no one knows who they are. And they don't know how to find out who they are.

* * *

⁹ Mr. Roin is State Farm's Counsel. Messrs. Harte and Sweetnam represented Plaintiff.

MR. HARTE: Excuse me, your Honor, I know Don O’Connell and I know Mel Jiganti. In fact, I hired his daughter so –

THE COURT: So what was the objection to either one of those?

MR. SWEETNAM: I don’t know if we have one.

MR. HARTE: We didn’t have any.

* * *

MR. SWEETNAM: Your Honor, we will except [*sic*] either one.

* * *

THE COURT: All right. You said right now that either one, O’Connell or Jiganti is acceptable to you.

MR. SWEETNAM: Yes.

MR. HARTE: Absolutely.

11/28/06 Hrg. Tr. at 6-11 (1st Supp. R. 69-74; DA 137-42).

Based on Plaintiff’s agreement to accept Judge O’Connell or Justice Jiganti as a third arbitrator, Judge Agran ordered the party-selected arbitrators to attempt to secure the participation of one or the other former judge to fill out the arbitration panel. 11/28/06 Order (2d Supp. R. C795; DA 131). Judge Agran also ordered the parties to report back a week later, on December 7, 2006. *Id.*

The next day, November 29, Justice Miller telephoned Mr. Perica to discuss approaching Judge O’Connell or Justice Jiganti. 12/6/06 Miller Aff. ¶ 4 (2d Supp. R. C850; DA 176). Mr. Perica, however, flatly refused, saying he did not agree with Judge Agran’s November 28 order. *Id.* Justice Miller indicated that he would contact Judge O’Connell or Justice Jiganti himself. *Id.* The following day, he telephoned Judge

O’Connell, who agreed to serve as a third arbitrator. *Id.* ¶ 5 (2d Supp. R. C850; DA 176). Justice Miller then telephoned and left a message for Mr. Perica about a joint communication with Judge O’Connell regarding the arbitration. *Id.* ¶ 6 (2d Supp. R. C850; DA 176). Mr. Perica never responded. *Id.*

Instead, on December 1, 2006, Plaintiff filed a motion seeking reconsideration of the order—to which he previously agreed—requiring the party-selected arbitrators to attempt to secure Judge O’Connell or Justice Jiganti as a third arbitrator. Pl.’s 12/1/06 Mot. (2d Supp. R. C796-99; DA 172-75). Surprisingly, in light of the express discussion at the November 28 hearing of Mr. Perica’s rejection of Judge O’Connell and Justice Jiganti (*see* 11/28/06 Hrg. Tr. at 6, 9-11 (1st Supp. R. 69, 72-74; DA 137, 140-42)), Plaintiff’s motion claimed that his lawyers had been “unaware” that Mr. Perica had rejected Judge O’Connell and Justice Jiganti as arbitrators when they agreed to both former judges at the November 28 hearing. Pl.’s 12/1/06 Mot. at 2 (2d Supp. R. C797; DA 173). Even more surprisingly, given that Mr. Perica had rejected Judge O’Connell and Justice Jiganti because he did not know them (11/22/06 Fax Ltr. (2d Supp. R. C793; DA 171)), Plaintiff’s motion claimed that his lawyers now “respect[ed]” and “agree[d] with” Mr. Perica’s decision to reject Judge O’Connell and Justice Jiganti as arbitrators. Pl.’s 12/1/06 Mot. at 2 (2d Supp. R. C797; DA 173). Having done an about-face on Judge O’Connell and Justice Jiganti, Plaintiff’s motion claimed there was an impasse and demanded that Judge Agran allow a Madison County judge to select the third arbitrator. *Id.* at 2-3 (2d Supp. R. C797-98; DA 173-74).

H. Judge Agran's Order.

When the parties returned to court on December 7, Judge Agran put an end to the arbitration misadventure. He found that Plaintiff clearly waived his right to arbitration, and that State Farm was entitled to do so as well:

There's no question in my mind that the . . . Eavenson parties waived arbitration long ago. I think that at this juncture, based on all that's transpired, that State Farm has the right to waive arbitration pursuant to my reading of the case law.

12/7/06 Hrg. Tr. at 6-7 (1st Supp. R. 83-84; DA 185-86). Judge Agran therefore granted State Farm's motion, vacated the June 29, 2006 stay of judicial proceedings, ordered Plaintiff to respond to the pending motion to dismiss, and denied Plaintiff's motion to reconsider. 12/7/06 Order (R. C1929-30; DA 178-79). On January 5, 2007, Plaintiff appealed from Judge Agran's December 7, 2006 interlocutory order pursuant to Supreme Court Rule 307(a). Pl.'s 1/5/07 Notice of Appeal (R. C1935).

STANDARD OF REVIEW

This Court must affirm Judge Agran's interlocutory decision that the parties have to litigate because they waived their rights to arbitration, unless the decision was an abuse of discretion. As the Illinois Supreme Court has explained, "in an interlocutory appeal, the scope of review is normally limited to an examination of whether or not the trial court abused its discretion in granting or refusing the requested interlocutory relief." *In re Lawrence M.*, 172 Ill. 2d 523, 526 (1996). This Court, moreover, has expressly held that "[r]ulings on motions to stay or compel arbitration are reviewed like interlocutory

appeals, for abuse of discretion.” *Ne. Ill. Reg’l Commuter R.R. Corp. v. Chi. Union Station Co.*, 358 Ill. App. 3d 985, 993 (1st Dist. 2005).

Such deferential review is particularly appropriate when “consider[ing] whether a party’s pretrial conduct amounts to waiver of arbitration.” *Id.* at 995. That is so because “the trial court must necessarily engage in a factual inquiry to determine if a party’s actions constitute waiver.” *Schroeder Murchie Laya Assocs., Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1093 (1st Dist. 2001).

Ignoring the pertinent First District authorities, Plaintiff seeks *de novo* review on the claimed authority of *Household Finance Corp. III v. Buber*, 351 Ill. App. 3d 550, 553 (2d Dist. 2004). But the Second District’s *Buber* opinion expressly refused to follow the First District’s *Schroeder Murchie Laya* decision. *Schroeder Murchie Laya* (from the First District), not *Buber* (from the Second District), is the controlling precedent in this case. Indeed, since the *Buber* decision, the First District has expressly reaffirmed that a “deferential standard of review” governs appeals over “whether a party’s pretrial conduct amounts to waiver of arbitration.” *Ne. Ill. Reg’l Commuter R.R.*, 358 Ill. App. 3d at 995.

Reviewing Judge Agran’s order under the deferential abuse of discretion standard, this Court should ask only whether “a sufficient showing was made to sustain the order entered by the court.” *Id.* And an abuse of discretion can be found only “when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view.” *Rosen v. Ingersoll-Rand Co.*, 372 Ill. App. 3d 440, 448 (1st Dist. 2007).

ARGUMENT

The history of this case, as well as the three other cases the Supreme Court transferred from Madison County to Cook County, makes clear that Plaintiff’s lawyers

believe the only chance for success on their claims against State Farm is to secure a Madison County forum. Plaintiff's lawyers apparently thought they could game the arbitration provision in the applicable insurance policy to effectively undo the Supreme Court's order transferring this case to Cook County. But their effort to manufacture an impasse and return to Madison County for appointment of a favorable third arbitrator failed. Judge Agran plainly was correct in concluding that Plaintiff waived his right to demand arbitration and that State Farm was free to do the same. Nothing in Plaintiff's brief casts any doubt on Judge Agran's conclusion, let alone establishes an abuse of discretion. Accordingly, there is no reason to indulge Plaintiff's manipulative effort to evade the Supreme Court's transfer order and secure Madison County justice.

I. Judge Agran Did Not Abuse His Discretion In Returning the Parties' Dispute To Litigation After Finding That The Parties Waived Their Rights To Arbitration.

Far from abusing his discretion, Judge Agran was absolutely right to recommence litigation of the parties' dispute after finding that plaintiff waived his right to demand arbitration and that State Farm was free to do the same. The evidence is overwhelming that Plaintiff waived his arbitration rights. *See* Part I.A., *infra*. There likewise can be no doubt that State Farm was entitled to waive its arbitration rights. *See* Part I.B., *infra*. And the resulting mutual waiver of arbitration plainly warranted resuming litigation of the parties' dispute. *See, e.g., Ne. Ill. Reg'l Commuter R.R. Corp. v. Chi. Union Station Co.*, 358 Ill. App. 3d 985, 995-99 (1st Dist. 2005) (upholding decisions denying stay of arbitration and refusing to compel arbitration where one party expressly waived arbitration and other did so impliedly); *Schroeder Murchie Laya Assocs., Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1094-99 (1st Dist. 2001) (affirming denial of motion to compel arbitration where one party expressly waived arbitration and other did

so impliedly); *Feldheim v. Sims*, 326 Ill. App. 3d 302, 309-13 (1st Dist. 2001) (reversing decision granting motion to compel arbitration where one party expressly waived arbitration and other did so impliedly).

A. Plaintiff Repeatedly Waived His Right To Demand Arbitration.

Judge Agran did not abuse his discretion in finding that Plaintiff waived any right to seek arbitration of his dispute with State Farm. The “well-settled rule” is that “a contractual right to arbitrate can be waived like any other contractual right.” *Schroeder Murchie Laya*, 319 Ill. App. 3d at 1095. “[I]n determining whether a party has waived its contractual right to arbitrate, the crucial inquiry is whether the party has acted inconsistently with its right to arbitrate.” *Id.* at 1098. Such conduct constitutes waiver because it indicates that the party has “abandoned its right” to arbitrate. *Id.* at 1096. Throughout the course of this case, Plaintiff on numerous occasions waived arbitration through three types of conduct flatly inconsistent with his arbitration rights.

First, Plaintiff tried for several years to litigate his dispute with State Farm. Despite the express arbitration provision in the applicable insurance policy (Krause Policy at 10 (2d Supp. R. C78; DA 11)), Plaintiff filed suit against State Farm. Compl. (R. C435-62); 1st Am. Compl. (2d Supp. R. C8-33; DA 34-59). He then sought extensive discovery, first in Madison County and again in Cook County, both times pursuing motion practice on the subject. Pl.’s 1st Req. for Admis. (R. C502-05); Pl.’s 1st Set of Interrogs. (R. C506-17); Pl.’s 1st Req. for Produc. (R. C518-22); Pl.’s 2d Req. for Produc. (R. C523-29); Pl.’s Supp. Reqs. for Produc. (R. C530-33); Pl.’s 2/16/05 Mot. (2d Supp. R. C107-10); Pl.’s 1st Set of Reqs. for Admis. (2d Supp. R. C376-85); Pl.’s 1st Set of Interrogs. (2d Supp. R. C387-94); Pl.’s 1st Req. for Produc. (2d Supp. R. C396-400); Pl.’s 11/14/05 Mem. (2d Supp. R. C439-48; DA 74-83). Only after being rebuffed in his

efforts to obtain discovery in litigation did Plaintiff submit his so-called “consent” to arbitration. 3/23/05 Order (R. C1520; DA 71); 2/24/06 Order (2d Supp. R. C518; DA 84); Pl.’s 3/16/06 Consent (2d Supp. R. C519-20; DA 86-87).

Such efforts to litigate a suit subject to arbitration, by themselves, are sufficient to constitute a waiver of arbitration rights. Initiating litigation over one’s claims certainly can qualify as waiver. *See Schroeder Murchie Laya*, 319 Ill. App. 3d at 1098 (instituting legal proceeding can waive arbitration rights); *Yates v. Doctor’s Assocs., Inc.*, 193 Ill. App. 3d 431, 440 (5th Dist. 1990) (a party’s “initiat[ion of] its own proceedings to place the dispute between the parties before a judicial forum for determination . . . was inconsistent with its contractual right to require arbitration and was an abandonment of that right”); *Schwarz v. Buell*, 137 Ill. App. 3d 29, 32 (5th Dist. 1985) (“the plaintiff sellers’ choice to litigate rather than arbitrate was sufficient to constitute waiver”). The same is true for active use of discovery procedures. *See Schroeder Murchie Laya*, 319 Ill. App. 3d at 1098 (that party “engaged in discovery at the trial court level” was not “consistent with [the actions] of a party intent on retaining a right to arbitrate”); Lee Hugh Goodman, *Nichols Illinois Civil Practice: ADR Handbook* § 2:113 (2000 & Supp. 2007) (“Active use of discovery procedures can lead to a waiver.”). And waiver can result when a party does not seek arbitration until its litigation strategy fails. *See, e.g., Feldheim*, 326 Ill. App. 3d at 313 (waiver resulted where defendants “voluntarily participated in the litigation, never raising their right to arbitrate until after their motions were denied,” because “[t]he law does not permit them to forum shop until they receive the desirable decision”). All of these grounds support Judge Agran’s finding of waiver here.

Second, Plaintiff actively opposed arbitrating his claims pursuant to the applicable arbitration provision. In his complaint, Plaintiff alleged that “[t]he arbitration clause is wrongfully used by State Farm to prevent plaintiff and the class from effectively vindicating their statutory and common law causes of action.” 1st Am. Compl. ¶ 9 (2d Supp. R. C12; DA 38). When State Farm sought arbitration of his claims, he refused to join in such proceedings despite State Farm’s offer to shoulder virtually all of the costs of arbitration. 2/22/05 Ltr. (2d Supp. R. C149-50; DA 67-68); 3/7/05 Ltr. (2d Supp. R. C151; DA 69). And in trying to justify his efforts to obtain extensive discovery in litigation, Plaintiff claimed that “(1) the arbitration clause will not permit resolution of Plaintiff’s claims, and (2) the arbitration clause is an unconscionable attempt to limit coverage.” Pl.’s 11/14/05 Mem. at 3 (2d Supp. R. C441; DA 76).

Plaintiff’s purported “consent” to arbitration only continued his resistance to the arbitration specified by the governing arbitration provision. Plaintiff “consented” to “arbitration of the claims herein . . . without any prejudice to any other rights he may have.” Pl.’s 3/16/06 Consent (2d Supp. R. C519; DA 86). Consistent with his position that “the arbitration clause will not permit resolution of Plaintiff’s claims” (Pl.’s 11/14/05 Mem. at 3 (2d Supp. R. C441; DA 76)), Plaintiff pointedly did not consent to the limited arbitration described in the arbitration provision. 4/6/06 E-mail (2d Supp. R. C569-70; DA 88-89). He instead insisted that any arbitration should encompass all issues relating to his claims against State Farm, contrary to his own interpretation of the arbitration provision’s plain language. Pl.’s 5/19/06 Resp. at 4-5 (2d Supp. R. C577-78; DA 94-95). Over Plaintiff’s vehement objection, Judge Agran had to specifically limit arbitration to the single issue subject to arbitration under the applicable policy. 6/29/06 Order (2d

Supp. R. C622; DA 97) (“The arbitrators’ decision shall be limited to whether or not the medical expenses were reasonable and necessary, with the amount due being equal to the reasonable and necessary medical expenses only.”).

Plaintiff’s efforts to block arbitration constituted a clear waiver of his right to later seek arbitration. As the First District has recognized, such efforts are not “consistent with those of a party intent on retaining a right to arbitrate.” *Schroeder Murchie Laya*, 319 Ill. App. 3d at 1098. Indeed, an “attempt to block arbitration” makes any later “plea to Illinois’ public policy [favoring arbitration],” like Plaintiff’s (at 13), “disingenuous.” *Id.* at 1099; *see also* Goodman, *supra*, § 2:113 (“Opposing an opponent’s motion to compel arbitration can operate as a waiver of arbitration.”). It is beyond ironic, moreover, that Plaintiff now proclaims a need for arbitration to expedite resolution of the parties’ dispute and avoid wasted resources. Pl.’s Br. 13. Plaintiff resisted arbitration for three years while furiously multiplying proceedings, and now has obtained a stay of dismissal proceedings pending this appeal, which is supposed to be expedited but (due to Plaintiff’s multiple requests for extensions of time) has proceeded at a leisurely pace as more than six months passed before Plaintiff filed his opening brief. *See* 2/14/07 Order (DA 241); Ill. Sup. Ct. R. 307(a), (c); 12/7/06 Order (R. C1929-30; DA 178-79); Pl.’s Br. 18. Plaintiff’s long and active opposition to arbitration constitutes a clear waiver of his right to demand arbitration now.

Third, it is beyond dispute that Plaintiff deliberately refused to cooperate in good faith in the process of selecting a third arbitrator. The arbitrator he selected, Bob Perica, made no effort whatsoever to fulfill his duty to work with the arbitrator selected by State Farm, former Justice Ben Miller, in choosing a third arbitrator within the 30-day period

allowed by the arbitration provision. 8/30/06 Miller Aff. ¶¶ 7-14 (2d Supp. R. C643-44; DA 99-100); 11/27/06 Miller Aff. ¶ 2 (2d Supp. R. C768; DA 146). Despite repeated pleas from Justice Miller, Mr. Perica simply refused to engage in the selection process. 8/30/06 Miller Aff. ¶¶ 7-14 (2d Supp. R. C643-44; DA 99-100).

Then, when given a second chance to cooperate with Justice Miller, Mr. Perica manufactured disagreement by rejecting suitable candidates for patently absurd reasons. 11/27/06 Miller Aff. ¶¶ 10, 13 (2d Supp. R. C769; DA 147). His claim that he could not agree to Justice Jiganti or Judge O'Connell because he did not know them and no one he knows knows them (11/22/06 Fax Ltr. (2d Supp. R. C793; DA 171)), for instance, was quickly proven false when Plaintiff's lawyers insisted that they knew both jurists well and would accept either as a third arbitrator. 11/28/06 Hrg. Tr. at 6-11 (1st Supp. R. 69-74; DA 137-42).

Plaintiff's lawyers then promptly embraced equally absurd claims in repudiating their three-day-old agreement to accept Justice Jiganti or Judge O'Connell as a third arbitrator. Plaintiff's lawyers claimed that when they agreed to Justice Jiganti and Judge O'Connell, they had been "unaware" that Mr. Perica had rejected them. Pl.'s 12/1/06 Mot. at 2 (2d Supp. R. C797; DA 173). But Mr. Perica's rejection of Justice Jiganti and Judge O'Connell was noted in the filings of both parties and discussed on the record at the hearing immediately before Plaintiff's counsel agreed to them as arbitrators. *See* Defs.' 11/28/06 Status Rep. at 2 (2d Supp. R. C765); 11/28/06 Perica Aff. ¶ 2, Ex. B (2d Supp. R. C741, C758, C761); 11/28/06 Hrg. Tr. at 6-11 (1st Supp. R. 69-74; DA 137-42). Similarly, Plaintiff's lawyers claimed that they reneged on their agreement to Justice Jiganti and Judge O'Connell because they "respect[ed] Mr. Perica's independent,

professional judgment” on the matter. Pl.’s 12/1/06 Mot. at 2 (2d Supp. R. C797; DA 173). But it defies belief that Plaintiff’s lawyers “respected” Mr. Perica’s “judgment” on the selection matter when Mr. Perica claimed to not know Justice Jiganti or Judge O’Connell. *See* 11/22/06 Fax Ltr. (2d Supp. R. C793; DA 171). It is obvious that the real reason Plaintiff reneged was to evade the Supreme Court’s order transferring this case from Madison County to Cook County: by manufacturing an “impasse” in arbitrator selection, Plaintiff created a pretext for running back to Madison County for selection of the third arbitrator.

Plaintiff’s failure to comply, in good faith, with the rules governing an arbitration is an independent basis for finding that Plaintiff waived his right to demand arbitration. Illinois courts have not hesitated to find waiver when a party failed to exercise its arbitration rights in accord with the letter and spirit of the applicable arbitration provisions and court orders. *See Fu Chin Printing Co. v. Lord Label & Mfg. Co.*, 40 Ill. App. 3d 829, 831-32 (2d Dist. 1976) (“By its failure to execute its right in accordance with the order of the court, defendant waived arbitration”); Goodman, *supra*, § 2:113 (“Waiver may also result from a failure to comply with the rules governing the arbitration.”).

Individually, Plaintiff’s efforts to litigate his claims, his consistent opposition to arbitration, and his deliberate failure to cooperate in selecting a third arbitrator each offer compelling grounds for finding that Plaintiff waived his right to seek arbitration. Together, this conduct presents an irrefutable basis for finding waiver. That much is plain from the First District’s decision in *Schroeder Murchie Laya*.

In that case, this Court affirmed an order denying the plaintiff's motion to compel arbitration. 319 Ill. App. 3d at 1095-99. The Court reasoned that the plaintiff had waived its right to arbitration by initiating the litigation, engaging in discovery, opposing the defendant's attempts to compel arbitration, and otherwise seeking to litigate the suit. *Id.* at 1098. "None of these actions," the Court concluded, "are consistent with those of a party intent on retaining a right to arbitrate and, therefore, constitute a sufficient showing to sustain the trial court's order." *Id.*

Consisting of not only efforts to litigate and prior opposition to arbitration, but also failures to comply with arbitration procedures, Plaintiff's conduct is an even stronger candidate for waiver than that of the *Schroeder Murchie Laya* plaintiff. There can be no doubt, therefore, that Judge Agran did not abuse his discretion in finding that Plaintiff waived his arbitration rights.

Indeed, Plaintiff's opening brief does not even mention, much less challenge, Judge Agran's finding that Plaintiff waived his arbitration rights. That telling omission forfeits any claim that Judge Agran erred in so finding. Supreme Court Rule 341(h)(7), regarding the Argument section of an appellant's opening brief, could not be clearer: "Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on a petition for rehearing." Plaintiff thus has waived any challenge to Judge Agran's finding that Plaintiff waived his arbitration rights. *See Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill. App. 3d 597, 600 (1st Dist. 1999) (affirming on waiver grounds).

B. State Farm Was Entitled To Waive Its Right To Pursue Arbitration.

Judge Agran also did not abuse his discretion in finding that State Farm had the right to waive arbitration. As already noted, "a contractual right to arbitrate can be waived like any other contractual right." *Schroeder Murchie Laya*, 319 Ill. App. 3d at

1095. With its motion to lift the stay of judicial proceedings and compel a response to the pending motion to dismiss, State Farm merely invoked that “well-settled rule” to relinquish its right to arbitrate Plaintiff’s claims and resume litigation of the parties’ dispute. *Id.*

It is true that State Farm previously requested arbitration of Plaintiff’s claims and obtained an order staying the case pending such arbitration. Defs.’ 4/11/06 Mot. (2d Supp. R. C555-73); 6/29/06 Order (2d Supp. R. C622; DA 97). But those facts do not diminish State Farm’s right to later waive arbitration and proceed in court. Again, *Schroeder Murchie Laya* is directly on point.

In that case, the defendant successfully moved to compel arbitration and stay court proceedings in a contract action. 319 Ill. App. 3d at 1091. When neither party commenced an arbitration in the 90 days allowed by the court order staying litigation, the circuit court reinstated the case. *Id.* After the defendant counterclaimed, the plaintiff demanded arbitration. *Id.* at 1091-92. The circuit court agreed with the defendant that litigation must continue because the plaintiff waived any right to arbitration, and this Court affirmed. *Id.* at 1092, 1094-99. That the defendant had previously sought arbitration was no barrier to its subsequent waiver of arbitration rights when the plaintiff demanded arbitration. *Id.* at 1094-99. Just so here.

Indeed, State Farm had good reason to waive its previously asserted arbitration rights. After Plaintiff “consented” to arbitration, it quickly became obvious that arbitration would be a long, drawn-out affair beset by collateral litigation, rather than the swift and efficient resolution State Farm sought. *See* Defs.’ 8/31/06 Mot. at 4-5 (2d Supp. R. C627-28; DA 113-14). Plaintiff repeatedly showed that he had no intent to

comply with the arbitration procedures and limitations in either the applicable policy provision (Krause Policy at 10 (2d Supp. R. C78; DA 11)) or Judge Agran's arbitration order (6/29/06 Order (2d Supp. R. C622; DA 97)).

As already described, Plaintiff tried to manufacture an "impasse" in the selection of a third arbitrator, by having his arbitrator first stonewall Justice Miller's efforts to reach agreement and then groundlessly reject impartial arbitrator candidates (all in contravention of the terms of the arbitration provision). *See* pp. 32-34, *supra*; Krause Policy at 10 (2d Supp. R. C78; DA 11). Plaintiff filed a new suit in Madison County asking a judge in that forum to appoint a third arbitrator (contrary to the instructions of the arbitration provision and Illinois law). *See* Pl.'s 9/14/06 Pet. (2d Supp. R. C677-79; DA 118-20); pp. 48-50, *infra*. And Plaintiff consistently opposed the narrow arbitration provided for in the insurance policy, demanding instead a broad arbitration of all of his claims (despite his admission that the arbitration provision did not allow resolution of his claims). Defs.' 8/31/06 Mot. at 5 (2d Supp. R. C628; DA 114); Krause Policy at 10 (2d Supp. R. C78; DA 11); 6/29/06 Order (2d Supp. R. C622; DA 97); Pl.'s 11/14/05 Mem. at 3 (2d Supp. R. C441; DA 76). With collateral litigation over each of these matters and the validity of any arbitration order looming, litigation of Plaintiff's claims promised a more rapid and efficient resolution of the parties' dispute. Defs.' 8/31/06 Mot. at 5-6 (2d Supp. R. C628-29; DA 114-15).

Courts have recognized that changes in the circumstances of an arbitration offer legitimate grounds for withdrawing a previous arbitration request. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 63 n.25 (1st Cir. 2006) (defendant "could seek to withdraw [its] motion to compel [arbitration] if it does not like the conditions that now apply to the

arbitral forum”); *Keating v. Superior Court*, 645 P.2d 1192, 1210 (Cal. 1982) (defendant “should be given the option of remaining in court rather than submitting to classwide arbitration”), *rev’d in part, dismissed in part on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984). The idea is that the changed circumstances effectively invalidate the conditions under which the parties agreed to arbitrate. The prospect of massive collateral litigation in two separate courts and a potential runaway arbitration certainly presented changed circumstances that gave State Farm good reason to withdraw its arbitration request.

Plaintiff disputes that obvious conclusion, claiming that he and his arbitrator “made every reasonable effort to cooperate in the selection of a third arbitrator.” Pl.’s Br. at 15. The evidence is to the contrary. Mr. Perica made no effort at all to cooperate in the selection of a third arbitrator during the 30 days the arbitration agreement allowed for that task, as Justice Miller attested without contradiction. 8/30/06 Miller Aff. ¶¶ 7-14 (2d Supp. R. C643-44; DA 99-100). During the allowed time, Justice Miller twice telephoned and twice wrote to Mr. Perica, eventually proposing four arbitrators. *Id.* Mr. Perica ignored Justice Miller’s communications and sat silent for the entire 30-day period. *Id.*

Plaintiff’s assertion (at 16) that “Mr. Perica sent Justice Miller an e-mail in August, 2006 explaining the delay in submitting names” is simply false. The document cited for that assertion is a letter dated September 1, 2006 (*after* the August 31 deadline for selecting an arbitrator and *after* State Farm had filed its motion to lift the stay and resume litigation) that simply promises to belatedly supply potential arbitrator names. 9/1/06 Ltr. (2d Supp. R. C745); *see also* 9/1/06 Ltr. (2d Supp. R. C782; DA 160).

Moreover, on September 7, 2006, when Mr. Perica tried to explain his acknowledged failure to participate in arbitrator selection, he falsely wrote that he “was totally unaware of any time limit or deadlines related to the subject arbitration,” thereby misrepresenting the fact that Justice Miller twice alerted Mr. Perica (in writing) to the looming deadline. 9/7/06 Ltr. (2d Supp. R. C785; DA 163); 8/18/06 Ltr. (2d Supp. R. C651; DA 107); 8/25/06 Ltr. (2d Supp. R. C653; DA 109). Plaintiff’s attempt to ignore and minimize Mr. Perica’s uncooperative conduct during the initial opportunity to select a third arbitrator is a gross mischaracterization of the record.

The same is true of Plaintiff’s description of Mr. Perica’s second chance to cooperate with Justice Miller in selecting a third arbitrator. When Plaintiff asserts that “[t]here were several arbitrators suggested and rejected by both arbitrators but no decision reached” (Pl.’s Br. 16), he omits that Mr. Perica waited until the eleventh hour (or later) to reject five of Justice Miller’s six candidates and propose five of his own candidates. 11/27/06 Miller Aff. ¶¶ 6-16 (2d Supp. R. C768-70; DA 146-48). He also omits that the reason Mr. Perica gave for rejecting Judge O’Connell and Justice Jiganti was proved false when Plaintiff’s lawyers trumpeted their relationships with both of those former judges. 11/22/06 Fax Ltr. (2d Supp. R. C793; DA 171); 11/28/06 Hrg. Tr. at 8 (1st Supp. R. 71; DA 139). Likewise, when Plaintiff writes that “[i]t appeared the two arbitrators had narrowed the list to two potential candidates” (Pl.’s Br. 16), he hides the fact that Plaintiff’s lawyers affirmatively and without reservation agreed to accept Judge O’Connell or Justice Jiganti as the third arbitrator. 11/28/06 Hrg. Tr. at 6-11 (1st Supp. R. 69-74; DA 137-42). And, finally, when Plaintiff asserts that the selection of Judge O’Connell or Justice Jiganti merely “was not completed” (Pl.’s Br. 16), he leaves out that

Mr. Perica flatly refused to contact either former judge and that Plaintiff's lawyers reneged on their express agreement in open court to accept either former judge as the third arbitrator. 12/6/06 Miller Aff. ¶ 4 (2d Supp. R. C850; DA 176); Pl.'s 12/1/06 Mot. at 2 (2d Supp. R. C797; DA 173).

Plaintiff resorts to similar mischaracterizations of the record in trying to criticize State Farm's arbitrator selection efforts. In particular, Plaintiff's claim that he consented to arbitration and agreed to a stay of the litigation, and then State Farm waited 138 days to select its arbitrator (Pl.'s Br. 10), is a gross distortion of the facts. In the first place, Plaintiff did *not* consent to the narrow arbitration provided for in the insurance policy; instead, he demanded a broad arbitration of his "claims," despite having previously admitted that the arbitration clause did not allow resolution of his claims. *See* p. 31, *supra*. In addition, although purporting to favor a stay in principle, Plaintiff *opposed* State Farm's stay motion. Consequently, the stay order was not entered until June 29, 2006, when Judge Agran rejected Plaintiff's position concerning the scope of arbitration. 6/29/06 Order (2d Supp. R. C622; DA 97).¹⁰ Thus, State Farm used only one month (June 29 to August 1), not 138 days, to select Justice Miller. In any event, the insurance policy's arbitration provision sets no deadline for the selection of party arbitrators, in contrast to the firm 30-day deadline for selecting a third arbitrator. Krause Policy at 10

¹⁰ As noted earlier (at n. 8, *supra*), the March 2005 agreed order Plaintiff references (at 4) had nothing to do with arbitration. Rather, it stayed the *Snead* litigation pending State Farm's Rule 384 motion to transfer *Eavenson* and *Jones* to Cook County. 3/8/05 Order (R. C1516; DA 70).

(2d Supp. R. C78; DA 11). State Farm's arbitrator selection efforts were perfectly reasonable.

From beginning to end, the conduct of Mr. Perica and Plaintiff's lawyers was the opposite of "every reasonable effort to cooperate in the selection of a third arbitrator." Indeed, Mr. Perica's conduct, together with his deceptive explanations for that conduct, indicate that Plaintiff disregarded entirely his duty under the applicable arbitration provision to select a "competent and impartial arbitrator." Krause Policy at 10 (2d Supp. R. C78; DA 11). In reality, the conduct of Mr. Perica and Plaintiff's lawyers was calculated to force an impasse over the selection of the third arbitrator so that Plaintiff could ask a Madison County judge to make the selection, thereby evading the Supreme Court's order transferring this case from Madison County to Cook County. State Farm had ample reason to waive its right to arbitrate by withdrawing its previous request for arbitration.

C. Judge Agran Had Authority To Lift The Stay Of Judicial Proceedings.

Notwithstanding the parties' mutual waiver of arbitration, Plaintiff contends that under the Uniform Arbitration Act Judge Agran lacked the authority to lift the stay of judicial proceedings. Pl.'s Br. 13-14 (citing 710 ILCS 5/2). On Plaintiff's view, a court can decide only whether an arbitration agreement exists and whether it covers the dispute at issue, with waiver (and other) questions reserved for the arbitrators. *Id.* at 14. The many cases that, after finding waiver, refuse to stay litigation pending arbitration obviously disprove Plaintiff's contention. *See, e.g., Ne. Ill. Reg'l Commuter R.R.*, 358 Ill. App. 3d at 995-99 (upholding refusal to compel arbitration on waiver grounds);

Schroeder Murchie Laya, 319 Ill. App. 3d at 1094-99 (same); *Feldheim*, 326 Ill. App. 3d at 309-13 (reversing order compelling arbitration on waiver grounds).

It thus is not surprising that none of the cases Plaintiff cites actually support his position. *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 447-48 (1988), addresses when the scope of an arbitration clause should be decided by a court (where the arbitration clause is narrow or its applicability is clear) and when that matter should be left for an arbitrator (where the arbitration clause is broad and its applicability is unclear). It says nothing about whether a court may decide waiver questions. The same is true of the Fifth District's *Bess v. DirecTV, Inc.*, 351 Ill. App. 3d 1148, 1152-55 (5th Dist. 2004), which merely holds that an arbitrator should decide whether a broad agreement requiring arbitration of "any dispute" allows class arbitration.

As for the Fourth District's *Menard County Housing Authority v. Johnco Construction, Inc.*, 341 Ill. App. 3d 460, 465-66 (4th Dist. 2003), that decision rules only that whether a party "forfeit[ed] its right to arbitration by failing to take timely action" is a "procedural issue for the arbitrator to decide," because "questions involving contractual time limitations usually require construing the contract in light of the customs and practices of the industry, a task peculiarly within the competence of the arbitrator." (internal quotation marks omitted). Here, Judge Agran's ruling that Plaintiff waived his right to arbitrate clearly did not implicate any "customs and practices of the industry." Moreover, the Fourth District's *Johnco Construction* opinion simply does not address, let alone support, Plaintiff's position that a court lacks the power to hold that a party's conduct during litigation constitutes a waiver of the right to arbitrate.

In any event, even if the cases Plaintiff cites actually supported his position (which they do not), none of those cases can overcome the well-established First District precedent that courts can and should decide whether the parties have waived arbitration. Indeed, in *Schroeder Murchie Laya* the First District rejected exactly the argument Plaintiff asserts—that a court’s “sole task” under the Uniform Arbitration Act is “to determine whether an arbitration agreement exist[s]”—holding instead that the trial court “clearly had discretion to determine whether [the plaintiff’s] prior actions constituted waiver of its right to compel arbitration.” 319 Ill. App. 3d at 1095. And on the authority of *Schroeder Murchie Laya*, this Court in *Northeast Illinois Regional Commuter Railroad*, expressly “reject[ed]” the “contention that the court improperly decided the [arbitration] waiver issue rather than permitting it to be addressed by an arbitration panel.” 358 Ill. App. 3d at 999. These First District precedents conclusively refute Plaintiff’s assertion that Judge Agran lacked authority to lift the stay of judicial proceedings on waiver grounds.

II. Plaintiff Mistakes Judge Agran’s Waiver Ruling For A Revocation Of The Applicable Arbitration Agreement.

Plaintiff further claims that Judge Agran erred because he allowed State Farm to unilaterally revoke its agreement to arbitrate. In reality, however, State Farm did not “revoke” the arbitration agreement at issue. Instead, both Plaintiff and State Farm waived their rights to pursue arbitration under the agreement. *See* pp. 29-41, *supra*. Judge Agran merely enforced the parties’ mutual waiver of arbitration, as the many cases refusing to order arbitration on waiver grounds previously have done. 12/7/06 Hrg. Tr. at 6-7 (1st Supp. R. 83-84; DA 185-86); *see, e.g., Ne. Ill. Reg’l Commuter R.R.*, 358 Ill. App. 3d at 995-99 (no arbitration where one party expressly waived arbitration and other

did so impliedly); *Schroeder Murchie Laya*, 319 Ill. App. 3d at 1094-99 (same); *Feldheim*, 326 Ill. App. 3d at 309-13 (same).

Revocation allows one party to unilaterally repudiate an agreement. Waiver, by contrast, happens only when both parties relinquish, by word or deed, their rights under an agreement. An arbitration agreement ordinarily cannot be revoked. 710 ILCS 5/1 (“A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract”). But it is beyond dispute that parties may waive their rights to demand arbitration, even when the arbitration agreement makes arbitration “mandatory.” See *Ne. Ill. Reg’l Commuter R.R.*, 358 Ill. App. 3d at 987, 996-99 (finding waiver where agreement provided that “any difference or dispute . . . shall be submitted to three competent arbitrators”); *Hilti, Inc. v. Griffith*, 68 Ill. App. 3d 528, 531, 533 (1st Dist. 1978) (finding waiver where agreement provided that “any controversy or claim . . . shall be finally settled by arbitration”). Waiver, not revocation, is the issue in this case, as Judge Agran made explicit when he ordered the resumption of litigation. 12/7/06 Hrg. Tr. at 6-7 (1st Supp. R. 83-84; DA 185-86).

Because this case concerns mutual waiver of the right to demand arbitration, not unilateral revocation of the underlying arbitration agreement, Plaintiff’s revocation authorities are completely irrelevant to this case. Indeed, Plaintiff’s lead case, *City State Bank of Chicago v. Detrick*, 236 Ill. App. 350 (1st Dist. 1925), could hardly be less analogous. In *Detrick*, the Appellate Court ruled, under a now-repealed arbitration statute, that a plaintiff that lost an arbitration could not unilaterally dismiss its suit before

the defendant enforced the arbitration award. *Id.* at 357-58. Not only was there no mutual waiver, the plaintiff was trying to repudiate an already-decided arbitration. *Detrick* obviously has no application here, where the evidentiary hearing had not even begun.

The same is true of the federal district court decisions from New York and Connecticut that Plaintiff cites. Each merely holds that a party may not unilaterally withdraw from arbitration to initiate litigation over the same dispute when the other party retains a right to insist on arbitration. *Carey v. Conn. Gen. Life Ins. Co.*, 93 F. Supp. 2d 165, 169 (D. Conn. 1999) (compelling arbitration where plaintiff commenced litigation after withdrawing from arbitration and there was no claim that defendant waived arbitration); *Mihalakis v. Pac. Brokerage Servs., Inc.*, No. 91 Civ. 994, 1991 WL 280236, *3-*4 (S.D.N.Y. Dec. 23, 1991) (same). Neither case involved mutual waiver, and thus neither says anything about the circumstances in which such waivers can be enforced. Therefore, even if the decisions were precedential in an Illinois appellate court (which they are not), they would have no bearing on this case.

Plaintiff erroneously further asserts that once he “consented” to arbitration and Judge Agran stayed judicial proceedings, the parties had to proceed with arbitration. As we have explained (*see* p. 31, *supra*), of course, Plaintiff did not actually consent to arbitration under the insurance policy. Moreover, it is well-established that even after a party requests and a case has been ordered to arbitration, a court still may find a mutual waiver warranting the resumption of litigation. That is what happened in *Schroeder Murchie Laya* after the parties failed to initiate arbitration within the time allowed. 319 Ill. App. 3d at 1091, 1098. And that is what happened in *Fu Chin Printing* after the

defendant failed to comply with the trial court's arbitration order. 40 Ill. App. 3d at 831-32. These cases reveal an important distinction ignored by Plaintiff. As already noted, an *arbitration agreement* ordinarily is irrevocable. 710 ILCS 5/1. But a *request or order to arbitrate under such an agreement* may be withdrawn (or "revoked"), and litigation may be ordered to resume, where the party currently demanding arbitration has waived its arbitration rights, as *Schroeder Murchie Laya* and *Fu Chin Printing* confirm.

Moreover, State Farm's waiver was by no means tardy. As soon as it became obvious that Plaintiff planned to force collateral litigation by manufacturing an "impasse" over the third arbitrator, State Farm withdrew its request to arbitrate and moved to resume litigation. *See* Defs.' 8/31/06 Mot. at 4-5 (2d Supp. R. C627-28; DA 113-14). The evidentiary hearing had not commenced, let alone concluded. Unlike the plaintiff in *Detrick*, which attempted to walk away from an arbitration after losing (236 Ill. App. at 357-58), State Farm was not acting to evade an unfavorable ruling relating to the arbitration. Indeed, although Plaintiff purports to be relying on an established rule, neither *Detrick* nor any other case he cites actually prohibits a party from withdrawing its request for arbitration where, as here, the other party previously waived its right to demand arbitration and there has been no substantive decision in the arbitration itself. The bottom line is that Judge Agran did not remotely abuse his discretion in finding that State Farm was free to waive its right to arbitrate here.

III. Plaintiff Mistakes Judge Agran's Waiver Ruling For A Decision Resolving An Impasse Over A Third Arbitrator.

Plaintiff finally argues that Judge Agran had no authority to resolve an impasse over selection of a third arbitrator. According to Plaintiff, Judge Agran should have allowed the selection of a third arbitrator in the Madison County proceedings Plaintiff

initiated in September 2006. This argument—another gambit in Plaintiff’s endless machinations to evade the Supreme Court’s transfer order and to secure a Madison County forum—is a complete non sequitur.

Judge Agran’s December 7, 2007 order was not an effort to resolve an impasse over selection of a third arbitrator. Rather, Judge Agran restored the parties’ dispute to litigation because Plaintiff waived his right to arbitration and State Farm was entitled to do the same. 12/7/06 Hrg. Tr. at 6-7 (1st Supp. R. 83-84; DA 185-86) (“There’s no question in my mind that the . . . Eavenson parties waived arbitration a long time ago. I think that at this juncture, based on all that’s transpired, that State Farm has the right to waive arbitration pursuant to my reading of the case law.”). A mutual waiver of arbitration requires litigation no matter how the arbitration provision resolves other arbitration issues. *See, e.g., Ne. Ill. Reg’l Commuter R.R.*, 358 Ill. App. 3d at 995-99 (no arbitration where one party expressly waived arbitration and other did so impliedly); *Schroeder Murchie Laya*, 319 Ill. App. 3d at 1094-99 (same); *Feldheim*, 326 Ill. App. 3d at 309-13 (same). The contractual method for resolving an impasse over the selection of a third arbitrator thus is irrelevant to this appeal of Judge Agran’s December 7 order.

It follows that Plaintiff’s invocation (at 12) of the *contra proferentum* principle of interpretation is to no avail. There is no contract language regarding mutual waiver of arbitration to be interpreted against State Farm. Likewise, the Uniform Arbitration Act provision (710 ILCS 5/3) that terminates an arbitration agreement if the parties do not agree on a method for selecting arbitrators has no bearing on this appeal, even if one could draw some kind of negative inference from that provision to limit a court’s authority to terminate an arbitration agreement. Judge Agran did not terminate the

applicable arbitration agreement. He found that the parties each waived their right to arbitration under that agreement. 12/7/06 Hrg. Tr. at 6-7 (1st Supp. R. 83-84; DA 185-86). And the cases clearly authorized Judge Agran to make that decision. *See, e.g., Ne. Ill. Reg'l Commuter R.R.*, 358 Ill. App. 3d at 995-99 (no arbitration where one party expressly waived arbitration and other did so impliedly); *Schroeder Murchie Laya*, 319 Ill. App. 3d at 1094-99 (same); *Feldheim*, 326 Ill. App. 3d at 309-13 (same).

Finally, even had Judge Agran erred in finding a mutual waiver of arbitration and reinstating litigation of the parties' dispute (which he did not), Plaintiff has no right to pursue selection of a third arbitrator in Madison County. As the Madison County Circuit Court itself ruled in dismissing Plaintiff's Petition To Select a Third Arbitrator, any effort to secure the appointment of a third arbitrator would have to be pursued in Cook County. See 1/10/07 Order (DA 197); 1/10/07 Hrg. Tr. at 17 (DA 214) ("The Petition to Select a third Arbitrator should have been filed in the pending matter in Cook County."). There are three reasons.

First, contrary to Plaintiff's claim that a Madison County judge should choose the third arbitrator because "Madison County was the county where the arbitration *was to take place*" (Pl.'s Br. 14 (emphasis added)), the arbitration provision unambiguously designates for that task a "judge of a court of record in the county in which the arbitration *is pending*." Krause Policy at 10 (2d Supp. R. C78; DA 11) (emphasis added). As a matter of law, the parties' incipient arbitration was "pending" in Cook County. The Supreme Court's transfer of *Eavenson* required the suit to "proceed and be determined as if it had originated" in Cook County. Ill. Sup. Ct. R. 187(c); *see* Ill. Sup. Ct. R. 384(c)(5). And Judge Agran had been adjudicating arbitration issues in Cook County for

nine months. *See* pp. 14-26, *supra*. That the arbitration eventually may have taken place “in the county in which the person making the claim resides” or some other agreed-upon location (*see* Krause Policy at 11 (2d Supp. R. C79; DA 12)) is of no consequence. At the time of the events under consideration, the arbitration was still “pending” in Cook County.

Second, section 2-619(a)(3) of the Civil Practice Law requires dismissal when “there is another action pending between the same parties for the same cause.” 735 ILCS 5/2-619(a)(3). That provision forecloses Plaintiff’s Madison County suit to appoint a third arbitrator. The Cook County and Madison County actions involve the “same parties.” *Compare* 1st Am. Compl. ¶¶ 12, 23 (2d Supp. R. C13, C16; DA 39, 42), *with* Pl.’s 9/14/06 Pet. (2d Supp. R. C677-79; DA 118-20). And they are “for the same cause” because they “arise out of the same transaction or occurrence.” *Kapoor v. Fujisawa Pharm. Co.*, 298 Ill. App. 3d 780, 786 (1st Dist. 1998); *compare* 1st Am. Compl. ¶¶ 1-9 (2d Supp. R. C8-12; DA 34-38), *with* Pl.’s 9/14/06 Pet. ¶¶ 1-3 (2d Supp. R. C677; DA 118).

Third, the Uniform Arbitration Act requires that any effort to compel arbitration must be pursued in the court, if any, in which the matters referable to arbitration are pending. 710 ILCS 5/2(c) (“If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications” to compel or stay arbitration, “the application shall be made therein.”). Such an effort to compel arbitration was the implicit purpose of Plaintiff’s Madison County action; for what good is a third arbitrator if there is no arbitration? *See* Pl.’s 9/14/06 Pet. ¶¶ 3, 7 (2d Supp. R. C677-78; DA 118-19). Thus, Cook County—where the

matters potentially referable to arbitration were pending—was the only proper forum for Plaintiff’s petition to select a third arbitrator.

In sum, Plaintiff’s assertion that Judge Agran erred by not allowing arbitration to proceed with a third arbitrator selected in Madison County is both irrelevant and wrong.

CONCLUSION

For the foregoing reasons, the Circuit Court did not abuse its discretion when it found that Plaintiff waived his right to demand arbitration and that State Farm was entitled to do so as well. Accordingly, State Farm respectfully asks that the Court affirm Judge Agran’s December 7, 2006 order lifting the prior stay of judicial proceedings and compelling Plaintiff to respond to State Farm’s pending motion to dismiss.

July 6, 2007

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the appendix, is 50 pages.

Joshua D. Yount

CERTIFICATE OF SERVICE

I, Joshua D. Yount, an attorney, hereby certify that I caused three copies of the foregoing **BRIEF OF DEFENDANTS-APPELLEES** and the accompanying **SEPARATE SUPPLEMENTARY APPENDIX OF DEFENDANTS-APPELLEES** to be placed with the U.S. Postal Service on July 6, 2007, for first class mail delivery, postage prepaid, to the following:

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