

**IN THE DISTRICT COURT OF APPEAL
SIXTH DISTRICT OF FLORIDA**

Case No. 6D2025-0288
L.T. Case No. 2024-CA-002809

KATHRYN WYRICK,

Plaintiff-Appellant,

v.

MILLENNIAL CAPITAL COMPANY, LLC, and
GREP SOUTHEAST, LLC,

Defendants-Appellees.

On Appeal from the Circuit Court of the Ninth Judicial Circuit
in and for Orange County, Florida

APPELLANT KATHRYN WYRICK'S INITIAL BRIEF

Shelby Leighton
PUBLIC JUSTICE
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 797-8600
sleighton@publicjustice.net

Hannah Kieschnick
PUBLIC JUSTICE
475 14th St., Suite 610
Oakland, CA 94162
(510) 622-8150
hkieschnick@publicjustice.net

Robert W. Murphy
LAW OFFICE OF ROBERT W. MURPHY
440 Premier Circle, Suite 240
Charlottesville, VA 22901
(954) 763-8660
rwmurphy@lawfirmmurphy.com

Joseph M. Sternberg
M. Parker Landers
LANDERS & STERNBERG, PLLC
100 E. Pine St., Suite 110
Orlando, FL 32801
(407) 495-1893
joseph@landersandsternberg.com
parker@landersandsternberg.com

TABLE OF CONTENTS

| | |
|--|----|
| TABLE OF CITATIONS | ii |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE..... | 3 |
| I. Ms. Wyrick applied for an apartment at Belmont, signed up for the resident portal, and then entered into a lease contract. | 3 |
| II. Ms. Wyrick’s Lease Contract, the RealPage Agreement, and the ActiveBuilding Agreement. | 5 |
| III. Ms. Wyrick brought a class action to challenge Defendants’ practice of unlawfully charging and collecting lease termination fees..... | 8 |
| IV. The Circuit Court compelled arbitration without addressing necessary threshold issues. | 11 |
| SUMMARY OF ARGUMENT | 12 |
| ARGUMENT | 13 |
| I. The Circuit Court Erred by Failing to Decide Whether the FAA Authorizes it to Compel Arbitration of This Dispute. | 13 |
| A. The FAA Did Not Authorize the Circuit Court to Compel Arbitration of This Dispute. | 15 |
| B. The Court Did Not Have Authority to Compel Arbitration under the Florida Arbitration Code | 23 |
| II. The Circuit Court Erred by Concluding That an Agreement to Arbitrate This Dispute Was Formed..... | 25 |
| III. The Circuit Court Erred by Delegating to the Arbitrator the Question Whether Defendants Could Enforce the RealPage Agreements..... | 31 |
| A. Neither Delegation Clause Applies to Ms. Wyrick’s Dispute. | 35 |
| B. Defendants Cannot Enforce the Delegation Clauses in Either Agreement as Non-Signatories..... | 38 |
| C. The Delegation Clause in the ActiveBuilding Agreement is Illusory | 43 |
| CONCLUSION..... | 46 |

TABLE OF CITATIONS

| | Page(s) |
|---|------------|
| Cases | |
| <i>All S. Subcontractors, Inc. v. Amerigas Propane, Inc.</i> , 206 So. 3d 77 (Fla. 1st DCA 2016) | 27 |
| <i>Attix v. Carrington Mortg. Servs., LLC</i> , 35 F.4th 1284 (11th Cir. 2022) | 32 |
| <i>Bazemore v. Jefferson Cap. Sys., LLC</i> , 827 F.3d 1325 (11th Cir. 2016) | 30 |
| <i>Calderon v. Sixt Rent a Car, LLC</i> , 5 F.4th 1204 (11th Cir. 2021) | 16, 20, 21 |
| <i>Carey v. 24 Hour Fitness, USA, Inc.</i> , 669 F.3d 202 (5th Cir. 2012) | 43 |
| <i>CEFCO v. Odom</i> , 278 So. 3d 347 (Fla. 1st DCA 2019) | 26, 30 |
| <i>Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.</i> , 374 So. 2d 487 (Fla. 1979) | 46 |
| <i>In re Checking Acct. Overdraft Litig.</i> , 856 F. App'x 238 (11th Cir. 2021) | 44 |
| <i>Coinbase, Inc. v. Suski</i> , 602 U.S. 143 (2024)..... | 34 |
| <i>CSE, Inc. v. Barron</i> , 620 So. 2d 808 (Fla. 2d DCA 1993)..... | 35 |
| <i>Davitashvili v. Grubhub Inc.</i> , 131 F.4th 109 (2d Cir. 2025) | 16 |
| <i>Diverse Elements, Inc. v. Ecommerce, Inc.</i> , 5 F. Supp. 3d 1378 (S.D. Fla. 2014) | 43 |

| | |
|---|------------|
| <i>Doe v. Princess Cruise Lines, Ltd.</i> , 657 F.3d 1204 (11th Cir. 2011) | 18, 19, 22 |
| <i>Douglas v. Johnson Real Estate Invs., LLC</i> , 470 F. App'x 823 (11th Cir. 2012) | 43 |
| <i>Eglin Fed. Credit Union v. Baird</i> , 400 So.3d 643 (Fla. 1st DCA 2024) | 27, 28 |
| <i>Gessa v. Manor Care of Fla., Inc.</i> , 86 So. 3d 484 (Fla. 2011) | 46 |
| <i>Handi-Van, Inc. v. Broward Cnty.</i> , 116 So. 3d 530 (Fla. 4th DCA 2013)..... | 43, 45 |
| <i>Integrated Health Servs. at Cent. Fla., Inc. v. Estate of DeSantis</i> , -- So. 3d --, 2025 WL 850427 (Fla. 2d DCA Mar. 19, 2025) | 32 |
| <i>Jackson v. Shakespeare Found., Inc.</i> , 108 So. 3d 587 (Fla. 2013) | 18 |
| <i>Kauders v. Uber Techs., Inc.</i> , 159 N.E.3d 1033 (Mass. 2021)..... | 29 |
| <i>Koehli v. BIP Int'l, Inc.</i> , 870 So. 2d 940 (Fla. 1st DCA 2004) | 40 |
| <i>Lacey v. Healthcare & Ret. Corp. of Am.</i> , 918 So. 2d 333 (Fla. 4th DCA 2005)..... | 46 |
| <i>Lambert v. Austin Indus.</i> , 544 F.3d 1192 (11th Cir. 2008) | 35 |
| <i>Lamonaco v. Experian Info. Sols., Inc.</i> , No. 6:23-cv-1326, 2024 WL 1703112 (M.D. Fla. Apr. 19, 2024)..... | 17, 31 |
| <i>Land Co. of Osceola Cnty., LLC v. Genesis Concepts, Inc.</i> , 169 So. 3d 243 (Fla. 4th DCA 2015)..... | 27 |
| <i>Merrill, Lynch, Pierce, Fenner & Smith Inc. v. Melamed</i> , 405 So. 2d 790 (Fla. 4th DCA 1981)..... | 14 |

| | |
|---|---------------|
| <i>Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983)..... | 14 |
| <i>New Prime Inc. v. Oliveira</i> , 586 U.S. 105 (2019)..... | <i>passim</i> |
| <i>Newell v. Celebrity Cruises, Inc.</i> , No. 18-20743-CIV, 2021 WL 12218402 (S.D. Fla. Nov. 23, 2021)..... | 38 |
| <i>Olson v. Fla. Living Options, Inc.</i> , 210 So.3d 107 (Fla. 2d DCA 2016)..... | 39 |
| <i>Palm Garden of Healthcare Holdings, LLC v. Haydu</i> , 209 So. 3d 636 (Fla. 5th DCA 2017)..... | 26 |
| <i>Rent-A-Center, W., Inc. v. Jackson</i> , 561 U.S. 63 (2010)..... | 33 |
| <i>Revitch v. DIRECTV, LLC</i> , 977 F.3d 713 (9th Cir. 2020) | 17 |
| <i>Rittmann v. Amazon.com, Inc.</i> , 971 F.3d 904 (9th Cir. 2020) | 24 |
| <i>Rodgers-Rouzier v. Am. Queen Steamboat Operating Co.</i> , 104 F.4th 978 (7th Cir. 2024) | 24 |
| <i>Schmidt v. Atúnez</i> , No. 24-cv-22464, 2024 WL 4198167 (S.D. Fla. Sept. 16, 2024)..... | 18, 19, 22 |
| <i>Schreiber v. Ally Fin. Inc.</i> , 634 F. App’x 263 (11th Cir. 2015)..... | 41 |
| <i>Seaboard Coast Line R.R. Co. v. Trailer Train</i> , 690 F.2d 1343 (11th Cir. 1982) | 21 |
| <i>Seifert v. U.S. Home Corp.</i> , 750 So. 2d 633 (Fla. 1999) | 17, 19, 22 |
| <i>Sellers v. JustAnswer LLC</i> , 73 Cal. App. 5th 444 (Cal. Ct. App. 2021)..... | 29 |

| | |
|---|---------------|
| <i>Shireman v. Tracker Marine, LLC</i> , No. 3:18-cv-740, 2019 WL 13267902 (M.D. Fla. Mar. 12, 2019) | 32 |
| <i>Solymar Invs., Ltd. v. Banco Santander S.A.</i> , 672 F.3d 981 (11th Cir. 2012) | 26 |
| <i>Usme v. CMI Leisure Mgmt., Inc.</i> , 106 F.4th 1079 (11th Cir. 2024) | 42 |
| <i>Viking River Cruises, Inc. v. Moriana</i> , 596 U.S. 639 (2022)..... | 16 |
| <i>Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.</i> , 489 U.S. 468 (1989)..... | 14 |
| <i>World-Class Talent Experience, Inc. v. Giordano</i> , 293 So. 3d 547 (Fla. 4th DCA 2020)..... | 37 |
| Statutes | |
| 9 U.S.C. § 2 | <i>passim</i> |
| Fla. Stat. § 83.575 (2)..... | 1, 5, 6, 9 |
| Fla. Stat. § 559.72(9)..... | 9, 10 |
| Fla. Stat. § 682.02(1)..... | 24 |
| Other Authorities | |
| Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv)..... | 12 |

INTRODUCTION

Plaintiff-Appellant Kathryn Wyrick lived at an apartment building owned by Defendant-Appellee Millennial Capital Company, LLC (“Millennial”) and managed by Defendant-Appellee GREP Southeast, LLC (“Greystar”) until her lease expired in December 2023. After she moved out, she was surprised to receive a letter from Defendants informing her that she owed more than \$1,800 for an “insufficient notice fee.” Defendants charged the fee based on the fine print of Ms. Wyrick’s lease, which required her to notify Defendants at least 60 days before the end of the lease term that she intended to move out at the end of the term. But, in doing so, they failed to follow Florida law. Under the Florida Residential Landlord and Tenant Act (“FRLTA”), that kind of fee can be charged only if the landlord first gives notice to the tenant 15 days *before* the 60-day notice deadline of her obligation to provide such notice or face a fee. Fla. Stat. § 83.575 (2). Defendants did not provide that notice, instead choosing to spring the fee on Ms. Wyrick after the fact.

In response, Ms. Wyrick brought a putative class action against Defendants, alleging that they had a policy of unlawfully charging and attempting to collect lease termination fees from their tenants in violation of FRLTA and the Florida Consumer Collection Practices Act (“FCCPA”), resulting in their unjust enrichment. Despite choosing not to include an arbitration provision in Ms. Wyrick’s lease, which provides that disputes be resolved by a judge in court, Defendants moved to compel

arbitration of her claims. Because they could not rely on the lease to do so, they instead pointed to two purported contracts between Ms. Wyrick and a different entity—RealPage, Inc.—that govern the use of the RealPage software Ms. Wyrick used to apply for her apartment and to access a “resident portal” known as ActiveBuilding. Ms. Wyrick’s claims have nothing to do with RealPage or those contracts and have everything to do with Defendants’ violations of Florida statutory law and her lease, which contains a merger clause stating that it is the sole agreement between her and Defendants.

Nonetheless, the Circuit Court compelled arbitration, concluding that a valid agreement to arbitrate was formed and delegating all other questions to the arbitrator, including whether the RealPage agreements covered Ms. Wyrick’s statutory claims against Defendants and whether Defendants could enforce agreements they did not sign. In doing so, the court completely sidestepped Ms. Wyrick’s threshold argument that neither the Federal Arbitration Act (“FAA”) nor Florida arbitration law authorized it to enforce arbitration agreements in contracts that have no relation to this dispute. And it failed to address her argument that she had no notice of and did not form an agreement to arbitrate her disputes with Defendants, rather than RealPage. Finally, it did not address Ms. Wyrick’s specific challenges to the enforceability of the clauses in the agreements delegating questions of “arbitrability”

to the arbitrator before enforcing those clauses. Each of those errors is ground for reversal.

In short, because Ms. Wyrick's relationship with Defendants is governed solely and exclusively by her lease and Florida statutory law, neither the FAA nor any other source of law allowed Defendants to compel arbitration under unrelated contracts between Ms. Wyrick and RealPage, and the Circuit Court's order compelling arbitration should be reversed.

STATEMENT OF THE CASE

I. Ms. Wyrick applied for an apartment at Belmont, signed up for the resident portal, and then entered into a lease contract.

Ms. Wyrick rented an apartment at Belmont, an apartment complex that is part of a larger community called Park Central in Orlando, Florida. A278 ¶ 3. She lived there from August 30, 2022, to December 29, 2023, when her lease expired. A278-79 ¶¶ 3, 10-11; A166 ¶ 7; A172. Belmont is owned by Millennial and managed by Greystar. A166 ¶¶ 7-8; A172. Millennial and Greystar use "Online Leasing" software provided by RealPage to "to assist in processing" applications for the apartments at Belmont, including to accept online applications and run background checks on prospective tenants. A166 ¶ 9. They also use a RealPage product called ActiveBuilding, which is a "portal" that tenants can access through a website or mobile application to pay rent, make maintenance requests, and otherwise communicate with Greystar. A168 ¶ 22.

On July 13, 2022, Ms. Wyrick submitted an online application to lease an apartment at Belmont. A279 ¶ 4; A166 ¶ 10; A219-23. The next day, she received an email from noreply@realpage.com, instructing her to “join your neighbors” on “ActiveBuilding, the dedicated resident portal for residents at Belmont.” A279 ¶ 5; A282. The email explained that residents use the portal to “[a]ccess online rent payments,” “[s]ubmit & track maintenance requests,” and “stay up to date on all the things happening around our community.” A282. On July 17, 2022, Ms. Wyrick created an ActiveBuilding account. A279 ¶ 6.

On July 19, 2022, Ms. Wyrick received an email from a Belmont leasing consultant via the email address parkcentral@greystar.com, informing her that her “application ha[d] been approved” for the apartment. A280 ¶ 8; A284-89. The email listed the various steps Ms. Wyrick would need to take to “get keys” to the apartment, including completing a move-in form, signing up for utilities, obtaining renters’ insurance, and having a “signed lease contract.” A284-85. The email informed Ms. Wyrick that the lease contract would be emailed via DocuSign and emphasized, “PLEASE READ AND SIGN YOUR LEASE!!! THANK YOU!!!!” A289.

Although the Circuit Court stated that Ms. Wyrick accepted the Lease Contract before creating an ActiveBuilding account, *see* Order at 3, in fact Ms. Wyrick did not receive the lease to review and sign from Greystar via DocuSign

until August 10, 2022—well after she created her ActiveBuilding account on July 17. A280 ¶ 9; A292. She reviewed and signed the lease before moving into her apartment on August 29, 2022. A280 ¶ 9; *see also* A172.

II. Ms. Wyrick’s Lease Contract, the RealPage Agreement, and the ActiveBuilding Agreement.

The Lease Contract “is between you, the resident[] . . . : Kathryn Wyrick and us, the owner: Millennial Capital Company LLC.” A172. It also lists Greystar as the “Manager of these apartments,” who is authorized to send and receive notices on behalf of Millennial. *Id.* Elsewhere in the Lease Contract, Greystar is referred to as an “Agent” for Millennial. A111. The term of the lease was from August 30, 2022, to December 29, 2023. A172. Among other things, it provides that tenants can be charged a fee of one month’s rent if they do not provide 60 days’ notice prior to terminating their lease, even if they “move by the last date in the lease term,” but only so long as Defendants provide the tenant with “the advanced written notice required by Fla. Stat. § 83.575(2).” A172; A179. The contract provides that claims under the lease will be resolved by “a judge” in court, A179, and that the “court shall interpret the lease and provisions herein in a manner such as to uphold the valid portions of this Lease Contract while preserving the intent of the parties,” A180.

The Lease Contract specifically provides, twice, that it is the “entire agreement” between the parties. A178. It also states that “neither we nor any of our representatives have any authority to make any statements, promises or

representations in conflict with or in addition to the information contained in this Lease Contract,” and confirms that “[a]ny current agreements, oral or written, including but not limited to . . . statements of our representatives, if not specifically expressed in this Lease Contract . . . are void and have no effect.” *Id.*

Ms. Wyrick submitted her lease application for Belmont online through the RealPage system. A279 ¶ 4. Although she does not recall seeing anything about arbitration during the registration and application process, *see id.*, according to Defendants, she agreed to the RealPage Agreement, which provides that “You and RealPage agree that any and all Claims shall be resolved exclusively in binding Arbitration rather than litigation in court,” *see* A167-68 ¶¶ 12-13, 18; A227. The RealPage Agreement defines “Claims” to mean:

all disputes, claims and controversies, or disagreements, whether based on past, present, or future events, between You and RealPage relating to, arising out of, or pertaining in any way to, Your application for housing at the Property, any application(s) for housing at other properties that use RealPage’s services, services RealPage provides to the Property or any other properties, or any tenant screening report(s) prepared, reviewed, or used in connection with Your application for housing at the Property or any other properties in the future.

A227. It provides specific examples of types of covered “Claims,” including “[d]isputes relating to the formation, interpretation, applicability, scope or enforceability of this Agreement.” *Id.* In addition, the Agreement requires that any arbitration be individual, not on a class basis, A228, and states that it “is governed by the Federal Arbitration Act,” *id.*

Defendants also asserted below that, according to Greystar’s “business records,” when Ms. Wyrick created an account to access ActiveBuilding, she agreed to RealPage’s ActiveBuilding Resident Portal Terms of Service (“the ActiveBuilding Agreement”). A168-70 ¶¶ 21, 24-25; A230-32. Ms. Wyrick does not remember checking any boxes to indicate her acceptance to the Terms and Conditions for ActiveBuilding or clicking on the hyperlink to view the Terms and Conditions. A279 ¶ 6. Nor does she remember seeing anything when registering for an ActiveBuilding account that would indicate that she was agreeing to arbitrate all claims, including future statutory claims, either with RealPage regarding the ActiveBuilding platform or with her future landlord, Millennial, or property manager, Greystar. *Id.* And she does not recall seeing anything that would made her think that she was agreeing to waive important legal rights like the right to bring claims in court or as a class action, let alone that she was waiving those rights as to claims against Millennial or Greystar. *Id.*

The ActiveBuilding Agreement states that it “govern[s] a user’s (‘User,’ ‘you’ or ‘your’) access to and use of this ActiveBuilding Resident Portal (the ‘Service’), a product offered by RealPage, Inc. (‘Provider,’ ‘we’ or ‘us’).” A230. The Agreement represents “the sole and entire agreement between [the user] and [RealPage] with respect to the Service[.]” A232. The Agreement allows RealPage to “revise and update these Terms of Service from time to time in our sole discretion,” with any

changes being “effective immediately upon posting.” A230. If a user continues to use the ActiveBuilding service after the posting of the revised terms, that “shall constitute [the user’s] acceptance and agreement to be bound by the changes.” *Id.*

The ActiveBuilding Agreement contains an arbitration provision, which states, “Any dispute, claim or controversy (each a ‘Dispute’) arising out of or relating to the Service, including any Telephone Consumer Protection Act (TCPA) claim between you, Provider, and your apartment community manager, will be resolved exclusively by binding arbitration rather than a court proceeding.” A231-32. That provision prohibits the arbitrator from awarding “punitive or exemplary damages,” “incidental, indirect or consequential damages,” or “pre-award interest.” A232.

III. Ms. Wyrick brought a class action to challenge Defendants’ practice of unlawfully charging and collecting lease termination fees.

Ms. Wyrick’s lease expired on December 29, 2023, and she moved out on that date. A280 ¶ 11; A172. Shortly thereafter, she received a letter from Greystar enclosing a summary of move out charges, stating that she was being charged an “insufficient notice fee” of \$1,855 because she did not provide the 60-day notice required by the lease terms before moving out on the end date of her lease. A40-41; A234. However, both the FRLTA and the Lease Contract provide that, to charge Ms. Wyrick a fee for insufficient notice, Defendants first must give *her* notice of the 60-day notice requirement and the fact that she could owe money if she does not

comply. *See* Fla. Stat. § 83.575(2); A172 (stating that Defendants can charge Ms. Wyrick “liquidated damages” for insufficient notice “if we give you the advance written notice required by Fla. Stat. § 83.575(2)”). Defendants did not provide that notice. *See* A15 ¶ 26.

On March 31, 2024, Ms. Wyrick brought this putative class action against Millennial and Greystar. She alleged that together, they had a policy of unlawfully charging tenants the “insufficient notice fee” in violation of the FRLTA’s prohibition on charging such fees without notice. Fla. Stat. § 83.575(2); *see* A20-21. And she alleged they unlawfully attempted to collect the fee knowing they could not do so under the FRLTA or the Lease Contract in violation the Florida Consumer Collection Practices Act (FCCPA), which prohibits Defendants from “[c]laim[ing], attempt[ing], or threaten[ing] to enforce a debt when such person knows that the debt is not legitimate, or assert[ing] the existence of some other legal right when such person knows that the right does not exist.” Fla. Stat. § 559.72(9); *see* A21-23. She also brought a claim for unjust enrichment. A23. To support her class claims, Ms. Wyrick alleged that Defendants use the same form Lease Contract for all tenants and that they use the same “Lease Expiration Notice” that she received—which does not include notice of the possibility of an “insufficient notice fee”—to notify all tenants that their lease will soon expire. *See* A16-17 ¶¶ 38-40.

On June 6, 2024, Defendants filed separate but similar motions to compel arbitration and to dismiss Ms. Wyrick’s case for failure to state a claim. *See* A42-A234. The parties then agreed to first brief the requests to compel arbitration before addressing the motions to dismiss. Acknowledging that the Lease Contract did not contain an arbitration provision, Defendants based their motions on the arbitration agreements between Ms. Wyrick and RealPage. *Id.* Ms. Wyrick opposed Defendants’ motions, asserting, among other arguments, (1) that the FAA does not authorize the Court to compel arbitration of this dispute, which does not “arise out of” either RealPage arbitration agreement; (2) that no contract to arbitrate this dispute exists because there was no mutual assent to arbitrate any dispute other than the narrow categories covered by the RealPage agreements; (3) that Defendants cannot enforce the RealPage agreements to which they are not parties; and (4) that the Lease Contract is the operative agreement between Ms. Wyrick and Defendants, to the exclusion of all other agreements. A235-74. Ms. Wyrick also raised additional arguments regarding the validity and enforceability of the ActiveBuilding Agreement. A272-74. Defendants each filed replies in support of their motions. A308-63. A non-evidentiary hearing on Defendants’ motions to compel arbitration was held on October 8, 2024. *See* A364-81.

IV. The Circuit Court compelled arbitration without addressing necessary threshold issues.

On January 10, 2025, the Circuit Court issued an order granting Defendants' motions to compel arbitration. *See* A1-A10. The court did not even mention, let alone analyze, Ms. Wyrick's argument that it lacked authority to compel arbitration under the FAA. *Id.* Instead, it skipped ahead to analyzing whether an agreement was formed, concluding that the ActiveBuilding Agreement was formed based on the affidavit submitted by Defendants describing the application process, but again not addressing a key argument made by Ms. Wyrick: that there was no mutual assent to arbitrate *this dispute* because she had no actual or constructive notice that she was agreeing to arbitrate statutory claims *against Defendants*. *See* A5-6. After concluding that an arbitration agreement was formed, the court held that all Ms. Wyrick's other challenges must be decided by an arbitrator, without addressing Ms. Wyrick's numerous specific challenges to the clauses in the arbitration agreements delegating questions of arbitrability to the arbitrator. *See* A6-9. The court acknowledged that "Wyrick makes cogent arguments for why this dispute would not be subject to the arbitration provisions of either the RealPage agreement, or the ActiveBuilding agreement," but it concluded that, because the parties had delegated arbitrability to the arbitrator, there was nothing else the court could decide. A9. The court stayed the case pending the outcome of arbitration. *Id.*

Ms. Wyrick timely appealed pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv).

SUMMARY OF ARGUMENT

The Circuit Court’s opinion suffers from at least four fundamental flaws. *First*, the court failed to address the threshold question whether the FAA applies to this dispute before compelling arbitration pursuant to the FAA. The U.S. Supreme Court has made clear that, even if the arbitration agreement at issue contains a clause delegating questions of arbitrability to an arbitrator, a court cannot compel arbitration unless it first determines that the dispute falls within § 2 of the FAA. Yet, the Circuit Court failed to do so here. If it had, it should have concluded that the FAA does not authorize compelling arbitration because this dispute—involving purely statutory claims by a tenant against her landlords—does not arise out of either third-party arbitration agreement relied on by Defendants. Nor can Defendants compel arbitration under the Florida Arbitration Code because Defendants are not parties to either arbitration agreement as is required under that statute.

Second, the court erred in concluding that a valid agreement to arbitrate this dispute was formed. The Circuit Court ignored Ms. Wyrick’s argument that she lacked notice that she was agreeing to arbitrate disputes with Defendants regarding their statutory obligations as her landlords, rather than solely disputes with RealPage about her use of its application and software platforms. Without that notice, there

was no mutual assent, and no arbitration agreements were formed. But even if Ms. Wyrick had notice, Defendants failed to meet their evidentiary burden to show that Ms. Wyrick did in fact agree to the RealPage arbitration agreements.

Third, the court erroneously delegated the remaining issues to the arbitrator without considering Ms. Wyrick's specific challenges to the delegation clauses in the arbitration agreements, which the U.S. Supreme Court has held courts must do. Had it done so, it should have found the delegation clauses unenforceable for the same reasons that the arbitration agreements themselves are unenforceable: this dispute does not fall within the scope of either agreement, Defendants cannot enforce the agreements as non-signatories, and the ActiveBuilding Agreement is illusory.

For any of these reasons, this Court should reverse the Circuit Court's order compelling arbitration.

ARGUMENT

I. The Circuit Court Erred by Failing to Decide Whether the FAA Authorizes it to Compel Arbitration of This Dispute.

In granting Defendants' motions to compel arbitration, the Circuit Court wholly ignored the threshold issue that was central to Ms. Wyrick's argument below: whether the FAA authorized the court to compel arbitration in the first place. *See* A248-53. As the U.S. Supreme Court has explained, "[w]hile a court's authority under the [Federal] Arbitration Act to compel arbitration may be considerable, it

isn't unconditional." *New Prime Inc. v. Oliveira*, 586 U.S. 105, 110 (2019).¹ "The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum." *Id.* at 111. "Instead, antecedent statutory provisions limit the scope of the court's powers" to compel arbitration under the FAA. *Id.* at 110. Thus, before "invok[ing] its statutory powers . . . to compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2." *Id.* at 111. If the contract falls beyond those boundaries, the contract is not enforceable pursuant to the FAA. *Id.* As a result, a court *must* start with "the

¹ Both the U.S. Supreme Court and Florida courts have long recognized that § 2 of the FAA, and U.S. Supreme Court precedent interpreting it, is binding on Florida courts. *See Merrill, Lynch, Pierce, Fenner & Smith Inc. v. Melamed*, 405 So. 2d 790, 792 (Fla. 4th DCA 1981) ("hold[ing] that Florida courts must recognize and apply the Federal Arbitration Act"); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (explaining that "the effect of [§ 2] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act," including "in either state or federal court"). Thus, the Circuit Court was bound to follow *New Prime* and determine whether this dispute falls within § 2 before compelling arbitration. However, while the U.S. Supreme Court has held "that the FAA's 'substantive' provisions—§§ 1 and 2—are applicable in state as well as federal court," it has "never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, . . . are nonetheless applicable in state court." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) (citation omitted). So, this Court is not bound by the procedures found in §§ 3 and 4 of the FAA.

necessarily antecedent statutory inquiry” regarding whether the dispute falls within §§ 1 and 2 of the FAA before compelling arbitration under the statute. *Id.* at 112.

A court must address this threshold issue even if the parties include in their agreement a “delegation clause” that “gives an arbitrator authority to decide even the initial question whether the parties’ dispute is subject to arbitration.” *Id.* at 111-12. In *New Prime*, the U.S. Supreme Court rejected the argument that a court did not need to decide whether the FAA applied because the parties had agreed to a delegation clause, explaining that courts can “enforce a delegation clause only if” the arbitration agreement falls within § 2. *Id.* at 112. That is because a “delegation clause is merely a specialized type of arbitration agreement, and the Act ‘operates on this additional arbitration agreement just as it does on any other.’” *Id.* (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010)).

Here, despite the parties devoting significant briefing to the issue, A248-53; A311-16; A343-45, the Circuit Court did not address whether it had authority to compel arbitration under the FAA before doing so, A1-10; *see also* A8 (citing § 4 of the FAA). Nor did it articulate any other statutory basis for its authority to compel arbitration. *See* A1-10. That alone is reversible error.

A. The FAA Did Not Authorize the Circuit Court to Compel Arbitration of This Dispute.

Had the court addressed the issue, it should have concluded that it did not have authority under the FAA to enforce the arbitration agreements relied on by

Defendants here because they fall outside the boundaries of the mandate to enforce arbitration agreements in § 2 of the FAA. Section 2 mandates that courts enforce arbitration agreements that meet certain requirements: the agreement must be (1) “[a] written provision”; (2) in a “maritime transaction or a contract evidencing a transaction involving commerce” (3) “to settle by arbitration” (or “to submit to arbitration”); (4) “a controversy thereafter arising out of” or “an existing controversy arising out of” that “contract or transaction.” 9 U.S.C. § 2. Defendants here point to written provisions to settle disputes by arbitration in two contracts—the RealPage Agreement and the ActiveBuilding Agreement. But that is not enough because, to fall within § 2, this “controversy” must “aris[e] out of” one of those contracts. *Id.* As the Supreme Court has explained, “the terms of § 2 limit the FAA’s enforcement mandate to agreements to arbitrate controversies that ‘arise out of’ the parties’ contractual relationship.” *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 652 n.4 (2022). Likewise, the Eleventh Circuit has confirmed that the FAA “governs an arbitration agreement only to the extent that it compels arbitration of ‘controvers[ies]’ that ‘aris[e] out of’ the ‘contract’ containing the arbitration agreement or the ‘transaction’ evidenced thereby.” *Calderon v. Sixt Rent a Car, LLC*, 5 F.4th 1204, 1212 (11th Cir. 2021) (quoting 9 U.S.C. § 2) (alterations in original); *see also Davitashvili v. Grubhub Inc.*, 131 F.4th 109, 121 (2d Cir. 2025) (Pérez, J., concurring) (“[T]he panel agrees unanimously on the principle that Section 2 of the

Federal Arbitration Act [] applies only to contracting parties’ agreements to arbitrate claims ‘arising out of’ such contract or transaction.” (quoting 9 U.S.C. § 2)); *Revitch v. DIRECTV, LLC*, 977 F.3d 713, 721 (9th Cir. 2020) (O’Scannlain, J., concurring) (explaining that “the FAA does not require the enforcement of an arbitration clause to settle a controversy that does not arise out of the contract or transaction” (emphasis omitted)); *Lamonaco v. Experian Info. Sols., Inc.*, No. 6:23-cv-1326, 2024 WL 1703112, at *10 (M.D. Fla. Apr. 19, 2024) (denying motion to compel arbitration of claims that “have no nexus with” the contract containing the arbitration agreement in part because court “doubt[ed] that it has the authority to enforce [the arbitration provision’s] delegation clause” without the claims “arising out of such contract” under § 2 (emphasis omitted)).

Ms. Wyrick’s statutory claims against Defendants do not “aris[e] out of” the RealPage or ActiveBuilding Agreements because her claims are not based on any duties Defendants had under those contracts. As the Florida Supreme Court has explained, claims “aris[e] out of” a contract if “those claims hav[e] some direct relation to the terms and provisions of the contract.” *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) (quoting *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983)). The court has since elaborated that this “direct relationship to a contract’s terms and provisions” means the claim has a “significant relationship” to the contract and thereby “emanates from an inimitable

duty created by the parties’ unique contractual relationship.” *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013); *see also Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1218 (11th Cir. 2011) (“‘Arising out of’ requires the existence of some direct relationship between the dispute and the performance of duties specified by the contract.”). Here, Plaintiff’s claims are based on Defendants’ duty under the Lease Contract and the FRLTA to provide notice before charging an “insufficient notice fee” and their duty under the FCCPA not to collect a debt they know they aren’t legally owed, not any duties they have under Ms. Wyrick’s separate agreements with RealPage. Indeed, because Defendants are not parties to the RealPage agreements, they do not have *any* duties to Plaintiff under those agreements. *See Schmidt v. Atúnez*, No. 24-cv-22464, 2024 WL 4198167, *5 (S.D. Fla. Sept. 16, 2024) (holding that “since the Defendants’ alleged actions would have breached the duties the Defendants owed the Plaintiffs under state law—even *without* any formal [] agreement—the Plaintiffs’ [state law] claim *isn’t* significantly related to the performance of duties specified by the contract” (cleaned up) (emphasis in original)), *appeal docketed*, No. 24-13114 (11th Cir. Sept. 24, 2024).

That is true even though, as Defendants asserted below, the parties would not have a landlord-tenant relationship and Ms. Wyrick would not have legal claims against Defendants without her having used RealPage’s system to apply for an apartment at their building in the first place. As the Florida Supreme Court explained

in *Seifert*, “the mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one ‘arising out of or relating to’ the agreement.” 750 So. 2d at 638; *see also Doe*, 657 F.3d at 1219-20 (holding that claims did not “relate to” or “arise from” employment contract because the “parties could each have fulfilled all of their duties under the crew agreement” but would “still be embroiled in the dispute alleged in Doe’s common law claims”).

For example, in *Schmidt*, the court held that a claim by a former client against her attorneys for disclosure of confidential information that occurred after the attorney-client relationship had ended did not arise out of the parties’ retainer agreement even though the attorneys would not have learned the confidential information if they had not first entered into a contractual relationship with the client. 2024 WL 4198167, at *5. The court explained that, under Florida law, “a causal relationship between the Plaintiffs’ claim and the Agreement doesn’t mean that there’s ‘some direct relationship between the dispute and the performance of duties specified by the contract,’” such that the dispute arose out of the agreement. *Id.* (quoting *Doe*, 657 F.3d at 1218). Similarly, here, even if there is some causal relationship between the RealPage agreements and Ms. Wyrick’s claims, there is no “direct relationship” between this dispute and “performance of duties specified by” the RealPage agreements, so this dispute does not arise out of them.

This case is also markedly similar to *Calderon*. There, the plaintiff used Orbitz's online travel booking platform to rent a car through Sixt Rent-a-Car. *Calderon*, 5 F.4th at 1207. In doing so, he agreed to Orbitz's terms of use, which contained an arbitration provision. *Id.* When he picked up his rental car, he signed a separate rental contract with Sixt, "which, notably, did not contain an arbitration provision." *Id.* Sixt later tried to collect money from him for alleged damage to the car, and he sued, alleging that Sixt violated its contract with him and two Florida consumer protection statutes. *Id.* at 1208. Sixt moved to compel arbitration, relying on the arbitration provision contained in Orbitz's terms of use, which it argued covered the plaintiff's dispute with Sixt because the provision purported to apply to "[a]ny disputes or claims relating in any way to . . . any services or products provided." *Id.* at 1208-09.

The Eleventh Circuit held that because the plaintiff's claims against Sixt did not "aris[e] out of" the Orbitz contract, the FAA did not apply. *Id.* at 1213-14. The court explained that, although it had never interpreted the § 2 language, it had previously interpreted the phrase "arises out of" in a contract to mean that it is "an immediate, foreseeable result of the performance of" the contract. *Id.* at 1213. Seeing no reason that interpretation would not also apply to § 2's language, the Eleventh Circuit concluded that the plaintiff's claims were not immediate, foreseeable results of the performance of the contract with Orbitz because "[t]he complaint doesn't

name Orbitz as a defendant, identify any wrongdoing by Orbitz, or allege any violation of Orbitz’s Terms of Use by anyone.” *Id.* The court pointed to its decision in *Seaboard Coast Line R.R. Co. v. Trailer Train*, 690 F.2d 1343 (11th Cir. 1982), where it “held that a dispute related to the leasing of railroad cars between two companies didn’t ‘aris[e]’ out of a contract governing the ongoing, separate supply of railroad cars between the same two companies—and therefore wasn’t arbitrable,” concluding that the relationship between the plaintiff’s lawsuit against Sixt and Orbitz’s terms of use was “even more attenuated than the relationship between the lawsuit and the related contract in *Seaboard*.” *Calderon*, 5 F.4th at 1213.

The same is true here. As in *Calderon*, Ms. Wyrick’s “complaint doesn’t name [RealPage] as a defendant, identify any wrongdoing by [RealPage], or allege any violation of [the RealPage or ActiveBuilding Agreements] by anyone.” *See id.* (noting that the complaint “mention[ed] Orbitz only once, and there only in passing”). Rather, as in *Calderon*, Ms. Wyrick and Defendants have a separate contract—the Lease Contract—that governs their duties to each other and “notably” does not contain an arbitration provision. *See id.* at 1207.

Defendants argued below that Ms. Wyrick’s claims necessarily arise out of the RealPage agreements because, though the complaint does not mention RealPage at all, the Lease Expiration Notice Ms. Wyrick cited and attached to her complaint was sent from NoReply@RealPage.com. *See* A15 ¶¶ 23-24, 26. Putting aside

whether RealPage had anything to do with the Notice other than providing the software to send it,² Ms. Wyrick’s claims are not based on the Lease Expiration Notice but rather Defendants’ failure to provide *any* written notice of the insufficient notice fee as required under Florida law. The citation to the Lease Expiration Notice was merely an example of a time when Defendants *could* have informed Ms. Wyrick of the move-out notice requirement and the potential insufficient notice fee but did not. *See* A15 ¶ 24. That is, Ms. Wyrick’s claims against Defendants would exist with or without the Lease Expiration Notice or her separate contractual relationship with RealPage. *See, e.g., Doe*, 657 F.3d at 1219 (holding that tort claims did not “arise out of” employment contract where employer “could have engaged in that tortious conduct even in the absence of any contractual or employment relationship with [the plaintiff]”); *Schmidt*, 2024 WL 4198167, *5.

In short, even if Plaintiff had never signed any agreement with RealPage, her claims against Defendants would be the same: they did not provide the statutorily and contractually required notice before charging the “insufficient notice fee.” Thus, to the extent Ms. Wyrick’s claims arise out of any contract, they arise out of the Lease Contract only, not the RealPage or ActiveBuilding Agreements. *See Seifert*, 750 So. 2d at 638 (describing rule that, “for a tort claim to be considered ‘arising out

² At the hearing on the Motion to Compel Arbitration, Defendants admitted that RealPage was “a third-party software platform” and that RealPage was not acting as the “landlord” or “manager” in transmitting this letter. A377, 53:23-54:2.

of or relating to’ an agreement, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself”).

Because the claims in this case do not “arise out of” either RealPage contract within the meaning of § 2 of the FAA, the FAA did not authorize the Circuit Court to enforce either agreement to arbitrate contained in those contracts. *See New Prime*, 586 U.S. at 111. Its order compelling arbitration should therefore be reversed.

B. The Court Did Not Have Authority to Compel Arbitration under the Florida Arbitration Code

Although state law *can*, under certain circumstances, provide a basis for the enforcement of an arbitration agreement even when the FAA does not, Florida law does not do so here.

To start, Defendants have waived any reliance on state law as a basis to compel arbitration, and, unsurprisingly given that waiver, the Circuit Court did not mention an alternative statutory basis for compelling arbitration under state law in its decision. Other than one passing reference to the Florida Arbitration Code in Millennial’s brief, *see* A155, neither Defendant pressed the argument below that state law could provide a basis for compelling arbitration, even after Plaintiff argued that neither the FAA nor state law applied, A252-53. To the contrary, Defendants’ motions to compel relied on the FAA as the sole basis for the Court’s authority to compel arbitration. *See, e.g.*, A48 (“The Arbitration Agreement is governed by the FAA[.]”); A148-49 (stating that the FAA “governs here” and arguing for the FAA’s

application in state court). Thus, they have waived the argument that the agreement is enforceable under state law even though the FAA does not require its enforcement.

Even if they had not waived the argument, the Florida Arbitration Code would not provide a basis for compelling arbitration because the scope of the Florida Arbitration Code is even narrower than the FAA. It is limited to controversies “arising *between the parties* to the agreement” to arbitrate. Fla. Stat. § 682.02(1) (emphasis added). Because this case is between Plaintiffs and Defendants, it is not a dispute “arising between the parties” to the arbitration agreement, Plaintiff and RealPage, and Defendants therefore cannot compel arbitration under the Florida Arbitration Code.

Moreover, the RealPage Agreement expressly provides it is governed by the FAA and not state law, specifying that “notwithstanding any other choice of law provision,” it is “governed by the Federal Arbitration Act.” A228. When the parties have chosen the FAA to govern an arbitration agreement to the exclusion of state law, that renders the agreement unenforceable if the FAA does not provide a basis for enforcing it. *See Rodgers-Rouzier v. Am. Queen Steamboat Operating Co.*, 104 F.4th 978, 993 (7th Cir. 2024) (“Because the parties agreed that arbitration would be governed by the FAA, which would not permit American Queen to compel arbitration, we conclude that Indiana law also would not compel Rodgers-Rouzier to arbitrate under this agreement.”); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904,

919-21 (9th Cir. 2020) (denying motion to compel arbitration where parties had chosen only the FAA to govern the arbitration provision and the FAA did not require enforcement). Thus, the parties' express choice of the FAA is an additional reason why the RealPage Agreement cannot be enforced under the Florida Arbitration Code.

Because neither the FAA nor the Florida Arbitration Code provides the necessary authority to enforce the RealPage arbitration agreements as to this dispute, the court erred in granting the motions to compel arbitration.

II. The Circuit Court Erred by Concluding That an Agreement to Arbitrate This Dispute Was Formed.

The Circuit Court concluded that "a valid arbitration agreement between the parties does exist," based on an affidavit from Defendants stating that Plaintiff was notified of the existence of an arbitration agreement and checked a box indicating her acceptance of the ActiveBuilding Agreement. A5-6. That conclusion was wrong for at least two reasons: First, there was no mutual assent because Ms. Wyrick lacked notice that either agreement would require her to arbitrate her disputes against Defendants, rather than RealPage. Second, even if there was sufficient notice, Defendants have not met their evidentiary burden to show that Ms. Wyrick assented to the agreements.

First, the Circuit Court ignored Ms. Wyrick's argument that Defendants could not show that, when she allegedly agreed to arbitrate her disputes with *RealPage*,

she had reasonable notice that she could also be forced to arbitrate disputes with *Defendants*—entirely different entities—arising out of their obligations under her lease and Florida consumer protection statutes. *See* A265-68; A261 n.8. To the extent the court did not address this argument because it believed (without saying so) it was for the arbitrator to decide, that was error because “any formation challenge to the contract containing the arbitration clause” must be decided by a court before compelling arbitration. *Solytar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 990 (11th Cir. 2012).

Had the court addressed the notice argument, it should have found that no contract was formed to arbitrate this dispute between Ms. Wyrick and Defendants. Under Florida law, “[t]he party seeking enforcement of an agreement has the burden of establishing that an enforceable agreement exists.” *CEFCO v. Odom*, 278 So. 3d 347, 352 (Fla. 1st DCA 2019); *see Palm Garden of Healthcare Holdings, LLC v. Haydu*, 209 So. 3d 636, 638 (Fla. 5th DCA 2017) (“Appellants, as the proponents of arbitration, have the burden of establishing an enforceable written agreement to arbitrate.”). Here, Defendants failed to meet their burden as to either agreement³

³ Although Ms. Wyrick argued that neither agreement was formed, *see* A265-68; A261 n.8, the court addressed only whether the ActiveBuilding Agreement was formed, *see* A5-6. Should this Court conclude that the ActiveBuilding Agreement was *not* formed, it could remand this case to the Circuit Court for it to address the formation of the RealPage Agreement in the first instance. However, because, on its face the RealPage Agreement does not provide notice that it applies to disputes

because both agreements are missing a key element of contract formation under Florida law: reasonable notice. *See Eglin Fed. Credit Union v. Baird*, 400 So. 3d 643, 647 (Fla. 1st DCA 2024). As the court explained in *Eglin*, “reasonable notice of an offer is a necessary precondition to mutual assent.” *Id.* And “mutual assent is a condition precedent to the formation of a contract.” *All S. Subcontractors, Inc. v. Amerigas Propane, Inc.*, 206 So. 3d 77, 81 (Fla. 1st DCA 2016). “[A]bsent mutual assent, neither the contract nor any of its individual provisions come into existence.” *Id.* Moreover, reasonable notice requires “sufficient specification of terms so that the obligations involved can be ascertained.” *Land Co. of Osceola Cnty., LLC v. Genesis Concepts, Inc.*, 169 So. 3d 243, 247 (Fla. 4th DCA 2015) (citation omitted). Thus, if Ms. Wyrick did not have “reasonable notice” of the specific terms that Defendants now seek to enforce, no contract was formed. *See Eglin*, 400 So. 3d at 647. She did not.

Start with the ActiveBuilding Agreement. Even accepting Defendants’ assertion that Ms. Wyrick clicked to indicate her acceptance of its terms, there was nothing on the page she would have viewed or in the Agreement itself to put her on even constructive notice that she was agreeing to arbitrate future statutory claims against Defendants—not RealPage—unrelated to her use ActiveBuilding. *See* A279

between Ms. Wyrick and anyone other than RealPage, this Court can address the issue and hold that the RealPage Agreement was not formed either.

¶ 6. The hyperlinked phrase “Terms and Conditions for ActiveBuilding” that Defendants say was presented as part of Ms. Wyrick’s registration process, A169 ¶ 24, does not put a reasonable user on notice that it contains terms that limit her rights in legal disputes far beyond her use of ActiveBuilding, *see* A279 ¶ 6. And even if Ms. Wyrick clicked on the hyperlink, the Agreement’s very first sentence is clear that the terms “govern” her “access to and use of this ActiveBuilding Resident Portal (the ‘Service’), a product offered by RealPage, Inc.” A230. That the Agreement governs *only* her access to and use of the ActiveBuilding portal—“a product offered by RealPage,” not Defendants—is confirmed by the Agreement’s arbitration provision, which states that it applies to “any dispute relating to the Service [i.e. the ActiveBuilding Resident Portal] or these Terms of Service.” A231; *see also id.* (stating that any dispute “arising out of or relating to the Service” must be arbitrated). Because Ms. Wyrick’s statutory consumer protection claims against Defendants based on unlawfully charged fees do not arise out of or relate to her use of ActiveBuilding, *see* Part I, *supra*, the Agreement does not anywhere provide notice that it could create obligations for Ms. Wyrick to arbitrate this dispute regarding her separate landlord-tenant relationship with Defendants. *See* 279 ¶ 6.

The lack of notice in the RealPage Agreement is even clearer. On its face, it states that it requires arbitration only of disputes “between You and RealPage.” A227. So, it provided no notice whatsoever to Ms. Wyrick that, by accepting the

Agreement, she was also agreeing to arbitrate disputes with anyone other than RealPage, including Defendants.

This lack of reasonable notice is all the more glaring because, at the time she submitted her application using RealPage and registered for ActiveBuilding, Ms. Wyrick anticipated that she would soon sign a separate contract—the Lease Contract—with Defendants. Thus, there was no reason to suspect that the agreements purporting to govern her disputes with RealPage or her “access to and use of” the ActiveBuilding Portal provided by RealPage were in fact intended to also govern her landlord-tenant relationship with Defendants. *Id.* at ¶ 7. Any reasonable consumer would think that their relationship with their landlord would be governed by their lease, not the fine print in a website’s terms of use. *See Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 481 (Cal. Ct. App. 2021) (explaining that, when evaluating notice provided by clickwrap, “the transactional context is an important factor to consider and is key to determining the expectations of a typical consumer”); *Kauders v. Uber Techs., Inc.*, 159 N.E.3d 1033, 1050-51 (Mass. 2021) (taking into account consumer expectations when evaluating notice provided by clickwrap and explaining it would be “by no means obvious” to a consumer “that signing up via an app for ride services would be accompanied by the type of extensive terms and conditions present here”). In short, without sufficient notice to Ms. Wyrick that she could be compelled to arbitrate claims against Defendants, not RealPage, unrelated

to the ActiveBuilding portal, there was no mutual assent, and the parties did not form the agreement to arbitrate that the Circuit Court enforced.

Second, even if Ms. Wyrick did have notice that the Agreements would cover this dispute with Defendants (which she did not), the Circuit Court erred in finding Defendants had met their evidentiary burden of proving that she accepted the ActiveBuilding Agreement.⁴ The evidence submitted by Defendants included only a few conclusory sentences in an affidavit from an employee of Greystar—not RealPage—relying on unspecified “business records” of Greystar, which were not produced. *See* A169 ¶¶ 24-25. Courts have found that such affidavits are insufficient to meet the moving party’s burden of showing an agreement to arbitrate. *See, e.g., Bazemore v. Jefferson Cap. Sys., LLC*, 827 F.3d 1325, 1327-28, 1333 (11th Cir. 2016) (rejecting effort by defendant to meet its burden of proof with conclusory affidavit from custodian of records stating that the plaintiff had accepted the terms of the agreement without having personal knowledge of that acceptance or producing only form documents in support); *CEFCO*, 278 So. 3d at 354-55 (concluding that conclusory affidavit stating plaintiff would have signed arbitration agreement based on defendants’ usual business practices was insufficient to

⁴ Again, the Circuit Court addressed only the ActiveBuilding Agreement. A5-6. But the evidence supporting Ms. Wyrick’s assent to the RealPage Agreement is likewise deficient because it relies on a conclusory affidavit without supporting documentation. *See* A166-67.

overcome the plaintiff's testimony that she did not sign the agreement); *Lamonaco*, 2024 WL 1703112, at *5 (finding affidavit describing online sign-up process insufficient because it stated only that it was based on a review of "enrollment data maintained in the regular course of business" and "did not attach those alleged business records").

As the court explained in *Lamonaco*, testimony involving a plaintiff's agreement to arbitrate their claims "must evince direct, personal knowledge of the conduct manifesting assent," and "[e]vidence of the defendants' 'habit and practice' or what the plaintiff 'would have seen' alone will not suffice." 2024 WL 1703112, *4. Here, where the affiant was not even connected with RealPage and produced no evidence from RealPage showing that Plaintiff herself in fact checked the box or clicked the button that allegedly manifested assent, Defendants have not met their burden of showing that Ms. Wyrick accepted either RealPage agreement.

III. The Circuit Court Erred by Delegating to the Arbitrator the Question Whether Defendants Could Enforce the RealPage Agreements.

Even if the court had authority to compel arbitration of this dispute under the FAA (it did not) and Ms. Wyrick formed valid arbitration agreements with RealPage to arbitrate this dispute with Defendants (she did not), the Circuit Court still erred by delegating to the arbitrator the question whether Defendants could enforce the ActiveBuilding Agreement. The court did so pursuant to a clause in the ActiveBuilding Agreement that purports to require arbitration not just of the merits

of any disputes relating to use of ActiveBuilding but also “issues relating to the scope and enforceability of this arbitration provision.” A3-4; *see* A232. This type of “agreement to arbitrate threshold arbitrability issues is often called a ‘delegation’ agreement, because it delegates the resolution of disputes about the arbitrability of the parties’ claims to an arbitrator.” *Attix v. Carrington Mortg. Servs., LLC*, 35 F.4th 1284, 1295 (11th Cir. 2022). According to the Circuit Court, because of this purported delegation agreement, “the determination of arbitrability,” including scope and enforcement by non-signatories like Defendants, “is itself arbitrable.” A6. That was error.

To begin, the question whether a non-signatory can enforce an arbitration agreement is always for the court to decide, even when there is a delegation clause. As the Second District Court of Appeal recently explained, whether “an undisputed nonsignatory to [an] agreement” can “enforce the arbitration agreement” is “a question that remains within the purview of the trial court notwithstanding any delegation provision.” *Integrated Health Servs. at Cent. Fla., Inc. v. Estate of DeSantis*, -- So. 3d -- , 2025 WL 850427, at *2 n.4 (Fla. 2d DCA Mar. 19, 2025) (collecting cases); *see also, e.g., Shireman v. Tracker Marine, LLC*, No. 3:18-cv-740, 2019 WL 13267902, at *9 (M.D. Fla. Mar. 12, 2019) (“[C]ourts, rather than arbitrators, must determine whether a non-signatory to a contract containing an arbitration agreement can compel a signatory to submit to arbitration,” including “to

enforce a delegation clause[.]”). Because it is undisputed that Defendants are not signatories to either agreement they seek to enforce, the Circuit Court was required to determine for itself whether Defendants can enforce those agreements “notwithstanding any delegation provision.”

Moreover, no issue can be delegated unless the delegation clause is enforceable in the first place. When a party specifically challenges the “precise agreement to arbitrate at issue”—including a delegation clause as “an additional, antecedent agreement”—a “court *must* consider the challenge before ordering compliance with that agreement.” *Rent-A-Center*, 561 U.S. at 70-71 (emphasis added). Here, Ms. Wyrick challenged both delegation clauses on the ground that they do not cover disputes with Defendants and that Defendants cannot enforce them as non-signatories. A264, 268-69 n.12, A270 n.13. She also challenged the delegation clause in the ActiveBuilding Agreement on the ground that it was illusory. A268-69. Thus, the Circuit Court erred by failing to address those specific challenges before compelling arbitration under the ActiveBuilding Agreement’s delegation clause.

It’s no matter that these challenges apply to both the arbitration agreements as a whole and the delegation clauses within them. As the U.S. Supreme Court recently explained, “a party seeking to avoid arbitration must directly challenge the arbitration or delegation clause, not just the contract as a whole. But this rule does

not require that a party challenge *only* the arbitration or delegation provision.” *Coinbase, Inc. v. Suski*, 602 U.S. 143, 150-51 (2024) (emphasis in original). “Rather, where a challenge applies ‘equally’ to the whole contract and to an arbitration or delegation provision, a court must address that challenge.” *Id.* (quoting *Rent-A-Center*, 561 U.S. at 71). As explained above, “[a] delegation clause is merely a specialized type of arbitration agreement.” *New Prime*, 586 U.S. at 112. For example, if Defendants cannot enforce the RealPage and ActiveBuilding Agreements as non-signatories, they cannot enforce the delegation clauses within them, either. As a result, the Circuit Court was required, but failed, to address whether Defendants can enforce the delegation clauses in the RealPage and ActiveBuilding Agreements before compelling arbitration pursuant to them.⁵

Had the court addressed Plaintiff’s specific challenges, it should have concluded that the delegation clauses are unenforceable because neither agreement applies to this dispute, Defendants cannot enforce either agreement as non-signatories, and the ActiveBuilding delegation clause is illusory.

⁵ Should this Court conclude that the Circuit Court erred in enforcing the delegation clause in the ActiveBuilding Agreement without first addressing Plaintiff’s specific challenges, it can remand to the Circuit Court to address those challenges in the first instance. Alternatively, because Ms. Wyrick’s specific challenges were fully briefed below and again here, the Court could decide them as a matter of law without remanding.

A. Neither Delegation Clause Applies to Ms. Wyrick’s Dispute.

First, the RealPage Agreement and the delegation clause within it apply *only* to disputes between Ms. Wyrick and RealPage, not Ms. Wyrick and Defendants. The provision defines covered “Claims” as disputes “*between You and RealPage,*” including “[d]isputes relating to the formation, interpretation, applicability, scope, or enforceability of this Agreement,” and states that “*You and RealPage agree that any and all Claims shall be resolved exclusively in binding Arbitration rather than litigation in court.*” A227 (emphases added). Because Ms. Wyrick’s claims, whether about arbitrability or the merits, are not “between [her] and RealPage”—indeed, they do not mention RealPage at all—they do not need to be resolved in arbitration under the plain terms of the agreement. *Id.* Given this unambiguous language, Defendants cannot meet their burden of proving that a dispute about arbitrability of Ms. Wyrick’s claims against Defendants falls within the scope of the RealPage Agreement’s delegation clause. *See CSE, Inc. v. Barron*, 620 So. 2d 808, 809 (Fla. 2d DCA 1993) (explaining that the “party demanding arbitration” has the burden to show that the “scope of the relevant arbitration clause” covers the dispute at issue); *see also Lambert v. Austin Indus.*, 544 F.3d 1192, 1195 (11th Cir. 2008) (under FAA, court can compel arbitration only upon showing by moving party that “the claims before the court fall within the scope of that agreement”).

Nor can Defendants meet their burden when it comes to the scope of the ActiveBuilding Agreement’s delegation clause, which the Circuit Court relied on to compel arbitration. The ActiveBuilding Agreement requires arbitration of “any dispute relating to the Service [i.e., the ActiveBuilding Resident Portal] or these Terms of Service,” including “issues relating to the scope and enforceability of this arbitration provision.” A231-32. Elsewhere, it confirms that its terms “govern . . . access to and use of this ActiveBuilding Resident Portal . . . offered by RealPage, Inc.,” not Defendants. A230. Because this dispute has nothing to do with access to or use of ActiveBuilding or Ms. Wyrick’s contractual relationship with RealPage, *see* Part I, *supra*, questions about whether it is arbitrable do not either. Thus, the ActiveBuilding delegation clause is not enforceable as to this dispute.

There is another reason why neither delegation clause should be interpreted to cover Ms. Wyrick’s dispute with Defendants: the fully integrated Lease Contract between Ms. Wyrick and Defendants that Ms. Wyrick signed *after* both RealPage agreements. *See* A172-80. In contrast to the plain language of the delegation clauses in the RealPage and ActiveBuilding Agreements—which do not mention claims against Defendants—the Lease Contract undisputedly governs the relationship between Ms. Wyrick and Defendants and is the basis for her claims against them. That contract is “between you, the resident[] . . . : Kathryn Wyrick . . . and us, the owner: Millennial Capital Company LLC,” and names Greystar as the “Manager of

these apartments.” A172. As such, the Lease Contract is between Ms. Wyrick and both Millennial as the owner and Greystar as its representative. And, critically, the Lease Contract—which does *not* contain an arbitration clause and instead contemplates resolution of any claims related to the contract by bench trial, *see* A179—contains a merger clause, providing that it “is the entire agreement between you and us,” A178. It also states that “[a]ny current agreements . . . if not specifically expressed in this Lease Contract . . . are void and have no effect.” *Id.* Under Florida law, clauses like these are “a highly persuasive statement that the parties intended the agreement to be totally integrated.” *World-Class Talent Experience, Inc. v. Giordano*, 293 So. 3d 547, 549 (Fla. 4th DCA 2020) (citation omitted). The Circuit Court failed to consider the effect of this merger clause. Indeed, it erroneously found that Ms. Wyrick entered into the ActiveBuilding Agreement after she signed the Lease. A3. But, if it had addressed the merger clause, the only way for it to read the RealPage and ActiveBuilding agreements in harmony with the Lease Contract’s merger clause is to conclude that the scope of each agreement is different: the Lease Contract covers landlord-tenant disputes like this one between Ms. Wyrick and Defendants, while the arbitration agreements (and delegation clauses) in the RealPage Agreements cover Ms. Wyrick’s disputes with RealPage related to her use of RealPage’s services. Indeed, under the plain terms of the merger clause, there *cannot be* an agreement other than the Lease Contract that governs Ms. Wyrick’s

relationship with Defendants. For that reason, too, the Circuit Court erred by compelling arbitration under the delegation clauses in the RealPage Agreements.

B. Defendants Cannot Enforce the Delegation Clauses in Either Agreement as Non-Signatories

Even if the delegation clauses in the RealPage or ActiveBuilding Agreements encompassed this dispute, and they do not, Defendants have not met their burden of showing they can enforce the delegation clauses as non-signatories. *See Newell v. Celebrity Cruises, Inc.*, No. 18-20743-CIV, 2021 WL 12218402, at *9 (S.D. Fla. Nov. 23, 2021) (explaining that the party seeking arbitration bears the burden of proving that an agreement to arbitrate exists that it can enforce as a non-signatory). Below, Greystar argued both that it is a third-party beneficiary of the ActiveBuilding Agreement, and that it can enforce the ActiveBuilding and RealPage Agreements under the doctrine of equitable estoppel, while Millennial argued only the latter.⁶ Neither of those arguments passes muster.

⁶ In its reply in the Circuit Court, Millennial also raised a new argument that it did not make in its motion to compel arbitration, arguing that the fact that the Lease Expiration Notice was sent from DoNotReply@realpage.com establishes an “agency relationship,” presumably between Millennial and RealPage, “based on ‘agency by implication,’” or “apparent agency.” A355-56. This argument was waived. Even if not waived, none of the elements of apparent agency cited by Millennial are met. *See* A355. Indeed, at oral argument, counsel for Defendants admitted that RealPage is simply a “third-party software program.” A377-78. And even if the elements for apparent agency were met, Millennial cited no case holding that apparent agency, rather than actual agency, is a basis for third-party enforcement of an arbitration agreement. Moreover, the case it does cite provides that an (actual)

Starting with the third-party beneficiary argument. An arbitration agreement or delegation clause may be enforced by a third-party beneficiary of the agreement, but a non-signatory is a third-party beneficiary *only* to a contract “expressly intended to benefit” that third party. *Olson v. Fla. Living Options, Inc.*, 210 So.3d 107, 110 (Fla. 2d DCA 2016). Greystar argued that it could enforce the entire ActiveBuilding Agreement as a third-party beneficiary because that agreement “expressly” references Greystar. *See* A324-25. The arbitration provision does reference claims against the “apartment community manager.” A231. But even assuming, as the Circuit Court did, that this phrase refers to Greystar, *see* A8, the ActiveBuilding agreement requires arbitration of only one specific type of claim against the “apartment community manager”: claims under the Telephone Consumer Protection Act (“TCPA”). The full arbitration provision states, “Any dispute, claim or controversy (each a ‘Dispute’) arising out of or relating to the Service, *including any Telephone Consumer Protection Act (TCPA) claim between you, [Real Page], and your apartment community manager*, will be resolved exclusively by binding arbitration rather than a court proceeding.” A231 (emphasis added). Thus, the plain

agent can compel arbitration when the case against the signatory principal concerns actions taken by the non-signatory agent. *See* A355 (quoting *Beazer Homes Corp. v. Bailey*, 940 So.2d 453, 462 (Fla. 5th DCA 2006)). Here, the purported agent, RealPage, is the signatory and is not seeking to enforce the arbitration agreement, while the purported principal, Millennial, is *not* a signatory to the agreement. Thus, agency, let alone apparent agency, does not provide a basis for Millennial to enforce either agreement.

language of the ActiveBuilding agreement at most reflects an intentional choice to benefit the apartment community manager only as to arbitration of TCPA claims against RealPage in which *both* RealPage and the apartment community manager are parties, not all claims, and definitely not claims like Ms. Wyrick's that have nothing to do with RealPage or ActiveBuilding.

Both Defendants also argued that they could enforce the RealPage and ActiveBuilding Agreements, including their delegation clauses, as non-signatories under the doctrine of equitable estoppel. In the arbitration context, Florida courts recognize two circumstances in which a party can be estopped from avoiding arbitration: “when the signatory’s claims allege substantially interdependent and concerted misconduct by the signatory and the non-signatory or when the claims relate directly to the contract and the signatory is relying on the contract to assert its claims against the non-signatory.” *Koehli v. BIP Int’l, Inc.*, 870 So.2d 940, 944 (Fla. 1st DCA 2004). Neither applies here.

For one, Ms. Wyrick has not alleged “interdependent and concerted misconduct” by the non-signatories (Defendants) and the signatory to the agreements with arbitration and delegation provisions (RealPage). To the contrary, Ms. Wyrick did not sue RealPage and her claims have nothing to do with misconduct by RealPage; instead, they are focused entirely on misconduct by Defendants alone in seeking to collect unlawful charges at the end of her lease term. By contrast, in

the cases cited by Millennial below, the plaintiff sued both the signatories and non-signatories and was seeking to hold both liable for violating the law. *See* A356 n.8 (citing *Kolsky v. Jackson Square, LLC*, 28 So. 3d 965, 969 (Fla. 3d DCA 2010); *Lash & Goldberg LLP v. Clark*, 88 So. 3d 426, 428 (Fla. 4th DCA 2012)). Defendants identified no case allowing what they seek to do here: enforce an arbitration agreement as a non-signatory under this theory even though no signatory is a defendant. *See Schreiber v. Ally Fin. Inc.*, 634 F. App'x 263, 265-66 (11th Cir. 2015) (holding that defendant could not enforce agreement under this equitable estoppel theory because plaintiff did not name the contract signatory as a defendant or allege “interdependent and concerted” misconduct on behalf of the signatory).

Moreover, just as Plaintiff's claims do not “arise out of” either the RealPage or ActiveBuilding Agreements, *see* Part I, *supra*, they do not “rely on” either agreement. She does not allege that Defendants violated either agreement; indeed, the complaint does not even mention the RealPage agreements. That is a far cry from *AP Atlantic, Inc. v. Silver Creek St. Augustine, LLLP*, cited by Millennial below, A356 n.8, where the court held that a non-signatory could enforce a contract because the claims against it were “directly related to both performance and payment under the contract.” 266 So. 3d 865, 866 (Fla. 5th DCA 2019). Despite that, Greystar argued below that, because Ms. Wyrick's online rental application through RealPage and then use of the ActiveBuilding Portal was part of the chain of events that led to

her entering into a landlord/tenant relationship with Defendants, it can enforce RealPage’s agreements. But, as the Eleventh Circuit recently explained, “a but-for relationship between the claims and the contract to be enforced ‘alone is not enough to warrant equitable estoppel.’” *Usme v. CMI Leisure Mgmt., Inc.*, 106 F.4th 1079, 1088 (11th Cir. 2024) (quoting *Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1174 (11th Cir. 2011)). In that case, it was “likely true that but for the agreements with the non-party signatory entities, the crewmembers here would not have been employed . . . at all. And without such employment they would have no Jones Act or general maritime claims against any of the entities (whether signatories or non-signatories).” *Id.* at 1090. Nonetheless, the court held that the non-signatories could not enforce the agreements, explaining that “this is the kind of but-for relationship we have deemed insufficient to warrant equitable estoppel.” *Id.* Instead, “[t]o actually rely on the contract, the signatory’s claims ‘must attempt to hold the nonsignatory to the terms of the contract.’” *Id.* (quoting *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1343 (11th Cir. 2012)). Here, because Plaintiff does not seek “to hold” Defendants “to the terms of” the ActiveBuilding or RealPage agreements, they cannot enforce the delegation clauses under an equitable estoppel theory.

C. The Delegation Clause in the ActiveBuilding Agreement is Illusory.

Finally, the delegation clause in the ActiveBuilding Agreement is illusory because it can be changed by RealPage at any time without advance notice. “A contract is illusory under Florida law when one of the promises appears on its face to be so insubstantial as to impose no obligation at all on the promisor—who says, in effect, ‘I will if I want to.’” *Handi-Van, Inc. v. Broward Cnty.*, 116 So. 3d 530, 540 (Fla. 4th DCA 2013) (internal quotation marks, citation omitted). When a contract is illusory, it is invalid for lack of consideration. *See Diverse Elements, Inc. v. Ecommerce, Inc.*, 5 F. Supp. 3d 1378, 1382 (S.D. Fla. 2014) (finding contract illusory and “invalid as a matter of law” where defendant “improperly attempted to reserve the right to modify the Terms of Service at any time, and without notice” (cleaned up)). Courts have applied these principles to arbitration agreements. For example, the Eleventh Circuit held that, where one party “retained the right to unilaterally modify part of the integrated contract, its promise to arbitrate was illusory” and thus not enforceable. *Douglas v. Johnson Real Estate Invs., LLC*, 470 F. App’x 823, 826 (11th Cir. 2012); *see also Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012) (“where one party to an arbitration agreement seeks to invoke arbitration to settle a dispute, if the other party can suddenly change the terms of the agreement to avoid arbitration, then the agreement was illusory from the outset”). Here, RealPage’s reciprocal promise to arbitrate claims against Ms.

Wyrick—or to perform any other obligation it purportedly has under the ActiveBuilding Agreement—was meaningless because RealPage reserved the right to “revise and update these Terms of Service from time to time *in [its] sole discretion.*” A230 (emphasis added). That is, it could avoid its obligations by simply changing the terms, while Ms. Wyrick would always be bound to *her* obligations, including to arbitrate threshold disputes about arbitrability.

Courts have held that a unilateral change-in-terms provision is not illusory if it provides for sufficient advance notice of the changes. *See, e.g., In re Checking Acct. Overdraft Litig.*, 856 F. App’x 238, 245-46 (11th Cir. 2021) (holding that change-in-terms provision was not illusory where agreement prevented bank from making any “changes to the agreement that would disadvantage Plaintiffs without first providing 30-days’ notice of such change”). But, here, the ActiveBuilding Agreement provides that “[a]ll changes are effective immediately upon posting,” while “continued use of the Service . . . following the posting of revised Terms of Service shall constitute your acceptance and agreement to be bound by the changes.” A230. Thus, unlike *In re Checking Account Overdraft Litig.*, where the consumer had advance notice of a change and could close their account before the change would take effect and they would be bound by it, 856 F. App’x at 245, Ms. Wyrick would not receive any notice at all of a change to the ActiveBuilding Agreement prior to accessing ActiveBuilding and might inadvertently “accept” the new terms

simply by using ActiveBuilding without knowing about any changes. In short, because RealPage has said, in effect, it “will if [it] want[s] to,” the ActiveBuilding Agreement, including its delegation provision, is illusory and invalid. *Handi-Van, Inc.*, 116 So. 3d at 540.

* * * *

Because neither Defendant met its burden of proving that the delegation clauses apply to this dispute or that it could enforce them as a non-signatory, and because the delegation clause in the ActiveBuilding Agreement is illusory, the Circuit Court erred in compelling arbitration under the delegation clause in the ActiveBuilding Agreement, and it had no basis for compelling arbitration under the delegation clause in the RealPage Agreement either. As a result, this Court must reverse. But, before remanding to the Circuit Court, it also can and should decide Plaintiff’s challenges to the whole arbitration agreements because they involve the same analyses as the delegation clauses. In other words, if this Court has concluded that the delegation clauses are unenforceable, it can hold as a matter of law that the RealPage Agreement and ActiveBuilding Agreement are also not enforceable for the same reasons. That is, as explained above, the arbitration agreements cannot be enforced because Ms. Wyrick’s disputes with Defendants do not fall within their scope, because Defendants cannot enforce them as non-signatories, either as third-

party beneficiaries or under a theory of equitable estoppel, and because the ActiveBuilding Agreement is illusory.⁷

CONCLUSION

For the foregoing reasons, the Court should reverse the Circuit Court’s order granting Defendants’ motions to compel arbitration.

Dated: April 28, 2025

Respectfully submitted,

/s/ Shelby Leighton

Shelby Leighton

Pro hac vice no. 1057530

PUBLIC JUSTICE

1620 L St. NW, Suite 630

Washington, DC 20036

(202) 797-8600

sleighton@publicjustice.net

Hannah Kieschnick

Pro hac vice no. 1057531

⁷ As Ms. Wyrick explained below, *see* A272-74, the arbitration provision in the ActiveBuilding Agreement is also unenforceable for the additional reasons that it is both unconscionable and an invalid waiver of Ms. Wyrick’s statutory rights. *See Lacey v. Healthcare & Ret. Corp. of Am.*, 918 So. 2d 333, 334 (Fla. 4th DCA 2005). In particular, it unlawfully purports to waive Ms. Wyrick’s ability to recover the punitive damages and statutory damages for her consumer protection claims that she would be able to recover in court. *See Gessa v. Manor Care of Fla., Inc.*, 86 So. 3d 484, 493 (Fla. 2011) (holding that provisions prohibiting recovery of punitive damages and limiting compensatory damages “violate the public policy of the State of Florida and are unenforceable” because they “directly frustrate the remedies created by the statute”), and it purports to waive her right to recover “damages of any kind” for future legal claims and indemnify RealPage for any claims or damages, A231-32; *see Lacey*, 918 So. 2d at 334; *see also Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.*, 374 So. 2d 487, 489 (Fla. 1979) (“[C]ontracts of indemnification which attempt to indemnify a party against its own wrongful acts are viewed with disfavor in Florida.”).

PUBLIC JUSTICE
475 14th St., Suite 610
Oakland, CA 94162
(510) 622-8150
hkieschnick@publicjustice.net

Robert W. Murphy
FL Bar No. 717223
LAW OFFICE OF ROBERT W. MURPHY
440 Premier Circle, Suite 240
Charlottesville, VA 22901
(954) 763-8660
rwmurphy@lawfirmmurphy.com

Joseph M. Sternberg
FL Bar No. 122447
M. Parker Landers
FL Bar No. 109712
LANDERS & STERNBERG, PLLC
100 E. Pine St., Suite 110
Orlando, FL 32801
(407) 495-1893
joseph@landersandsternberg.com
parker@landersandsternberg.com

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2025, a true and correct copy of the foregoing was filed using the Florida Courts e-Filing Portal, which sends an automatic e-mail message, containing the document, on all current parties and counsel of record.

/s/ Shelby Leighton
Shelby Leighton

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Florida Rule of Appellate Procedure 9.210(a)(2) because it was typed in 14-point Times New Roman font.

/s/ Shelby Leighton
Shelby Leighton