No. 24-10019

In the United States Court of Appeals for the Eleventh Circuit

MERRITT ISLAND WOODWERX, LLC, *individually and on behalf of all others similarly situated*,

TRUE TOUCH SERVICES, LLC, *individually and on behalf of all others similarly situated*,

Plaintiffs–Appellees,

v.

SPACE COAST CREDIT UNION,

Defendant–Appellant.

Appeal from the U.S. District Court for the Middle District of Florida, No. 6:23-cv-01066, Hon. Paul G. Byron

PETITION FOR REHEARING EN BANC

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July 2, 2025

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Defendant-Appellant Space Coast Credit Union, through undersigned counsel, hereby submits the following Certificate of Interested Persons and Corporate Disclosure Statement, and certifies the following:

1. Space Coast Credit Union is a Florida state-chartered credit union. It has no parent corporation and no publicly held company owns 10% or more of its stock.

2. The following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, and any publicly held corporation that owns 10% or more of the party's stock.

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RULE 40-3(C) STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

1. *Bedgood v. Wyndham Vacation Resorts, Inc.*, 88 F.4th 1355 (11th Cir. 2023).
2. *Ivax Corp. v. B. Braun of America, Inc.*, 286 F.3d 1309 (11th Cir. 2002).

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

1. What is the proper scope of *Bedgood*'s "futility" rule?

2. Under the totality-of-the-circumstances test for assessing an alleged default of arbitration rights, are continued efforts to facilitate arbitration after the non-movant sues legally irrelevant?

/s/ Stuart M. Richter
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INTRODUCTION

The panel decision stretches the "odd" case of *Bedgood v. Wyndham Vacation Resorts, Inc.* past its breaking point and gravely undermines arbitration rights. 88 F.4th 1355, 1359 (11th Cir. 2023). This petition focuses on two issues.

First, what is the proper scope of *Bedgood*'s "futility" rule? Should it apply narrowly to circumstances similar *Bedgood*—*i.e.*, courts will excuse a litigant's failure to comply with a demand to arbitrate when doing so would be futile due to the movant's refusal to cure an alleged default on its obligations to facilitate arbitration? Or is the rule broader? Does it allow a litigant who never attempted to arbitrate from resisting a demand to proceed with a neutral that is ready to accept the claim, based upon a pre-suit procedural hiccup that the movant sought to and did cure?

The answer should be "narrow." That's what *Bedgood* says, and that's what principles of federal arbitration law compel. But the panel expanded the futility rule to cover circumstances wildly different than those in *Bedgood*. Under the panel's holding, a litigant can renege on its promise to arbitrate by raising a procedural wrinkle that arguably might have slowed down arbitration. That's so regardless of whether the recalcitrant party ever tried

to or intended to arbitrate pre-suit; regardless of whether the error was easily curable; and regardless of the movant's conduct upon becoming aware of the issue. That can't be right. Given the strong federal policy favoring arbitration, bargained-for arbitration rights should not be so easily destroyed.

Consider the circumstances here. Plaintiff–Appellee True Touch Service Inc. admittedly agreed to arbitrate its contract claims with Defendant–Appellant Space Coast Credit Union. True Touch never tried to arbitrate its claims nor manifested an intent to arbitrate prior to filing suit. By the time Space Coast demanded arbitration with True Touch—thereby triggering its promise to proceed with alternative dispute resolution—the AAA was prepared to accept True Touch's dispute. Nevertheless, True Touch refused. It pointed to the experience of a total stranger, co-plaintiff Merritt Island Woodwerx, whose pre-suit attempt to arbitrate with Space Coast was hampered due to a series of misunderstandings and clerical errors at the AAA. Space Coast immediately sought to fix those issues, and everything was ironed out before either Space Coast or True Touch invoked arbitration rights under their agreement.

But the panel said True Touch can stay in court. As it saw things, True Touch had demonstrated "futility" to excuse its noncompliance with the arbitration agreement. True Touch had an identical arbitration agreement to Woodwerx, and the AAA initially refused to entertain Woodwerx's arbitration demand. Nothing else mattered.

Respectfully, that's not what *Bedgood* holds. The futility rule in *Bedgood* turned on the fact that one of the movants in that case was in uncured and incurable noncompliance of the AAA's procedural rules. Ordering the parties to arbitrate with that particular movant would have been pointless. Tellingly, *Bedgood* reached a *different* outcome as to a separate set of litigants in the same case—specifically because there was no active default as to those litigants. Without an uncured noncompliance, there was no basis to say that an order compelling those parties to arbitrate would have been futile. That made all the difference.

Second, can continued efforts to facilitate arbitration after suit is filed cure any supposed "futility" and obligate the non-movant to proceed to arbitration as promised? Or is post-suit conduct legally inapposite? Under Circuit law, the former is correct. Courts must look at the totality of the circumstances before stripping a movant of its arbitration rights, *Ivax Corp.*

v. B. Braun of Am., Inc., 286 F.3d 1309, 1315-16 (11th Cir.2002), and ongoing attempts to clear procedural roadblocks plainly speak to the movant's intent to arbitrate. But, citing concerns of "gamesmanship" (Op.14), the panel downplayed Space Coast's immediate action to facilitate arbitration upon learning of the Woodwerx declination and deemed Space Coast's continued efforts after True Touch sued to be legally irrelevant. This truncated analysis cannot be squared with the totality-of-the-circumstances standard.

The implications of the panel's futility holding are drastic. Space Coast is the third largest credit union in Florida, with over half a million members. Many of them have agreed to arbitration. Are they all excused from that promise due to a brief period of alleged "futility" that has since been remedied? In an alleged class action, can thousands of absent parties use the panel's futility ruling to piggyback on a default as to one named plaintiff and escape their agreements to arbitrate? The answers should be "no." But the panel's decision puts these issues into doubt. That doubt will cost businesses millions of dollars in litigation fees, clog courts with needless motions practice, and jeopardize arbitration rights. The full Court should intervene and clarify the narrow scope of *Bedgood*'s futility rule.

ISSUES PRESENTED

1. What is the proper scope of *Bedgood*'s "futility" rule?

2. Under the totality-of-the-circumstances test, are continued efforts to facilitate arbitration after the non-movant sues legally relevant?

COURSE OF PROCEEDINGS

A. True Touch Agrees to Arbitrate.

True Touch has a business checking account with Space Coast. Dkt.8 at 2, ¶¶6-8.[1] The parties' contract contains a binding agreement to arbitrate "any and all Claims that are threatened, made, filed or initiated after" the effective date of the arbitration agreement. Dkt.8-1 at 10, § 37. True Touch concedes that it is bound by this agreement and that its underlying dispute with Space Coast falls within the scope. Dkt.49 at 9.

Neither party is obligated to arbitrate immediately. Rather, Space Coast or True Touch "may elect to resolve a particular Claim through arbitration, even if one of us has already initiated litigation in court related to the Claim." Dkt.8-1 at 10, § 37. It is the election of arbitration by either

[1] Citations to "Dkt.XXX" refer to the docket number in the district court. Page references refer to the page number in the header generated by the district court's electronic filing system.

party that triggers the forfeiture of the right to go to (or stay in) court: "IF EITHER YOU OR WE ELECT TO RESOLVE A PARTICULAR CLAIM THROUGH ARBITRATION, YOU WILL GIVE UP YOUR RIGHT TO GO TO COURT TO ASSERT OR DEFEND YOUR RIGHTS UNDER THIS ACCOUNT AGREEMENT." *Id.*

True Touch never elected to arbitrate. Op.3-4. It followed Woodwerx—an entity with whom True Touch has no privity—into federal court. Op.3-4. True Touch never alleged it tried to arbitrate or intended to arbitrate. Conversely, Woodwerx previously attempted to initiate arbitration through the AAA. Op.3-4. Those attempts initially failed due to a series of problems at the AAA.[2] Op.3-4.

Space Coast was first alerted to the issues at the AAA in April 2023, when it received a letter declining the Woodwerx arbitration. Dkt.8-3 at 1; Op.4. The letter commanded Space Cost to "email

[2] The AAA denied Woodwerx's demand because Space Coast had not pre-registered the arbitration clause. But pre-registration is not mandatory. Under Consumer Rule 12, "[if] the clause is not registered, the AAA conducts an expedited review [on receiving an arbitration demand] to determine if it comports with the Consumer Due Process Protocol." *Procedural Steps in AAA Consumer Arbitration,* PRACTICAL LAW ARBITRATION, *available at* https://us.practicallaw.thomsonreuters.com/w-001-0282. Expedited review was never offered to Space Coast.

ConsumerFiling@adr.org," if "you believe we have declined this matter in error." Dkt. 8-3 at 1. That's exactly what Space Coast did. Dkt.26 at 3, ¶5. It stated it wanted to proceed with arbitration and questioned the basis for declining. *Id.* But the AAA never responded. So, after weeks of waiting, Space Coast separately submitted its arbitration clause for review. *Id.* ¶6. The credit union began this process in June 2023 on the same day Plaintiffs filed their original complaint (June 7, 2023) and before they requested waiver of service (June 14, 2023).[3] Dkt.13. Two days later, Space Coast followed up with the Woodwerx case manager to inform them of Space Coast's continued efforts to facilitate arbitration. Dkt.26 at 3, ¶6.

Space Coast finally heard back from the AAA in late July 2023, when it sent a letter accepting Space Coast's arbitration clause and agreeing to administer claims under it. *Id.* ¶7. With these issues resolved, Space Coast elected to arbitrate with True Touch. *Id.* ¶8. Space Coast had not yet

[3] The AAA's public Consumer Clause Registry shows that Space Coast was registered with the AAA as of June 7, 2023. *Consumer Clause Registry Home Page*, AMERICAN ARBITRATION ASSOCIATION, https://apps.adr.org/ClauseRegistryUI/faces/org/adr/extapps/clauseregistry/view/pages/clauseRegistry.jsf.

answered True Touch's complaint nor engaged in any litigation in district court. Nevertheless, True Touch refused to arbitrate. *Id.* ¶8

B. District Court Proceedings.

Space Coast moved to compel True Touch to arbitrate its claims pursuant to Sections 3 and 4 of the Federal Arbitration Act. Dkt.24. True Touch conceded it agreed to arbitrate. *See* Dkt.49 at 9. But it nevertheless argued it should be excused from doing so because Space Coast was allegedly in default of its arbitration rights as to Woodwerx. True Touch never made a separate argument for default. Instead, True Touch argued that attempting to arbitrate pre-suit would have been "futile" in light of the Woodwerx decision, so it should be allowed to stay in court with Woodwerx.

The district court agreed. It concluded Space Coast was in "default" of its agreement to arbitrate with Woodwerx, pointing to Woodwerx's failed attempt to initiate arbitration. Dkt.49 at 11-18. Then, in a short footnote, the district court held True Touch got the benefit of its "default" analysis as to Woodwerx because it would have been "futile" for True Touch to seek arbitration. *Id.* at 12 n.2.

C. The Panel's Decision.

This Court issued its decision in *Bedgood* shortly after the district court rendered its decision in this case. Op.5. The panel here felt bound by this intervening decision and affirmed the district court across the board. Op.2. It affirmed the district court's ruling as to Woodwerx. It concluded the district court did not clearly err by relying upon the AAA's declination letter as a basis for holding Space Coast in default under § 3 of the FAA. Op.9-10. And it further held that, because Woodwerx attempted to arbitrate before going to Court, Woodwerx had not failed, neglected, or refused to arbitrate under § 4 of the FAA. Op.12.

Given the True Touch never attempted to arbitrate, the panel agreed *Bedgood*'s futility rule would need to apply for True Touch to get the benefit of the Woodwerx default under FAA § 3. Op.11. The panel held the futility rule applied because "True Touch had an identical arbitration provision to Woodwerx." Op.11. It provided no further basis for this outcome, ignoring Space Coast's pre-suit efforts to facilitate arbitration and its success in doing so before either True Touch or Space Coast demanded arbitration.

The panel briefly considered these efforts through the lens of FAA § 4—only to brush them aside. The panel agreed True Touch failed to

arbitrate (satisfying the first element for relief under § 4) Op.12. But, again pointing to *Bedgood*, the panel said Space Coast was not aggrieved by this failure (the second element) in light of the Woodwerx declination. Op.12-13.

The panel acknowledged the critical fact on which this case and *Bedgood* differ: The company in *Bedgood* did not and could not cure the problems with the AAA that stymied arbitration; but Space Coast did, and the AAA was ready to accept True Touch's claim by the time it moved to compel arbitration. Op.13-14. Still, it held this fact was not enough to distinguish *Bedgood* because, as a matter of law, "post-filing conduct cannot cure the prior non-compliance." Op.14

ARGUMENT

I. THE PANEL DECISION IS WRONG.

A. By Expanding *Bedgood*'s Futility Rule Incorrectly, the Panel Decision Weakens the Presumption Favoring Arbitration.

The panel believed all that was necessary to find a futility-based default as to True Touch was that it had an identical arbitration agreement as Woodwerx, citing *Bedgood*. Op.11. But that's not what *Bedgood* says. Its futility holding is far narrower. *Bedgood* contains two interrelated futility analyses culminating in two completely different results. The difference

between the two? For one, the movant was in a state of default at the time it moved to compel. The other was not.

The Court first considered a motion by Wyndham Resorts to compel arbitration against a group of plaintiffs that had not previously attempted to arbitrate. 88 F.4th at 1362-63, 1366-67, 1369-70. These plaintiffs sued with others who previously demanded arbitration, only to have their demands rejected because Resorts failed to comply with the AAA Consumer Rules. *Id.* at 1366-67. Significantly, Resorts refused to fix the problems with the AAA. *Id.* at 1361. So, even by the time the case reached this Court, Resorts was still in a state of uncured noncompliance with the AAA. *Id.* This noncompliance would have doomed any attempt by any plaintiff to demand arbitration under the Resorts arbitration agreement. *Id.* These undisputed facts formed the basis for the Resorts plaintiffs to resist the motion to compel arbitration. *Id.* at 1366-67, 1369-70. The Court agreed that Resorts had was in default and not entitled to relief under §§ 3 or 4 of the FAA.

Things turned out differently for a second group of litigants who sued two other Wyndham entities (Development and WorldMark). *Id.* at 1369-70. These entities were *not* in active noncompliance with the AAA when they moved to compel arbitration. *Id.* at 1370. Addressing whether these

defendants had waived their arbitration rights against plaintiffs who had never demanded arbitration, this Court said "no." *Id.* That's because "there [was] no definitive indication in the record that the AAA actually determined that [those defendants] had violated AAA policies as relevant to these plaintiffs." *Id.* The Court acknowledge it was "tempting to assume" that demands by these plaintiffs would suffer the same fate Resorts plaintiffs, given their "similar arbitration clauses." *Id.* But the Court correctly recognized that similarities and tempting assumptions are not a legitimate basis for stripping a defendant of arbitral rights. *Id.* at 1369-70.

The rule from *Bedgood* is this: If the record shows it would be pointless to ask a nonmovant to comply with its arbitration obligations because of the movant's uncured failure to facilitate arbitration, courts need not compel litigants to engage in futile gestures. But there must be a "definitive indication in the record" for this conclusion. Bare assumptions—even "tempting" ones—will not suffice.

The panel decision reduces *Bedgood*'s futility rule to a simple-but-wrong proposition: If a movant defaults as to one litigant, other litigants with the same arbitration agreement can follow that first litigant into court

without needing to separately show a default on their separate arbitration agreements. *Bedgood* does not support this proposition.

The panel's misunderstanding of *Bedgood* creates a deeper problem: It violates core tenets of federal arbitration law. True Touch concededly agreed to arbitrate with Space Coast, which puts this case firmly within the FAA's "liberal federal policy favoring arbitration." *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1263-64 (11th Cir. 2017). Under this policy, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself ***or an allegation of waiver, delay, or a like defense to arbitrability***." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added). "Because federal policy strongly favors arbitration," the party who argues waiver"—or here, futility—"bears a heavy burden of proof." *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1200 n.17 (11th Cir. 2011).

By giving True Touch the benefit of the Woodwerx default holding just because it has an identical arbitration clause, the panel decision nullifies the presumption favoring arbitration and relieves True Touch of its burden to prove Space Coast gave up its right to arbitrate. The Court in *Bedgood* cited

these same principles in rejecting the "tempting" assumption that it would have been futile to attempt to arbitrate with Development and WorldMark. 88 F.4th at 1370.

Critically, True Touch's obligation to proceed to the AAA wasn't triggered until Space Coast demanded arbitration in July 2023. The parties' contract does not automatically compel arbitration of every dispute. Dkt.8-1 at 10, § 37; *see contra O'Neal Constructors, LLC v. DRT Am., LLC*, 991 F.3d 1376, 1378 (11th Cir. 2021) ("[A]ny Claim subject to, but not resolved by, mediation shall be subject to arbitration…"). So the parties' duty to arbitrate does not arise until one side demands it. *Marcus v. Frome*, 275 F. Supp. 2d 496, 505 (S.D.N.Y. 2003) (The Purchase Agreement states clearly that either side 'may demand' arbitration. It is plain that for the arbitration provision under § 10.8 to take effect,…one side must make an arbitration demand."). By that time True Touch's duty arose, there was no argument that Space Coast was noncompliant. The clause was registered, fees were paid, and the AAA's doors were open.

Finally, True Touch did not offer evidence that the AAA's initial denial of the Woodwerx arbitration demand caused it to abandon a previously-formed intent to arbitrate. When subsequently asked to honor its promise to

arbitrate, True Touch's position boiled down to: "Because Woodwerx doesn't have to arbitrate, I don't have to arbitrate either." But that's not how the presumptions established by federal arbitration law work. Space Coast has a separate contract with True Touch containing a distinct agreement to arbitrate. To escape that promise, True Touch had to overcome the presumption in favor of arbitration by carrying a heavy burden of producing evidence showing Space Coast waived its right to arbitrate *specifically as to True Touch*. But it did not.

B. The Panel Decision Vitiates the Totality-of-the-Circumstances Standard.

Separately, the panel's decision diminishes the controlling standard for proving whether movant has defaults on its right to arbitrate. To determine whether a party resisting arbitration has met its heavy burden to show default, a court must decide "if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right." *Ivax Corp.*, 286 F.3d at 1315-16 (cleaned up). Here, the panel placed dispositive emphasis on two pre-suit facts (non-compliance and inability to cure prior to suit), and then cut off its analysis on the date True Touch filed suit. Op.13-14. It deemed legally irrelevant Space Coast's ongoing efforts to fix the problems at the

AAA, which culminated in the AAA agreeing to accept claims True Touch's claims before Space Coast even responded to the suit.

The totality-of-the-circumstances standard is a critical part of the overarching presumption in favor of arbitration. Along with the "heavy burden" imposed on a non-movant to show default, *Krinsk*, 654 F.3d at 1200 n.17, the totality-of-the-circumstances standard protects movants from losing arbitration rights due to imperfect implementation. *Cf. Gerstenhaber v. Matherne Holdings, Inc.*, 2018 WL 6261848, at *2 (S.D. Fla. Nov. 6, 2018) (default judgments under Federal Rule 60(b)(1) may be set aside for "mistake, inadvertence, surprise, or excusable neglect," "taking into account the totality of the circumstances surrounding the party's omission"). That so regardless of whether that be caused by parties the movant doesn't control (*e.g.*, the AAA) or its own unintentional mistakes.

The panel's decision here is a prime example of why the totality-of-the-circumstances standard matters. Looking at less than all the facts can lead to a drastically different impression of a movant's intent than one would take from the full set of facts. By cherry-picking the pre-suit record and legally ignoring the post-suit record, a competent lawyer can create a negative impression of Space Coast (or any other movant unfortunate

enough to land in its position vis-à-vis the AAA). The panel placed dispositive emphasis on the fact that Space Coast was allegedly out of compliance "at any time before suit" and that it had not come into compliance before True Touch sued. Op.13-14.

But context matters. Consider that Space Coast immediately emailed the AAA after receiving the Woodwerx declination letter, which is what the AAA instructed it to do. Consider that the AAA ignored Space Coast after it did exactly what it was told to do. Consider that Space Coast submitted the arbitration clause for review before it had been served with True Touch's suit. And consider the fact that, when Space Coast finally got the AAA's attention, the arbitration clause was accepted in due course. *Supra* pp.6-8.

These facts are undisputed. And they would lead a reasonable factfinder to a *drastically* different conclusion than if he considered just the finding of non-compliance and the inability to fix it before True Touch sued. The troubling problem with the panel's decision is that it legally mandates judicial blinders as to circumstances like these. The panel's decision suggests that pre-suit non-compliance and a inability to fix that non-compliance before the plaintiff makes it to the courthouse (whenever that might be) is

sufficient as a matter of law to divest a movant of its right to arbitrate. Op.13-14.

The filing-day cutoff for evidence compounds the problem, as it leaves movants at the mercy of third parties whom they do not control. Op.14. Consider if the AAA had immediately responded to Space Coast in April 2023, as it should have done. The procedural issues would have been cleaned up, and the AAA would have been prepared to accept True Touch's claims long before True Touch made it to the courthouse. But, because the AAA decided not to respond, Space Coast lost its right to arbitrate. A defendant's rights should not hinge upon the arbitrary decision of the AAA to answer an email. Yet, under the panel's logic, that's seemingly the case. Avoiding baffling outcomes like this is precisely why courts must consider the totality of the circumstances before stripping away arbitration rights—up to the day the movant files its motion to compel.[4]

[4] Space Coast does not advocate a categorical rule under which a movant can avoid a finding of default just by curing any problems prior to moving to compel arbitration. *See* Op.14 (expressing concerns about "gamesmanship").

II. REVIEW IS IMPORTANT.

Review of the panel's decision is important. It sets troubling precedent devoid of a limiting principle. It could easily be abused by plaintiffs seeking to avoid their binding promises to arbitrate claims. Implementing arbitration ultimately relies upon humans and is thus susceptible to human error. Quite apart from whether innocent mistakes should lead to a loss of arbitration rights as to *any* litigant, the panel's decision raises the prospect of losing arbitration rights as to *many* or even *all* counterparties with whom a business has agreed to arbitrate. Doubtlessly, plaintiffs' counsel here will try to argue that the Woodwerx default holding plus the True Touch futility rule means that every putative class member they will seek to represent is excused from arbitration.[5]

Nothing about *Bedgood*'s futility rule—much less background norms of arbitration law—suggests that a default as to one would-be lead plaintiff should destroy arbitration rights as scores of absent members who have never sued, never attempted to arbitrate, and never claimed the company has default on their respective arbitration agreements. But the panel's

[5] Space Coast will vigorously oppose that argument if and when made.

decision leaves this drastic consequence in play. The result will be a needless increases arbitration-related litigation and legal expenditures, along with unacceptable risks to arbitration rights that Congress and federal law clearly protect. Review by the full court is necessary to head off these problems.

CONCLUSION

The petition should be granted.

Date: July 2, 2025

Respectfully submitted,

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[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 24-10019

MERRITT ISLAND WOODWERX, LLC,
individually and on behalf of all others similarly situated,
TRUE TOUCH SERVICES, LLC,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

versus

SPACE COAST CREDIT UNION,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

D.C. Docket No. 6:23-cv-01066-PGB-DCI

Before LUCK, LAGOA, and ABUDU, Circuit Judges.

PER CURIAM:

Space Coast Credit Union brings this interlocutory appeal of the district court's denial of its motion to compel arbitration. After the district court's decision, we decided *Bedgood v. Wyndham Vacation Resorts, Inc.*, 88 F.4th 1355 (11th Cir. 2023)—a very similar case that resolves this appeal. The question in *Bedgood* was "whether, having seemingly stymied the purchasers' efforts to arbitrate, [a company] and its co-defendants can now prevent them from litigating on the ground that their agreements require arbitration." *Id.* at 1359. We held that both the consumers who had "originally sought to arbitrate their claims against [the company], only to see their petitions rejected on account of [the company's] noncompliance with [American Arbitration Association ("AAA")] policies," as well as the consumers "who never formally submitted their claims against [the company] to the AAA, but whose agreements with [that company] contained identical arbitration provisions," "may proceed to litigation." *Id.* Space Coast raises four issues on appeal that largely map onto those raised in *Bedgood*. On each issue, Space Coast's arguments fail. Under the facts here, this case may proceed to litigation. Therefore, we affirm the district court's denial of the motion to compel arbitration.

I.

The plaintiffs allege that they agreed to a Master Services Agreement ("MSA") when they opened checking accounts with Space Coast. The plaintiffs dispute that they should have to pay various fees that Space Coast charged them because of the text of the MSA. Importantly, the MSA has a mandatory arbitration clause, which selected the American Arbitration Association and its rules as those to govern the arbitration. The arbitration clause also had a provision that stated that "[i]f [the] AAA is unavailable to resolve the Claims, and if you and we do not agree on a substitute forum, then you can select the forum for the resolution of the Claims."

A business intending the AAA to administer consumer arbitrations must notify the AAA, submit its arbitration provisions for an administrative compliance review, and pay an associated fee. *See Rule 12*, Amer. Arb. Ass'n Consumer Arb. Rules (Jan. 2016) (last visited May 6, 2025), https://adr.org/sites/default/files/Consumer%20Rules.pdf [https://perma.cc/58Z9-K356]. If the AAA finds that the provision substantially complies with its due process safeguards, the AAA may agree to administer arbitrations under the clause and include the provision in its public database. *See id.*

On March 27, 2023, Merritt Island Woodwerx, LLC filed an arbitration demand with the AAA related to Space Coast's fees. On April 20, 2023, the AAA responded in a letter to Space Coast and Woodwerx that it was declining "to administer this claim and any other claims between Space Coast Credit Union and its consumers

at this time" because Space Coast had not submitted its consumer dispute resolution plan for review or paid the fee. The letter noted that Consumer Rule 1(d) provides that "either party may choose to submit its dispute to the appropriate court for resolution, should the AAA decline to administer an arbitration." And the letter also said that "if Space Coast Credit Union wishes for the AAA to consider accepting consumer disputes going forward, Space Coast Credit Union must, at a minimum, register its clause on the Consumer Clause Registry on [the AAA's] website[.]" On April 25, 2023, several days after receiving the letter, Space Coast emailed the AAA expressing its desire to arbitrate and asking the specific reasons for the AAA's declination.

On June 7, 2023, Woodwerx and True Touch Services, LLC filed this putative class action against Space Coast alleging the same improper fees. Two days later, Space Coast filed its arbitration agreement with the AAA for review and paid the AAA's fee. And on July 24, the AAA approved Space Coast's provision and said it was prepared to administer consumer-related disputes.

Space Coast then moved to compel arbitration. The district court ruled against Space Coast, concluding that Space Coast had failed to perform its contractual obligations under the arbitration agreement. Specifically, the district court explained that Space Coast had failed to take the steps necessary for the AAA arbitration until over a month after the AAA had declined Woodwerx's arbitration demand. By delaying, the district court concluded, Space Coast waived its contractual right to arbitrate.

Four days after the district court entered its order denying Space Coast's motion to compel, we announced our decision in *Bedgood*, a factually similar case that was appealed from the same district court in the same procedural posture. 88 F.4th at 1359. In *Bedgood*, several timeshare owners entered into purchase agreements with a hotel company and its affiliates. *Id.* After a dispute arose, the purchasers filed petitions to arbitrate before the AAA as their purchase agreements with the company required, but the AAA dismissed the petitions because the company had failed to comply with the AAA's policies. *Id.* So, the purchasers sued in federal court, and the company moved to compel arbitration under the Federal Arbitration Act ("FAA"), seeking a stay under Section 3 and asking the district court to order the parties to arbitration under Section 4. *Id.* Notably, even after it was sued and moved to compel, the company never tried to rectify its noncompliance. *Id.* at 1361, 1366–67. We held "that [the company's] failure to comply with the rules of its chosen arbitral forum renders the remedies specified in Sections 3 and 4 of the FAA unavailable to it and, accordingly, that the plaintiffs who have contracts with [the company] . . . may proceed to litigation." *Id.* at 1362–63.

Ten days after we decided *Bedgood*, Space Coast brought this interlocutory appeal under 9 U.S.C. section 16(a)(1).

II.

We review *de novo* the denial of a motion to compel arbitration but review for clear error any factual findings involved. *See Bedgood*, 88 F.4th at 1362 n.4.

III.

According to Space Coast, the district court erred in four ways. First, Space Coast argues the arbitration provision contractually obligated the plaintiffs to arbitrate and barred them from suing in federal court notwithstanding the AAA's declination. Second, as to Woodwerx, Space Coast argues the district court incorrectly determined that Space Coast was "in default" on its arbitration rights and therefore not entitled to a stay under Section 3 of the FAA. Third, as to True Touch, Space Coast argues the district court incorrectly determined that True Touch's perceived futility excused it from needing to attempt arbitration before suing given that Woodwerx had already tried unsuccessfully to arbitrate. Finally, Space Coast argues the district court erred in concluding that neither plaintiff was entitled to an affirmative order directing arbitration under Section 4 of the FAA. As explained below, we disagree on all counts and find no error by the district court.

A. Were the parties contractually obligated to arbitrate?

First, Space Coast argues that Woodwerx and True Touch have a contractual obligation to arbitrate based on the arbitration provision's substitute-forum clause, even though the AAA denied Woodwerx's arbitration demand. If Space Coast's attack on the district court's order based on the plaintiffs' alleged failure to abide by the substitute-forum clause were a challenge to the district court's refusal to appoint a substitute arbitrator under Section 5 of the FAA, we would lack jurisdiction over such a challenge at this

stage of the litigation. *See Bedgood*, 88 F.4th at 1367 ("Because the statute specifically authorizes interlocutory appeals of Section 3 and Section 4 orders but doesn't mention Section 5 orders, we conclude that we lack jurisdiction over the district court's substitute-arbitrator decision."). But because Space Coast focuses its argument on the plaintiffs' duties under the substitute forum clause, we construe Space Coast's challenge to be that this litigation should be stayed, and the plaintiffs should be required to arbitrate under the substitute-forum clause.

Under the substitute-forum clause, however, a court is a forum. Space Coast's argument that the clause must be interpreted to require an *arbitration forum* fails under review of its plain text, which states that "[i]f [the] AAA is unavailable to resolve the Claims, and if you and we do not agree on a substitute forum, then you can select the forum for the resolution of the Claims." The substitute forum clause may be under a heading titled "Selection of Arbitrator," but that refers to the earlier lines in that paragraph about selecting the individual to run the arbitration. The key substitute-forum sentence isn't connected to picking an individual arbitrator. That is, it isn't connected to "[s]election of [an] [a]rbitrator." This clause is instead about the forum in which claims can be brought under a particular circumstance. The heading doesn't limit the clause's scope when its text is clear, saying "forum for the resolution of the Claims" broadly. *See Forum,* BLACK'S LAW DICTIONARY (12th ed. 2024) (defining forum as a "[a] court or other judicial body; a place of jurisdiction"). Thus, contrary to Space

Coast's argument, the plaintiffs didn't violate the contract on its face.

Finally, it's worth mentioning that Space Coast's first challenge is also an attack on the district court's general understanding of Sections 3 and 4 of the FAA: Space Coast maintains that the district court failed to read as an integrated whole the arbitration provision, which included an all-caps boiler-plate promise to arbitrate, the substitute-forum clause discussed above, and a conflicts clause stating that "[i]n the event of a conflict between the Rules and this Arbitration Agreement, this Arbitration Agreement shall supersede the conflicting Rules only to the extent of the inconsistency." According to Space Coast, the district court erred when it determined that Consumer Rule 1(d) was incorporated into the MSA and thus allowed the plaintiffs to sue in federal court, thereby rendering Sections 3 and 4 of the FAA inapplicable. Instead, argues Space Coast, the arbitration provision's all-caps promise to arbitrate, the conflicts clause, and the substitute-forum clause were "squarely on point," such that as soon as Woodwerx tried to arbitrate, the MSA required all parties to resolve the dispute in an arbitral forum and forever extinguished each party's right to go to court on the plaintiffs' claims.

In other words, Space Coast's first challenge is linked to its remaining challenges to the district court's determinations that it lacked authority to grant Space Coast relief under Sections 3 and 4 of the FAA. To the extent Space Coast's broader attack on the district court's understanding of Sections 3 and 4 implicates Space

Coast's three remaining challenges, we address those implications below. And as we will explain, because Space Coast's next three challenges fail under *Bedgood*, its first challenge also fails to whatever extent it attacks the district court's reading of the FAA more broadly. That leads to the remaining challenges.

B. Was Space Coast in default as to Woodwerx?

Space Coast next challenges the district court's determination that it was "in default" as to Woodwerx on its right to arbitrate under Section 3 of the FAA by failing to pre-register its arbitration clause with the AAA. 9 U.S.C. § 3. It argues that the right to expedited review under Consumer Rule 12 means it wasn't "in default." "To determine whether a party has defaulted for Section 3 purposes, a court must 'decide if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right.'" *Bedgood*, 88 F.4th at 1369 (quoting *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315–16 (11th Cir. 2002), *abrogated in part on other grounds by Morgan v. Sundance, Inc.*, 596 U.S. 411, 419 (2022)).[1]

[1] Space Coast also incorrectly argues "default" under § 3 is coterminous with "waiver." While waiver and default are related doctrines, "[t]o determine whether a party has defaulted for Section 3 purposes, a court must 'decide if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right.'" *Bedgood*, 88 F.4th at 1369 (quoting *Ivax Corp.*, 286 F.3d at 1315–16). That is a distinct question from whether a party has *intentionally* waived its right. *See Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) ("[W]aiver

In *Bedgood*, "we h[e]ld that the AAA was empowered to conclude that [the company's] arbitration clause violated its policies, and that the district court didn't err in relying on the AAA's determination to conclude that [the company] was 'in default' within the meaning of Section 3." *Id.* at 1363. Just as in *Bedgood*, we cannot say that the district court erred in determining that Space Coast was in default under Section 3 by relying on the AAA's decision that it was refusing to arbitrate because of Space Coast's failure to comply with the AAA's policies.

The AAA stated that it wouldn't "administer [Woodwerx's] claim and any other claims between Space Coast Credit Union and its consumers at this time" because of Space Coast's procedural failure. While *Bedgood* noted that it was especially true that the company there was in default because it hadn't made an "effort to investigate—let alone remedy—its noncompliance before the AAA[,]" *Bedgood* didn't restrict default to such circumstances. *Id.* at 1366. And in any case, at the time the plaintiffs sued here, Space Coast had not yet attempted to remedy its noncompliance with the AAA. Space Coast was therefore in default under Section 3 of the FAA because it acted inconsistently with its arbitration right by not trying to remedy the barrier to arbitration that it had caused.

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is the intentional relinquishment or abandonment of a known right." (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993))).

C. Was Space Coast in default as to True Touch?

Third, Space Coast argues that True Touch's perceived "futility" doesn't excuse it from compliance with its obligation to arbitrate under the agreement.[2] That is, Space Coast argues that True Touch cannot establish a default under Section 3 of the FAA because it never requested arbitration. Because the arguments above apply with equal force to True Touch, True Touch may litigate in court—as far as Section 3 of the FAA is concerned—unless Space Coast is correct that the futility argument fails and alters the above analysis. Unfortunately for Space Coast, we decided this issue in *Bedgood* too. True Touch had an identical arbitration provision to Woodwerx, so under *Bedgood*, it doesn't matter that True Touch didn't formally request to arbitrate before filing suit. 88 F.4th at 1359. *Bedgood* considered the futility argument as part of its discussion of Section 3 of the FAA and made the futility determination a fact-based inquiry. *See id.* at 1369. Here, True Touch had an identical arbitration provision to the one the AAA refused to administer. By possessing the identical rejected agreement, True Touch had a sufficient "evidentiary basis" in the form "of an actual rejection letter" to support a valid futility argument. *Id.*

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[2] Space Coast lists this issue as its fourth issue on appeal; but because *Bedgood* most completely discussed "futility" in the context of analyzing Section 3 of the FAA, we choose to address it here as a follow-on issue to the previous subsection. *See* 88 F.4th at 1369–70. We need not address "futility" with respect to Section 4 of the FAA.

In sum, just as in *Bedgood*, True Touch's failure to request arbitration doesn't matter given the evidence of futility in the form of the AAA's declination letter to Woodwerx. *Id.* Thus, Space Coast's argument about Section 3 of the FAA fails with respect to True Touch too.

D. Was Space Coast entitled to an order directing arbitration?

Fourth, Space Coast challenges the district court's decision that Space Coast wasn't entitled to an affirmative order under Section 4 of the FAA compelling arbitration. "Section 4 prescribes two conditions to relief." *Id.* at 1366. "They are separate, but they are causally related: first, the party resisting arbitration must have failed, neglected, or refused to arbitrate; and second, the party seeking to direct arbitration must have been aggrieved by that failure, neglect, or refusal." *Id.* (cleaned up); *see also* 9 U.S.C. § 4. Under *Bedgood*, Space Coast's argument with respect to Woodwerx fails on the first condition. Because Woodwerx "attempted to arbitrate, there was no 'failure, neglect, or refusal' by which [Space Coast] could have been 'aggrieved.'" *Bedgood*, 88 F.4th at 1366 (quoting 9 U.S.C. § 4).

On the other hand, True Touch failed to request arbitration, so Space Coast can meet the first condition for Section 4 relief. *See id.* at 1367. But as in *Bedgood*, Space Coast fails to meet the second, causal condition because "[t]o the extent that [Space Coast] is aggrieved, it was aggrieved either by its own failure to bring its arbitration clause into compliance with AAA policies [by filing it and paying the fee] or, at the very least, by the AAA's decision to that

effect, not . . . [True Touch's] conduct." *Id.* Space Coast's own actions led the AAA to say that it wasn't going to arbitrate any of Space Coast's consumers' claims at that time, so it cannot now claim to be aggrieved because of True Touch's actions.

Resisting this conclusion, Space Coast points to our statement in *Bedgood* that "[w]ithout any indication that [the company] has brought or intends to bring its arbitration agreements into line with the AAA policies, it can't claim to have been 'aggrieved' by the [plaintiffs'] failure or refusal to arbitrate." *Id.* at 1367. As Space Coast sees it, in *Bedgood*, the company's "failure to act and inability to cure the problems preventing the parties from arbitrating were sine qua non" to our holding that the company had not been aggrieved by the plaintiffs who hadn't formally sought to arbitrate. And because Space Coast did come into compliance with the AAA's policies before moving to compel, the argument goes, *Bedgood* isn't controlling.

Space Coast's efforts to distinguish *Bedgood* are unconvincing. *Bedgood*'s key holdings are not limited by the type of procedural failure on the part of the party now pressing for arbitration; the key is that the failure resulted in a refusal by the AAA to arbitrate and that Space Coast's actions were inconsistent with asserting its arbitration right at any time before the suit. It is true that we stated that the company in *Bedgood* had not brought and didn't intend to bring its arbitration agreements in line with the AAA policies, whereas here, Space Coast did later comply with the AAA's policies and pay the fee. But Space Coast's potentially curative

conduct occurred during the course of the litigation. Conduct during the litigation cannot cure Space Coast's previous noncompliance with the AAA policies. In stating in *Bedgood* that the company failed to comply because it had never attempted to cure the issue preventing the AAA arbitration, we never endorsed the converse: that if the company had said the day before our opinion came out that it now wanted to cure the arbitration issue, we would force the parties to arbitrate. Our reference to the company's continued noncompliance with the AAA procedures simply reinforced the paucity of the company's argument in that case.

Put simply, post-filing conduct cannot cure the prior noncompliance. Any rule to the contrary would result in gamesmanship by companies attempting to remedy an arbitration roadblock that they knowingly caused were they to draw a judge they didn't like or wanted to waste counterparty resources spent on litigation. This is especially true in the arbitration context, where the parties "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Given that the intended benefits of arbitration are "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes[,]" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010), the rule Space Coast asks us to adopt would frustrate arbitration's purpose in the first place, *see Preston v. Ferrer*, 552 U.S. 346, 357 (2008) ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" (quoting *Mitsubishi*

Motors, 473 U.S. at 633)); *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 932 (11th Cir. 1990) (purpose of arbitration is to "effectuate . . . speedy resolution of disputes"); *Aerojet-Gen. Corp. v. Am. Arb. Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973) ("The basic purpose of arbitration is the speedy disposition of disputes without the expense and delay of extended court proceedings."); *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967) (same); *Loc. Union No. 251, Int'l Brotherhood of Teamsters v. Narragansett Improvement Co.*, 503 F.2d 309, 312 (1st Cir. 1974) (same). As the district court concluded, by ignoring the AAA's letter for a month and a half until after a lawsuit was filed against it, Space Coast acted inconsistently with the intention to vindicate its contractual arbitration rights; the fact that it later attempted to comply with the AAA policies doesn't resurrect the waived contractual right to arbitrate. *See Thomas N. Carlton Est., Inc. v. Keller*, 52 So. 2d 131, 133 (Fla. 1951) ("When a party waives a right under a contract he cannot, without the consent of his adversary, reclaim it.").

Therefore, the plaintiffs here were within their rights under *Bedgood* to proceed to—and remain in—litigation. While we said *Bedgood* was an "odd case," our dicta doesn't mean that *Bedgood*'s legal rules are circumscribed to the exact facts therein. The facts are sufficiently similar here, and so *Bedgood* resolves the issues raised on appeal.

IV.

Accordingly, we **AFFIRM** the district court's denial of Space Coast's motion to compel arbitration.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 40(d)(3) and Eleventh Circuit Rule 40-4 because it contains 3,893 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 40-4. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared in Microsoft Word 2016 using a proportionally spaced typeface (Book Antiqua) in 14-point font.

Date: July 2, 2025 /s/ Stuart M. Richter

CERTIFICATE OF SERVICE

I certify that on July 2, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, which will send a notice of electronic filing to all parties appearing in this matter.

Date: July 2, 2025 /s/ Stuart M. Richter