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In The

SUPREME COURT OF VIRGINIA

Record No. 171381

GEORGE PRIMOV,

Appellant,

-v.-

SERCO, INC.

Appellee.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS…….....i

TABLE OF AUTHORITIES…….…….....ii-iii

I. ASSIGNMENT OF ERROR……...…….……...1

II. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW……..1-2

III. THE APPLICABLE STANDARD OF REVIEW IS ABUSE OF DISCRETION…….……....2-4

IV. STATEMENT OF FACTS……...…....4-8

V. ARGUMENT…….…….….8-22

A. The trial court could choose between two options for its adjudication of SERCO's dispositive motions……..8-9

B. The trial court abused its discretion……..……9-15

C. Under certain circumstances, violations of ADR provisions could warrant dismissal of a case, but such a dismissal would typically be without prejudice…..15-16

D. Dismissal of Primov's case "without prejudice" would nevertheless be highly prejudicial to Primov's right to seek a remedy for his unpaid wage claim…...……..16-19

E. The trial court should merely have stayed the proceedings for 60 days and ordered the parties to engage in non-binding mediation, in a good faith effort to resolve their dispute……....19-22

VI. CONCLUSION……...22

CERTIFICATES OF SERVICE AND COMPLIANCE……..23

TABLE OF AUTHORITIES

I. STATUTES

5 U.S.C. § 5925……..6

5 U.S.C. § 5928…….....6

9 U.S.C. §§ 1-16……...19

VA. CODE ANN. § 8.01-246……..17

VA. CODE ANN. § 8.01-380……2, 7

II. RULES OF COURT

FRCP 12(b)(6)……..20

VA. R. S. Ct. 1:4…….5

VA. R. S. Ct. 5:6……..…1

VA. R. S. Ct. 5:26……1, 23

VA. R. S. Ct. 5:27……...1

VA. R. S. Ct. 5:32……...1

III. CASES

Am. Tech. Servs., Inc. v. Universal Travel Plan, Inc.,
2005 WL 2218437 (E.D. Va.)……..19, 20

David White Crane Serv. v. Howell, 714 S.E.2d 572 (2011)……..….4

Flippo v. CSC Assocs. III, L.L.C., 547 S.E.2d 216 (2001)……...5

Gray v. Virginia Sec'y of Transp., 662 S.E.2d 66 (2008)……4

Huaman v. Aquino, 630 S.E.2d 293 (2006)……10

Landrum v. Chippenham & Johnston-Willis Hosps., Inc.,
717 S.E.2d 134 (2011)……..2

Moreau v. Fuller, 661 S.E.2d 841 (2008)……...3

Station #2, LLC v. Lynch, 695 S.E.2d 537 (2010)……..…4

Tattoo Art, Inc. v. Tat Int'l, LLC, 711 F.Supp. 2d 645 (E.D. Va. 2010)……16

Tomlin v. McKenzie, 468 S.E.2d 882 (1996)……4

I. ASSIGNMENT OF ERROR

No. 2. The trial court erred by dismissing Primov's complaint *with prejudice*—an unduly harsh remedy—when it should have either declined to dismiss it at all, or else, dismiss it *without* prejudice.[1]

II. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

COMES NOW, Appellant, GEORGE PRIMOV, by Counsel, pursuant to this Court's 2/27/18 order, in addition to VA. R. S. Ct. 5:6, 5:26, and 5:27, and files this Opening Brief, wherein he appeals from the 7/19/17 Final Order entered by the Fairfax County Circuit Court ("the trial court"), sustaining Appellee's ("SERCO's") plea in bar, and dismissing Primov's case, with prejudice.

On 9/30/15 Primov filed a complaint against his former employer, SERCO, asserting a cause of action of breach of written contract, alleging SERCO failed to pay him the compensation to which the parties had stipulated in their written employment agreement, consisting of a 6/24/12 "Offer letter" (Appx. at pp. 9-10) in conjunction with an 11/6/12 Letter of Assignment ("LoA"). After several months of litigation, Primov exercised his absolute statutory right to suffer a voluntary nonsuit, pursuant to VA. CODE ANN. § 8.01-380, and timely re-filed his complaint (Appx. at pp. 2-8)

[1] PRESERVED: Appx. at 18. (Objection # 8 to 7/19/17 Final Order). (Also preserved at p. 17 of Primov's Opposition to SERCO's demurrer, a pleading which, pursuant to VA. R. S. Ct. ("Rule") 5:32(a)(2), was not made a part of the Appendix ("Appx."), but which, as a part of the Record, can be

that is the subject of this appeal. For its responsive pleadings, SERCO filed a demurrer, (Appx. at pp. 41-43), and a plea in bar, (Appx. at pp. 29-32), both of which characterized the "mediation provision" of the LoA as a "condition precedent" to filing suit. The mediation provision ostensibly required that, at least 60 days before filing suit, Primov make a written request that SERCO enter into non-binding mediation to resolve the dispute.

On 7/7/17 the trial court conducted a hearing,[2] and on 7/19/17, it issued a memorandum opinion (Appx. at pp. 20-28) and entered a final order (Appx. at pp. 16-19) sustaining the plea in bar and dismissing the case with prejudice. That order is the subject of this appeal, which Primov timely noted. (Appx. at pp. 44-45).

III. THE APPLICABLE STANDARD OF REVIEW IS ABUSE OF DISCRETION

In *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 717 S.E.2d 134, 137 (2011), this Court explained its review of a trial court's decision under an abuse of discretion standard, citing the following principles.

> . . . [W]hen a decision is discretionary, we do not mean that the [trial] court may do whatever pleases it. The phrase means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is

[2] See Transcript ("TR.") in ToC at pp. 245-274.

> not influenced by any mistake of law. . . . An abuse of discretion . . . can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment. . . . The Fourth Circuit has recognized this definition . . . [a]nd we now embrace it. *Id.*

In *Moreau v. Fuller*, 661 S.E.2d 841, 846 (2008), this Court explained,

> The judiciary's inherent power derives from its existence as an institution entrusted with the function of rendering judgment. To deny this function is to deny the very institution itself. The court's inherent power has been recognized to extend to matters "incident to the exercise of the judicial power which is vested" in it. *Id.* (internal citations omitted).

In the case at bar, the trial court could have legitimately elected between two options—either allow the case to proceed, full steam ahead, or stay the proceedings for 60 days and order the parties to engage in good faith (but non-binding) mediation. Because it decided instead, to dismiss Primov's complaint, *with prejudice*, its exercise of discretion went beyond the scope of its available options, and its decision was an abuse of discretion *as a matter of law*. Moreover, even a dismissal *without* prejudice would have constituted an abuse of the trial court's discretion, and in this case, for all practical purposes, would have been tantamount to a dismissal

with prejudice. Nevertheless, the trial court did have a narrow bandwidth in which to exercise its discretion, by choosing between the two options mentioned above, and therefore, this Court's standard of review is "abuse of discretion."[3]

IV. STATEMENT OF FACTS

Because there were no disputed issues of material fact relevant to SERCO's plea in bar, this Court reviews the trial court's ruling based upon the pleadings, supplemented by the facts, if any, as stipulated by the parties. *David White Crane Serv. v. Howell*, 714 S.E.2d 572, 575 (2011). In such a posture, this Court accepts as true the plaintiff's (here, Appellant-Primov's) allegations of fact contained within his complaint. *Station #2, LLC v. Lynch*, 695 S.E.2d 537, 538-39 (2010), citing *Gray v. Virginia Sec'y of Transp.*, 662 S.E.2d 66, 68 (2008). *Accord*, *Tomlin v. McKenzie*, 468 S.E.2d 882, 884 (1996) (stating, "[w]here no evidence is taken in support of the plea [in bar], the trial court, and the appellate court upon review, must rely solely upon the pleadings in resolving the issue presented . . . . When

[3] The cited standard differs from that cited in Primov's petition for appeal, wherein he argued the standard of review was *de novo.* That standard of review applied to Assignments of Error ("AoE") # 1, 3, 4, and 5, as to each of which, this Court refused Primov's petition for appeal. (See this Court's 2/27/18 Order).

considering the pleadings, 'the facts stated in the plaintiff's [complaint are] deemed true.'" *Id.* (internal citations omitted).[4]

SERCO is a U.S. military contractor that had been awarded a Base Closure and Assistance Team ("BCAT") government contract, to assist with U.S. military base closures in Afghanistan. (Appx. at p. 3, ¶¶ 6-7).[5] On 6/24/12 SERCO sent a letter to Primov offering him a ". . . full time . . . position with S[ERCO] at [its] Afghanistan BCAT office . . . ." ("the offer letter") (Appx. at pp. 9-10). Both SERCO and Primov signed the offer letter, transforming it into a written contract between them. Several months later, right before he was scheduled to deploy to Afghanistan, SERCO presented Primov with a second letter, the 11/6/12 "Letter of Assignment" ("LoA") (Appx. at pp. 11-15) which he also signed. Together, the offer letter and the LoA comprise the parties' Agreement.

The underlying dispute concerns the payment of "uplifts," specifically, a "Danger uplift" and a "Hardship uplift." The former " . . . is designed to provide additional compensation above basic compensation for service at

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[4] Moreover, Rule 1:4(i) renders the various exhibits attached to both Primov's complaint and his Brief in Opposition to Plea in Bar a part of those pleadings, and therefore, subject to this Court's consideration in its decision of the issues presented in this appeal. *Flippo v. F & L Land Co.*, 400 S.E.2d 156 (1991).

[5] Page 2 of Primov's Complaint inadvertently contains two paragraphs, both numbered "6." The reference here to ¶ 6 is to the second ¶ 6.

places in foreign areas where there exist conditions of civil insurrection, civil war, terrorism or wartime conditions which threaten physical harm or imminent danger to the health or well-being of an employee." (Appx. at 13, ¶ 7(d)). The latter ". . . is designed to provide additional compensation for services at places in foreign areas where conditions of environment differ substantially from conditions of environment in [CONUS] and warrant additional compensation as a recruitment and retention incentive."[6] *Id.*

Primov remained deployed in Afghanistan, in service to SERCO, from approximately November 2012 – September 2014. During his entire tenure there, he was paid a 35% Danger uplift and a 15% Hardship uplift, but for only his first forty hours of work per week, after which, he received no additional Danger or Hardship uplifts. (Appx. at pp. 6-7, ¶¶ 26-29, 35-37). The crux of Primov's underlying complaint is that, *as a matter of law*—pursuant to both the Department of State Standardized Regulations ("DSSR"), and as a matter of contract interpretation—he was entitled to a 35%—as opposed to a 15%—Hardship uplift; and he was entitled to *both* uplifts on *all* hours worked—unlimited by SERCO's arbitrary and artificial

[6] The LoA's definitions of those uplifts are consistent with the definitions of those terms, as stated in 5 U.S.C. § 5928 and 5925(a), respectively. (Exs. C(1) and B(1) to Complaint (ToC at pp. 38, 15).

ceiling of forty hours per week.[7] Primov maintains that because SERCO's payment of both uplifts fell significantly short of its legal obligations, the company materially breached the parties' written Agreement. The resolution of that dispute turns on the correct interpretation of the language of both the offer letter and the LoA, and the resolution of ambiguities within and between them.

On 9/30/15 Primov filed a complaint in the trial court for breach of written contract. That case was litigated for close to a year, but before trial commenced he availed himself of his absolute statutory right to suffer a first voluntary nonsuit, pursuant to VA. CODE ANN. § 8.01-380. In that antecedent case, after SERCO filed a demurrer on other grounds, and after Primov had filed his response to that demurrer, SERCO raised, for the first time, the "request for mediation" provision, through an email to Primov's counsel. (Appx. at p. 35). Primov responded by written letter, (Appx. at 36-39), in which he expressed his willingness to mediate. *Id.* at 36. The parties did not resolve the dispute and Primov timely re-filed his complaint, from which, the trial court should have inferred that either: (1) SERCO refused to negotiate in good faith, thereby violating its own contract; or (2) the parties engaged in good faith (but non-binding) mediation, but were,

[7] While deployed to Afghanistan, Primov typically worked 70+ hours/week. (Appx. at p. 6, ¶ 33).

nonetheless, unable to resolve their dispute. It begs the question whether, under those circumstances, Primov was obligated to request mediation as a condition precedent to his *re-filing* of his complaint.

V. ARGUMENT

A. The trial court could choose between two options for its adjudication of SERCO's dispositive motions

The LoA's mediation provision states, in pertinent part,

> The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation. If the dispute has not been resolved by mediation within 60 days of a written request to mediate made by one of the parties, then either party may bring suit in the state or federal courts located in Fairfax County, Virginia . . . . (Appx. at pp. 14-15, § 11).

In resolving SERCO's dispositive motions, the trial court had two available options. It could have either overruled SERCO's plea in bar and demurrer,[8] and allowed the case to proceed, full steam ahead; or else, it could have exercised its inherent discretionary power to stay the

[8] The trial court's final order did not address SERCO's demurrer, because, having first sustained its plea in bar, it never reached the merits of the demurrer. Normally, a trial court should have resolved those dispositive motions in reverse order—addressing the demurrer first, and thereby testing the pleading itself, before turning to the plea in bar, which often turns on a disputed material fact. In this case, the correct decision on either dispositive motion would seem to resolve both, since both were premised on SERCO's characterization of the request for mediation provision as a "condition precedent" to Primov's filing of his complaint.

proceedings for sixty days, and order the parties to make a good faith effort to resolve their dispute through non-binding mediation, consistent with the mediation provision of the Agreement. Such an exercise of the trial court's discretion would do no violence to either the terms of the Agreement or the fundamental right of either party to avail itself of the trial court as the forum in which to resolve the dispute, should mediation prove unsuccessful—a contingency contemplated by the terms of the mediation provision, itself. Such a ruling would not only be without prejudice to either party's rights under the Agreement; it would affirmatively create a more hospitable environment for negotiations, by removing the pressure of simultaneously contending with deadlines inherent in ongoing litigation.

B. The trial court abused its discretion

Instead of either allowing the case to proceed without delay, or alternatively, staying the litigation for 60 days to create a window for good faith but non-binding mediation, the trial court imposed what is arguably the most severe sanction available to it—dismissal of Primov's lawsuit *with prejudice*. Its decision was based upon its finding that Primov had "express[ed] a willingness to mediate," but failed to affirmatively and explicitly *request* mediation, Appx. at p. 27, and therefore failed to comply

with the dictates of the mediation provision—which the trial court characterized as a "condition precedent" to filing suit.

The absurdity of that ruling, predicated, as it was, upon a meaningless distinction which elevated form over substance, is manifest, and reflects the absence of a judicial gut-check. One would hope that, before imposing such a harsh penalty, a trial court would reflect on whether the law compelled or even countenanced such a disproportionate and asymmetric response. Primov's alleged transgression, consisting in his supposed failure to "request" non-binding mediation, by merely demonstrating his willingness to engage in mediation, did not warrant the extinguishment of his (property) right to pursue his claim against SERCO. *Huaman v. Aquino*, 630 S.E.2d 293 (2006) (holding that a lawsuit itself, or a claim contained therein, is a personal property right in Virginia).

The Agreement certainly contemplates that if, for whatever reason, the parties are unable to reach a negotiated settlement of their dispute through mediation, then the courts provide the proper forum in which to resolve it. In short, the Alternative Dispute Resolution ("ADR") mechanism prescribed by the terms of the Agreement is non-binding on the parties. That ADR provision contemplates nothing more than that the parties will, in good faith, attempt to resolve their dispute through mediation, but if they are

unsuccessful, they are free to enlist the assistance of the courts—the very forum designed precisely for the purpose of resolving disputes.

But instead of implementing what was actually contemplated by the terms of the Agreement, the trial court characterized the mediation provision as a mandatory condition precedent to filing suit, and found that Primov had not satisfied that condition precedent. In so doing, the trial court, broadly speaking, treated the non-binding ADR provision as something akin to a statute of limitations ("SOL"), which can be complied with in only one way—through the affirmative filing of a complaint in court, on or before the date the SOL expires. To illustrate, with regard to SOLs, the mere act of mailing the complaint on or before expiration of the SOL does not constitute compliance with that statute. The complaint *must reach* the court and receive a date-stamp on or before expiration of the SOL. And if strict technical compliance with a SOL is not met, the plaintiff is deemed to have forever waived his right to pursue his claim, regardless of its merits.

Generally speaking,[9] when application of a rule of law imposes a seemingly harsh result concerning the merits of a litigant's claim or defense to a claim, that harsh result imposed by the decision upon the individual litigant is typically counterbalanced by the decision's salutary effects in the

[9] There may be exceptions to this rule, but none comes to mind.

protection and advancement of important societal or institutional interests. For example, there are strong public policy reasons supporting the strict enforcement of SOLs, notwithstanding the harsh results for particular litigants who run afoul of those rules by even the narrowest of margins. Strict enforcement of SOLs provides certainty as to the duration of potential liability, thereby protecting people from the uncertainty attendant to defending against stale claims, in relation to which, memories may have faded, evidence may have been lost or destroyed, and witnesses may have died or disappeared. In that context, strict adherence to deadlines prescribed by the political branches of government, through duly enacted legislation, promotes important societal interests, and warrants dismissal, with prejudice, of claims that fail, by even the narrowest of margins, to meet those strict standards.

Similarly, dismissal of a claim, with prejudice, through the sustaining of a plea in bar asserting an affirmative defense associated with the doctrines of *res judicata* or collateral estoppel, advances the institutional interest in conserving scarce judicial resources, and promotes certainty and consistency in the law. Allowing the same litigant—or even distinct litigants with a sufficient commonality of interest so as to render them in "privity" with one another—to litigate a multiplicity of suits in pursuit of a claim or

defense to a claim, or in an attempt to establish the existence or non-existence of a material fact, could easily lead to inconsistent results, which would further erode the public's confidence in the integrity of our justice system. Therefore, strict adherence to judicially-created rules compelling the dismissal, with prejudice, of claims that have already been litigated, or which attempt to re-litigate a contested issue of material fact already decided by a court of competent jurisdiction, promotes the institutional interests the preclusion doctrines were intended to advance.

But in a case such as this one, where the contract at issue contains what is arguably an ADR provision, but one which clearly contemplates that neither party is precluded from availing himself of his fundamental due process right to have his dispute adjudicated by a court of law, what societal or institutional interests are advanced by construing such an ADR provision so strictly and so narrowly and in such unforgiving terms, that even a mere technical failure to abide by the terms of that provision serves to forever extinguish a party's *substantive* rights under the Agreement? Answer: NONE and NONE. Strictly construing the ADR provision at issue in this case advances no broader societal or institutional interests. Instead, it elevates form over substance, by creating purely technical hurdles that can cause a litigant to unwittingly forfeit substantive rights, something the

law should not countenance and certainly does not compel under the circumstances of this case.

The fundamental lack of fairness in the trial court's harsh interpretation of the ADR provision at issue here is also suspect because of the asymmetrical results it creates. The trial court concluded that the appropriate penalty for Primov's failure to affirmatively *request* SERCO engage in non-binding mediation, rather than merely express *his* willingness to do so, was dismissal, with prejudice, of his suit. But if Primov had complied in both form and substance by making a timely formal written request, and SERCO had rejected his request to mediate, thereby breaching its own ADR provision, the appropriate remedy would certainly *not be* the entry of summary judgment in favor of Primov. Yet, that would mirror the remedy imposed by the trial court for Primov's alleged breach. Rather, the appropriate remedy would be to relegate the parties to seek resolution of their dispute through contested litigation in the courts.

Although it is true that provisions in a contract need not always be reciprocal,[10] where, as here, the judicial interpretation of a contractual

[10] For example, contracts not infrequently contain attorney's fees provisions that provide for an award of fees in favor of the prevailing party, but only when the prevailing party is, *e.g.,* the employer or the landlord or the seller. In those scenarios, the absence of reciprocity does not call into question the enforceability of the provision because the right of a prevailing party to

provision results in the forfeiture by one party of his *fundamental due process right* to have his claims or defenses adjudicated on their merits by a court of law, but under no circumstances would impose that same penalty on the adverse party, the asymmetry in application of the provision and its disproportionate impact render such an interpretation inherently suspect. In this case, the trial court's interpretation of the mediation provision would have no appreciable impact on SERCO's right to a trial, if SERCO had committed the reciprocal transgression—refusing a timely written request to submit to non-binding mediation, and thereby disregarding its contractual obligation to attempt to reach a good faith negotiated settlement.

C. Under certain circumstances, violations of ADR provisions could warrant dismissal of a case, but such a dismissal would typically be without prejudice.

As it applies to violations of contractually-created ADR provisions, there are instances in which dismissal of a claim may be warranted. For example, when a contract provides that the parties have agreed to *binding* arbitration *in lieu of* judicial proceedings, the dismissal of a judicial proceeding involving a dispute implicating that contract is justified, on the

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an award of attorney's fees is not a fundamental right. Indeed, it is not a right, at all, but rather, a statutory or contractual (and occasionally a common law) exception to the American rule requiring each litigant to bear his own costs and legal fees, regardless of outcome. In contrast, the right at issue here—to have one's legal dispute adjudicated by a court of law—implicates the fundamental constitutional right to due process of law.

grounds that the parties should receive the benefit of their bargained for exchange, which, as postulated above, included, as a material term, an ADR mechanism relegating a dispute to resolution by means of a different process, such as arbitration, and in a different forum.

Typically, though, dismissals on the basis of a party's failure to abide by the terms of an ADR provision are without prejudice, on the grounds that the court lacks subject matter jurisdiction ("SMJ") over the dispute. See, *e.g.*, *Tattoo Art, Inc. v. Tat Int'l, LLC*, 711 F.Supp. 2d 645, 650, 655 (E.D. Va. 2010) (reluctantly dismissing, *without* prejudice, on lack of SMJ grounds, a complaint containing an ADR provision strikingly similar to the one at issue here, and noting that ". . . dismissing the instant lawsuit may ultimately prove inefficient and futile because the parties are not required to actually resolve the dispute through mediation. . . . [They] are merely required to request mediation prior to initiating litigation."). *Id.* at 652.

D. Dismissal of Primov's case "without prejudice" would nevertheless be highly prejudicial to Primov's right to seek a remedy for his unpaid wage claim

In this case, even a dismissal *without* prejudice would indeed prejudice Primov's right to pursue his wage claim against SERCO. The terms of his employment with the company, including his wages, during his tenure in Afghanistan, from November 2012 – September 2014, were subject to the

five-year SOL established for actions based upon written contracts. VA. CODE ANN. § 8.01-246(2). That means his SOL began to expire in November 2017 in relation to those pay-periods most remote in time, and will expire completely in September 2019.

Primov timely filed his complaint on 9/30/15, nonsuited it, and then refiled it on 12/14/16, a date that relates back to the original filing date. On 7/19/17 the trial court entered its order dismissing Primov's claims with prejudice. Assuming this Court were to reverse that decision and recharacterize the dismissal to be *without prejudice*, then, presumably, that reversal would relate back to 7/19/17, making the dismissal on that date *without* prejudice. But if, under the hypothesis to be tested—that the dismissal of Primov's claims should have been without prejudice, rather than with prejudice—had the trial court correctly dismissed Primov's claims *without* prejudice on that date, then, as few as sixty days later, his complaint would have ripened, insofar as its eligibility to be re-filed, in the event non-binding mediation was unsuccessful. That sixty-day window would have allowed him to refile his claims as early as mid-September 2017, still a couple of months before the SOL on the first of his claims expired, thereby forever extinguishing that claim, relating to his first pay-period ("PP") while serving in Afghanistan, in November 2012. And every

two weeks thereafter, the SOL on yet another claim related to a subsequent PP would expire. Thus, even if this Court were to reverse the trial court and order the dismissal of Primov's case to have been *without* prejudice, thereby, presumably allowing him to refile it within sixty days of the entry of such an order, in the meantime, the SOL related to his claims dating back more than five years would have already expired, leaving Primov with not much more than a Pyrrhic victory.[11]

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[11] So, for example, Primov is filing this Opening Brief on 4/9/18. Assuming this Court receives SERCO's brief in opposition and Primov's reply brief in May 2018, conducts oral argument in June 2018, and issues its decision in July 2018 (a very accelerated schedule), Primov will have lost the ability to pursue any of his claims preceding July 2013—that is, a period of about nine months—from November 2012 through July 2013. Unless some tolling provision, of which Primov is not aware, would apply so as to toll the running of the applicable SOL, recovering the unpaid wages for nine of the 22 months during which he was deployed by SERCO to Afghanistan—40% of the duration of his tenure there, would have become out of reach through a civil lawsuit. And that figure is incredibly optimistic, assuming, as it does, that oral argument on the case will occur within a month of the Court's receipt of all of the briefs, and likewise, assuming that the Court will issue its decision a month after that. In reality, it could be close to the end of 2018 before the Court issues its decision, which, even if ostensibly favorable to Primov—because it reverses the trial court's dismissal of his claims with prejudice, and transforms it to a dismissal without prejudice—by the time it issues that decision, Primov's claims related to 14 of the 22 months of his tenure in Afghanistan (nearly 2/3 of that time) would have expired. Under the facts postulated in this hypothetical, through no fault of Primov's, but because of the trial court's mistake in dismissing his claims *with*—rather than *without*—prejudice, Primov could well lose 2/3 or more of the value of his claims as a result of the expiration of the applicable SOL. And those calculations do not account for the additional sixty days that would have to elapse before Primov's claim was ripe for re-filing.

The substantial prejudice to Primov's claims resulting from this Court's hypothetical reversal of the trial court's final order, and the substitution, in its place, of an order dismissing his complaint *without* prejudice, would occur (See fn. 11, *supra.*) even though Primov initially filed his antecedent nonsuited complaint on 9/30/15—well within the applicable five-year SOL.

E. The trial court should merely have stayed the proceedings for 60 days and ordered the parties to engage in non-binding mediation, in a good faith effort to resolve their dispute

A fairer outcome would result if this Court were to follow the lead of the United States District Court for the Eastern District of Virginia ("EDVA") in its decision in *Am. Tech. Servs., Inc. v. Universal Travel Plan, Inc.*, 2005 WL 2218437 (E.D. Va.), an unreported opinion which construed an ADR provision that was more clearly a condition precedent than the one at issue in the case at bar. Despite its conclusion that the ADR provision at issue was a condition precedent to filing suit, a decision based in part on that court's construction of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), a statutory scheme not at issue in the case at bar, the *ATS* court nevertheless exercised its discretion to stay the case for thirty days and "order[ed] . . . the parties [to] appear before a Magistrate Judge for a settlement conference in the interim." *ATS* at *3. The *ATS* court based its

decision on the fact that the case was in the very early stages of litigation,[12] and the court was "unable to determine whether either side ha[d] tried in good faith to comply with the Agreement's [ADR] Provision or which side, if any, ha[d] been unresponsive to the opposing party's efforts." *Id.* Again, in this case, the inference compelled by the fact that Primov re-filed his complaint after nonsuiting it, and did so after expressing his willingness to engage in mediation, is either that SERCO declined to engage in mediation, or else the parties engaged in mediation but were unable to reach a negotiated settlement of their dispute. (See p. 8, *supra.*). Thus, this Court is faced with the same uncertainty as the *ATS* court. In view of the *ATS* court's decision to order a stay of the proceedings and order the parties to mediation, notwithstanding its characterization of the contractual provision at issue there as a condition precedent, it follows that a similar resolution is appropriate here.

Finally, the *ATS* court noted that "there is little prejudice to either side if the Court stays the case to give the parties an opportunity to comply with the terms of the [Alternative] Dispute Resolution Provision" at issue there—a conclusion that is warranted in the case at bar, as well. In proceedings

[12] The posture of the *ATS* case was analogous to the posture of the case at bar. The *ATS* defendant had filed the federal court equivalent to a demurrer—a motion to dismiss pursuant to FRCP 12(b)(6). The *ATS* court's order resolved that motion to dismiss.

before the trial court, and in its Opposition to Primov's petition for appeal, SERCO made much of the fact that a reversal by this Court would result in SERCO being forced to litigate the case three times—first, in the antecedent nonsuited case; next, when the case was re-filed, until the trial court dismissed it with prejudice after sustaining SERCO's plea in bar; and finally, a third time if this Court resuscitates Primov's complaint and remands the case for further proceedings.

SERCO doth protest too much. Primov had an absolute statutory right to avail himself of his first nonsuit, a right that is not subject to judicial limitation through the imposition of conditions on the exercise of that right. By arguing that Primov's nonsuit of the prior iteration of his complaint has somehow been prejudicial to SERCO's rights, SERCO is obliquely attempting to place a condition or restriction on a plaintiff's exercise of that absolute statutory right, by imbuing Primov's decision to nonsuit with adverse consequences to SERCO, which it now asks this Court to weigh as a factor in its adjudication of this appeal. Were this Court to accept SERCO's invitation, it would unconstitutionally encroach upon the domain of the legislative branch, by chilling litigants' exercise of their absolute statutory right to suffer a first voluntary nonsuit, without penalty, without restrictions, and without conditions. No merit should be given to SERCO's

argument that its litigation of the antecedent nonsuited case should impact this Court's adjudication of this appeal. Likewise, SERCO cannot claim any prejudice from a reversal of the trial court's final order in this case, for, like the *ATS* case, this case was also in its very early stages. SERCO had not filed an Answer; neither side had propounded discovery, taken depositions, or prepared for a trial on the merits.

VI. CONCLUSION

The trial court abused its discretion by improperly dismissing Primov's case with prejudice, when it should have ignored the mediation provision and allowed the case to proceed, full-speed ahead, or alternatively, stayed the proceedings for sixty days and ordered the parties to participate in good faith, in non-binding mediation.

WHEREFORE, Appellant, GEORGE PRIMOV, respectfully requests this Honorable Court reverse the trial court's 7/19/17 final order and remand the case with instructions to the trial court to stay the pending proceedings, and order the parties to engage in good faith mediation of their dispute.

Respectfully submitted,

GEORGE PRIMOV,

By Counsel

/s/ Phillip B. Leiser, Esq.

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CERTIFICATE OF SERVICE AND OF COMPLIANCE WITH VA. R. S. Ct. 5:26(h)

I hereby certify that I have complied with the requirements of Rule 5:26, and that on this 9th day of April 2018, three copies of **Appellant's Opening Brief** and **Joint Appendix** were both emailed to and mailed by certified mail, postage pre-paid, to Patricia L. Harrington, Clerk of the Supreme Court of Virginia, at 100 N. Ninth Street, 5th floor, Richmond, Virginia 23219-2321.

I hereby further certify that on this date, a single copy of each pleading identified above was both emailed and mailed first-class postage pre-paid to:

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I further certify that, in compliance with Rule 5:26(b), the word count for Appellant's Opening Brief is 5,396. Counsel for Appellant does NOT wish to waive oral argument.

/s/ Phillip B. Leiser, Esq.

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Phillip B. Leiser, Esq.