IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

MERIT HOLDINGS LLC, MERIT CHICKASHA BG LLC, MERIT CHICKASHA CDJR LLC, MERIT DUNCAN CDJR LLC, MERIT DUNCAN BCG LLC, MERIT FAIRVIEW FORD LLC, MERIT AUTO GROUP REAL ESTATE LLC, LB HOLDINGS II LLC, LE NORMAN PROPERTIES, LLC, REIGN CAPITAL HOLDINGS LLC, DAVID D. LE NORMAN, and LE NORMAN RECOVERY LLC,	)
Plaintiffs/Appellants,	)
vs.	)
INTERNATIONAL BANK OF COMMERCE, an Oklahoma Bank, and INTERNATIONAL BANK OF COMMERCE, a Texas Bank,	)
Defendants/Appellees.	)

Case No. 122,379

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE NATALIE MAI, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Melvin R. McVay, Jr.
Eric S. Eissenstat
Catherine L. Campbell
Cody J. Cooper
Jennifer L. Miller
PHILLIPS MURRAH, P.C.
Oklahoma City, Oklahoma

For Plaintiffs/Appellants (Except Appellant Le Norman Recovery LLC)

Jason A. Dunn
Socorro Adams Dooley
Zachary Carson
PERRI DUNN PLLC
Oklahoma City, Oklahoma

For Plaintiff/Appellant Le Norman Recovery LLC

Michael Lauderdale
Spencer F. Smith
Alex Duncan
McAFEE & TAFT
A PROFESSIONAL CORPORATION
Oklahoma City, Oklahoma

For Defendants/Appellees

OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

¶1 Appellants/Plaintiffs Merit Holdings LLC; Merit Chickasha BG LLC; Merit Chickasha CDJR LLC; Merit Duncan CDJR LLC; Merit Duncan BCG LLC; Merit Fairview Ford LLC; Merit Auto Group Real Estate LLC; LB Holdings II LLC; Le Norman Properties, LLC; Reign Capital Holdings LLC; David D. Le Norman; and Le Norman Recovery LLC (collectively, Merit) appeal the trial court's order finding that Appellees International Bank of Commerce, an Oklahoma Bank, and International Bank of Commerce, a Texas Bank (collectively, IBC), have not waived their right to compel Merit's claims to arbitration. Merit also appeals the

trial court's order filed June 25, 2024, finding an enforceable agreement to arbitrate exists and Merit's claims "are subject to the arbitration agreement" and thus granting IBC's alternative motion to compel arbitration.

FACTS AND PROCEDURAL BACKGROUND

¶2 According to Merit's second amended petition, Randy Byford, owner of Byford Buick GMC, wanted to purchase two more auto dealerships but needed additional capital to do so. Byford reached out to David Le Norman and "solicited his investment as a capital partner to help grow" his current dealership and two more dealerships. Le Norman invested in the current dealership and the "purchase of two additional dealerships, and he gave substantial financial support over time to the growth and expansion of what became the Byford-Le Norman Auto Group." Merit's second amended petition states:

> 18. In conjunction with Mr. Le Norman's investment into the Auto Group, the dealership entities (both new and old) were reorganized such that all dealership entities—including Merit Chickasha BG LLC . . . Merit Chickasha CDJR LLC . . . Merit Duncan BCG LLC . . . Merit Duncan CDJR LLC . . . and Merit Fairview Ford LLC . . . , among others not party to this matter—were owned by the Byford-Le Norman Holding Company, LLC (now Merit Holdings, LLC ("Merit Holdings")).
>
> 19. Merit Holdings, in turn, was owned 25% by Mr. Byford and his wife and 75% by Le Norman Properties, LLC ("LNP").

Although LNP (owned by Le Norman) managed Merit Holdings, Byford "operate[d] the dealerships because of his existing relationships with vehicle manufacturers and his qualification as a Dealer."

¶3 Merit's second amended petition further provides that Le Norman contacted IBC Oklahoma about financing the Auto Group operations which the Bank approved. Further, "In late 2019, Mr. Le Norman entered into an arrangement to provide supplemental floor plan financing to the Auto Group at Mr. Byford's request." Merit claims that soon thereafter, Byford "resisted Mr. Le Norman's efforts to conduct inventory audits and otherwise administer this supplemental floor plan financing" and "delayed repayment of the supplemental floor plan financing." When initially confronted by Le Norman, Byford denied any wrongdoing but said he would correct the issues. After not correcting the issues regarding the supplemental floor plan financing, when Le Norman confronted Byford again on May 9, 2020, Byford "admitted in writing to Mr. Le Norman that he had been defrauding the Merit-Le Norman Parties." Shortly thereafter, Byford committed suicide.

¶4 In the wake of these events, Le Norman began an investigation into Byford's operation of the Auto Group. As stated in Merit's appellate brief in chief, "Unbeknownst to Merit Holdings, Byford fraudulently obtained advances exceeding the value of the collateral and had been keeping the proceeds of

inventory sold" and "also obtained fraudulently induced advances securing financing with collateral that never existed." Merit alleged that "Merit Holdings became saddled with the debt of the outstanding notes obtained from IBC and other banks" and "[i]n an effort to restructure the debt, IBC and Merit Holdings entered into negotiations resulting in a series of loan agreements to restructure the floor plan financing loan agreements."

¶5 Merit urges in its appellate brief that "[t]he parties executed the first series of loan agreements in October 2020: a stop-gap, restated loan and guaranty agreement while negotiations between the parties would continue." Merit explains that after execution of the stop-gap loan agreements that "the parties began negotiations related to various other legal instruments: a limited waiver agreement, amendments to the restated loan, guaranty, and inventory financing credit agreements, and a consent agreement." Each of these loan agreements has an arbitration provision requiring disputes between the parties to be resolved by arbitration.

¶6 Merit brought the present action against IBC. However, because Merit's second amended petition is 114 pages long with over 80 claims, we quote the following language from its amended petition in error summarizing the facts and issues relevant to the issues before us in this appeal:

> This case arises from various loan documents (including guarantees) entered between Defendants

> International Bank of Commerce (Oklahoma) and International Bank of Commerce (Texas) (collectively "IBC") and certain Plaintiffs. Plaintiffs (collectively "Merit") alleged that the Byfords fraudulently induced them to invest in auto dealerships. The Byfords had loans from IBC secured by the assets of the dealerships. Merit asserts that IBC's actions/inactions in connection with the dealerships' floor plan loans aided and abetted the Byfords' fraud. Additionally, after discovering the initial fraud, IBC made fraudulent representations and concealed information from Merit and fraudulently and economically coerced Merit to enter agreements to cover the debts accrued by the Byfords. Those agreements contain certain clauses, including arbitration provisions, which Merit was fraudulently induced to execute.

According to IBC's appellate brief, its "loans have matured and are now in default, and at the time of the injunction hearing in April 2023, IBC alleged it was owed $48 million dollars with interest continuing to accrue at a default rate."

¶7 Soon after Merit filed its second amended petition, IBC filed its second motion seeking dismissal of certain claims in the second amended petition. On the first page of this second motion to dismiss, IBC dropped the following footnote:

> Defendants previously submitted an Alternative Motion to Compel Arbitration. As set forth therein, to the extent the Court denies this Motion to Dismiss either in whole or in part, any surviving claims should be sent to arbitration. Per the arbitration agreement, Defendants do not, by filing this motion, waive their rights to arbitrate any remaining claims.

Merit filed a response to the second motion to dismiss and IBC filed a reply brief.

On the same day IBC filed its reply brief, it also filed a supplement to their alternative motion to compel arbitration and brief in support.[1]

¶8 In an order filed May 13, 2024, the trial court denied in part IBC's second motion to dismiss. That same day the trial court entered another order regarding IBC's alternative motion to compel arbitration. In relevant part the trial court found the following as to Merit:

> that all of the claims and claims for relief asserted by them are contemplated by, and subject to, the various arbitration agreements contained within the Loan Documents and contracts at issue in this case. The Court further specifically finds that Defendants have not waived the right to compel Plaintiffs' claims to arbitration.

The trial court also concluded that a later evidentiary hearing would be necessary to determine whether Merit's claims "should be compelled to arbitration, based on the assertion by [Merit's] counsel that the arbitration agreements themselves were fraudulently induced." The trial court explained, "The testimony, exhibits, and arguments presented at the evidentiary hearing shall be limited to whether the arbitration agreements contained within the various loan documents at issue in this

[1] IBC initially filed their alternative motion to compel arbitration on October 24, 2022. IBC's supplement to the motion to compel arbitration was filed after the second amended petition was filed on July 26, 2023, to remove those Plaintiffs no longer asserting claims against IBC.

case were fraudulently induced" and "shall not be permitted to offer testimony or argue that the Loan Documents as a whole were fraudulently induced."

¶9 After the evidentiary hearing, the trial court found in an order filed June 25, 2024, that "an enforceable agreement to arbitrate exists and that the claims asserted by Plaintiffs . . . are subject to the arbitration agreement." The trial court granted the motion to compel arbitration and directed Merit to pursue its claims against IBC in arbitration. The trial court also ordered "that this entire action, including claims made and causes of action asserted by Spitfire,[2] be stayed pending arbitration of the claims and defenses made by the parties and resolution of the Spitfire bankruptcy."

Merit appeals the two orders regarding arbitration.

STANDARD OF REVIEW

¶10 "We review an order granting or denying a motion to compel arbitration *de novo* . . . ." *Thompson v. Bar-S Foods Co.*, 2007 OK 75, ¶ 9, 174 P.3d 567. The Oklahoma Supreme Court has instructed:

> The determination of whether a party waived its right to compel arbitration is a mixed question of law and fact: "The review of whether the trial court applied the correct legal standards is a de novo review for correctness . . . while the review of the trial court's determination of the existence of facts supporting waiver is deferential in nature."

[2] Spitfire is not a party to this appeal.

Howell's Well Serv., Inc. v. Focus Grp. Advisors, LLC, 2021 OK 25, ¶ 6, 507 P.3d 623 (quoting *Northland Ins. Co. v. Kellogg*, 1995 OK CIV APP 84, ¶ 5, 897 P.2d 1161, *superseded by statute as stated in Howell's*, 2021 OK 25, n.4).

¶11 Additionally, "A determination of the existence of a valid enforceable agreement to arbitrate is a question of law to be reviewed by a *de novo* standard." *Signature Leasing, LLC v. Buyer's Grp., LLC*, 2020 OK 50, ¶ 2, 466 P.3d 544.

ANALYSIS

I. Waiver of the Right to Arbitrate

¶12 Merit appeals the trial court's decision finding that IBC did not waive any contractual right to arbitration. The parties acknowledge that the various arbitration agreements in this case are subject to the Federal Arbitration Act.

¶13 "The Federal Arbitration Act (FAA) governs interstate commerce contracts." *Williams v. TAMKO Bldg. Products, Inc.*, 2019 OK 61, ¶ 5, 451 P.3d 146. "The FAA controls substantive rights, but the Oklahoma Uniform Arbitration Act (OUAA) controls the procedure for enforcing the FAA." *Id.* "The FAA does not preempt the OUAA's procedural rules for appeals." *Id.* ¶ 6.

¶14 The Court in *Howell's Well Service, Inc. v. Focus Group Advisors, LLC*, 2021 OK 25, ¶ 7, 507 P.3d 623, said, "Parties' agreements to bind themselves to mandatory arbitration are generally looked upon with favor as a shortcut to substantial justice with a minimum of court interference." "Over the years, we

have recognized that arbitration agreements are designed to preclude court intervention into the merits of disputes when arbitration has been provided for contractually and any doubts concerning the arbitrability of a particular dispute should be resolved in favor of coverage." *Id.* ¶ 8.

¶15 However, in a more recent case, the U.S. Supreme Court in its unanimous opinion in *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022), clarified this "decades-old" view of the FAA:

> [T]he FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. [*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct 927, 941, 74 L. E. 2d 765.] Our frequent use of that phrase connotes something different. "Th[e] policy," we have explained, "is merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." [Quoted citation omitted.] Or in another formulation: The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 18 L.Ed.2d 1270 (1967). Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation.

Morgan, 142 S. Ct. at 1713. The Court went on to say, "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id.* This leads us to believe that the U.S. Supreme Court views the FAA's policy as

"based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism." *National Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. 1987).

¶16 When confronted with a request to enforce an agreement to arbitrate, we must look to those rules applicable to contracts generally, including assertions of waiver. As the U.S. Supreme Court said in *Morgan*: "If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it." *Morgan,* 142 S. Ct. at 1713.

¶17 The Oklahoma Supreme Court in *Howell's* approved five of the six factors enunciated in *Northland Insurance Co. v. Kellogg*, 1995 OK CIV APP 84, ¶ 8, for determining waiver of the right to arbitrate. The *Howell's* Court said:

> In *Northland*, the court, adhering to similar tests set forth in federal cases, formulated a balancing test to determine whether a party has waived its right to arbitration:
>
> 1. Whether a party has taken actions that are inconsistent with a right to arbitrate;
> 2. Whether the issue of arbitration was raised only after there had been significant preparation for litigation;
> 3. Whether the trial date is near or there has been a long delay in raising the issue of contractual arbitration rights;
> 4. Whether the party invoking the arbitration right has filed pleadings in the litigation without seeking a stay of the proceedings;
> . . . and
> 6. Whether the opposing party has been prejudiced by the delay.

Howell's, 2021 OK 25, ¶ 15.[3]

¶18 Although the parties' agreement here states that "[a]ctive participation in any pending litigation . . . shall not in any event be deemed a waiver" of a "party's right to compel arbitration," such anti-waiver contract provisions are subject to waiver. We will therefore examine these five factors to see whether Merit met its burden of proving waiver.

¶19 The parties cite numerous state and federal cases in their appellate briefs to support their arguments. Merit asserts in its appellate brief:

> While the Tenth Circuit does not appear to have addressed the issue, the United States District Court for the District of Utah and Kansas have each determined that "the Tenth Circuit would follow the lead of the Second, Third, and Sixth Circuits in holding that a 'no waiver' provision in an arbitration agreement does not alter the Court's analysis . . . in determining whether the right to arbitration was waived." *See Chamberlain v. Crown Asset Mgmt., LLC*, No. 1:21CV146 DAK-JCB, 2023 WL 4315835, at *1 n.5 (D. Utah July 3, 2023 (citations omitted) and *Funderburke v. Midland Funding, L.L.C.*, No. 12-2221-JAR/DJW, 2013 WL 394198, at *7, (D. Kan. February 1, 2013).

[3] "After *Northland* was published, the Oklahoma Legislature revised the OUAA, granting arbiters broad discovery-related powers so that parties to arbitration are no longer at a discovery disadvantage." *Howell's Well Serv., Inc. v. Focus Grp. Advisors*, 2021 OK 25, n.4, 507 P.3d 623. Because subsequent cases "found it no longer necessary to weigh the *Northland* test's fifth factor regarding discovery . . . . we will not consider this defunct, fifth factor." *Id.*

The Sixth Circuit addressed this issue in *Johnson Associates Corp. v. HL Operating Corp.*, 680 F.3d 713 (6th Cir. 2012). In addressing arguments about a no-waiver provision and the waiver analysis, the *Johnson* Court determined:

> "[T]he presence of [a] 'no waiver' clause does not alter the ordinary analysis undertaken to determine if a party has waived its right to arbitration." This makes sense because "to allow the 'no waiver' clause to preclude a finding of waiver would permit parties to waste scarce judicial time and effort and hamper judges' authority to control the course of the proceedings" and allow parties to "test[] the water before taking the swim" by delaying assertion of their right to arbitration until the litigation is nearly complete.

Id. at 717 (quoted citation omitted); *see also Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 452 (3d Cir. 2011)(finding "'that the presence of a 'no waiver' clause does not alter the ordinary analysis undertaken to determine if a party has waived its right to arbitration.'" (quoted citation omitted)); *see also Westinghouse Credit Corp. v. Shelton*, 645 F.2d 869, 873-74 (10th Cir. 1981)(in a case not involving an arbitration provision, the Court generally held that "the view we think Oklahoma state courts would follow, is that an 'anti-waiver' clause, like any other term in the contract, is itself subject to waiver or modification by course of performance and that whether such waiver or modification has occurred is a question for the factfinder").

¶20 With these tenets in mind, we acknowledge that an anti-waiver provision like the one here does not prevent us from applying the ordinary waiver analysis to

determine if a party has waived the right to arbitration. From here, we will address the factors discussed by the parties and outlined above in *Howell's*.

1. Actions Inconsistent with the Right to Arbitrate

¶21 Merit first argues that IBC's actions in seeking a dismissal for failure to state a claim, requesting discovery, and requesting attorney fees and costs were inconsistent with the intent to arbitrate—*i.e.*, the first factor listed above which concerns "[w]hether a party has taken actions that are inconsistent with a right to arbitrate." *Howell's*, 2021 OK 25, ¶ 15.

¶22 In response to Merit's original petition, IBC filed first a special appearance and then a motion to dismiss contemporaneously with a separate alternative motion to compel arbitration. IBC asked the trial court first to dismiss Merit's lawsuit for failing to state a claim. But on the first page of its motion to dismiss, IBC stated this in a footnote:

> With this filing, Defendants have contemporaneously submitted an Alternative Motion to Compel Arbitration. As set forth therein, to the extent the Court denies this Motion to Dismiss either in whole or in part, any surviving claims should be sent to arbitration. Per the arbitration agreement, Defendants do not, by filing this motion, waive their rights to arbitrate any remaining claims.

Similarly, in its contemporaneous alternative motion to compel arbitration, IBC argued that, if the trial court denied the motion to dismiss in whole or in part, it

asked the trial court to compel the remaining claims to arbitration pursuant to their arbitration agreement. Merit filed a response, and IBC replied.

¶23 After several months of litigating Merit's application for an emergency temporary restraining order and injunctive relief, the parties agreed to Merit filing a first amended petition containing minor, non-substantive changes and to IBC's adopting the motion to dismiss and motion to compel arbitration filings to apply to the first amended petition.

¶24 Before the July 2023 hearing on IBC's motion to dismiss and motion to compel arbitration, IBC filed an application for attorney's fees and costs and a motion to recover damages which both related to Merit's application for an emergency temporary restraining order and injunctive relief.

¶25 After the July hearing on IBC's motion to dismiss, the trial court directed Merit to file a second amended petition and held IBC's motion to compel arbitration in abeyance. In response to Merit's second amended petition, IBC filed a second motion to dismiss for failure to state a claim referring in a footnote to its previously filed alternative motion to compel arbitration and anti-waiver arbitration clause. Merit filed a response and IBC replied. In an order filed May 13, 2024,[4] the trial court granted in part and denied in part IBC's second motion to dismiss finding:

[4] We note four separate orders were filed on this day.

> 2. The court also rules that the claims of civil conspiracy and aiding and abetting . . . should be more specifically targeted towards what action the Plaintiffs allege Defendants did and dismisses those claims with twenty (20) days to amend those causes of actions from the date of this order.
> 3. The court further finds and rules that the claim of economic duress falls as an alternative to, or part of, the fraudulent inducement claim rather than a stand alone cause of action.
> 4. In all other respects Defendants' Motion to Dismiss is denied.

¶26 Merit argues these actions by IBC were inconsistent with the right to arbitrate because it filed a motion to dismiss for failure to state a claim (*i.e.*, a motion addressing the merits), requested the trial court to consider this motion first, and then asked the trial court to send any remaining claims to arbitration—in effect, getting two bites at the apple. IBC asked the trial court to resolve Merit's claims by dismissing them, but if that failed in whole or in part, then to enforce the arbitration agreement and have the arbitrator resolve the claims.

¶27 In *Howell's,* the Oklahoma Supreme Court concluded that the defendants "had not taken any meaningful steps to encourage litigation of this case in court and their only proactive pleading was their motion to compel arbitration." *Id.* ¶ 21. Further, "No discovery had been taken or exchanged, no dates for trial were in place and a scheduling order had not been entered at the time of" the defendants' filing of its motion to compel arbitration. *Id.* And, the defendants had only filed an answer. *Id.* ¶ 16. The Court concluded that the defendants' motion to compel

arbitration should have been granted. *Id.* ¶ 21. The *Howell's* Court also cited *BOSC, Inc. v. Board of County Commissioners of County of Bernalillo*, 853 F.3d 1165, 1174-75 (10th Cir. 2017) in which the Tenth Circuit found there to be no waiver of arbitration. In the *BOSC* case, as summarized in *Howell's*:

> [T]he plaintiff was the party seeking to arbitrate after having dismissed its state court case. The court found that the plaintiff "took some actions inconsistent with its right to demand arbitration" by filing a state court action involving the claims it sought to arbitrate as well as filing a response to the defendant's motion to dismiss. Nevertheless, *the court held that the plaintiff did not go so far as to voluntarily submit its claims to a court for relief because it had not served the defendants and dismissed the case before the court could rule on the motion to dismiss*. Further, no trial date or other deadlines had been set by the court and very little case activity, including no discovery, had yet occurred.

Howell's, 2021 OK 25, ¶ 20 (quoting *BOSC, Inc.*, 853 F.3d at 1175)(citations omitted and emphasis added).

¶28 *Howell's* also summarized *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002), stating that the "Second Circuit recognized a long line of cases where delay alone is insufficient to overcome the presumption in favor of arbitration, and found that such delay must be accompanied by *substantial motion practice* or discovery or other evidence of excessive cost to the challenging party." *Howell's*, 2021 OK 25, ¶ 20 (emphasis added); *see also Willco Enters., LLC v. Woodruff*, 2010 OK CIV APP 18, ¶ 27, 231 P.3d 767 (concluding that

"[w]ith the exception of the lone set of discovery requests they served . . . the remaining pleadings [a]ppellants filed with the trial court . . . were defensive in nature," and their actions were therefore "not inconsistent with their right to arbitrate").

¶29 Conversely, the Court in *Northland Insurance Company v. Kellogg*, 1995 OK CIV APP 84, 897 P.2d 1161, superseded by statute on other grounds as stated in *Howell's Well Service, Inc. v. Focus Group Advisors, LLC*, 2021 OK 25, n.4, 507 P.3d 623, concluded plaintiff waived the right to arbitrate:

> Our review of the record on appeal clearly reveals that [p]laintiff significantly participated in the litigation. Indeed, [p]laintiff *initiated* the litigation. Then, without seeking a stay of proceedings, [p]laintiff subjected [d]efendant to discovery requests and then pursued judgment on the alleged merits by motion for summary judgment.
>
> . . . .
>
> Although the trial date had not been set at the time [p]laintiff raised the issue of arbitration rights, a date of determination had come and gone because [p]laintiff sought summary judgment, which is a procedure designed to dispose of litigation by placing ultimate issues before the trial court for determination based upon undisputed issues of fact or dispositive questions of law. Thus, [p]laintiff had sought a judgment on the merits.

Id. ¶¶ 9, 11 (citations omitted).

¶30 At the federal level, the Fifth Circuit has determined a party waives its right to arbitration when it invokes the judicial process. "To invoke the judicial process, a party 'must, at the very least, engage in some overt act in court that evinces a

desire to resolve the arbitrable dispute through litigation rather than arbitration.'" *Forby v. One Technologies, L.P.*, 909 F.3d 780, 784 (5th Cir. 2018)(quoted citation omitted). The Court further stated, "'A party waives arbitration by seeking a decision on the merits before attempting to arbitrate.'" *Id.* It also held, "'A dismissal with prejudice for failure to state a claim is a decision on the merits and essentially ends the plaintiff's lawsuit.'" *Id.* The Fifth Circuit in the case of *In re Mirant Corp.*, 613 F.3d 584, 589-90 (5th Cir. 2010), also considered as a factor whether defendant filed a motion to dismiss as an alternative to its motion to compel arbitration, rather than the reverse. Just as IBC did, the defendant, the Court in *Mirant* noted, "first sought 'a decision on the merits before attempting to arbitrate,'" rather than demonstrating "its preference to arbitrate by submitting a dispositive motion only as an alternative to a motion to compel arbitration." *Id.* at 589-90. The *Mirant* Court concluded that the defendant had waived arbitration.

¶31 Merit also argues that serving discovery requests is inconsistent with the right to arbitrate. However, we reiterate that the *Howell's* Court found the fifth factor "defunct" because "the Oklahoma Legislature revised the OUAA, granting arbiters broad discovery-related powers so that parties to arbitration are no longer at a discovery disadvantage." *Howell's*, 2021 OK 25, n.4. Because this factor no longer plays a part in deciding the issue before us, we will not further address this discovery factor.

¶32 Our review of the record persuades us that IBC's actions were inconsistent with its right to arbitrate. IBC filed its first motion to dismiss on the merits. And although it contemporaneously filed an alternative motion to compel arbitration, it sought to defer action on this alternative motion and specifically asked the trial court in both motions to address its motion to dismiss first, with surviving claims, if any, to be determined by arbitration. IBC proceeded to engage in Merit's application for a temporary restraining order and injunctive relief for several months without reasserting its motion to compel arbitration or requesting a stay. Before the July 2023 hearing on IBC's motion to dismiss and motion to compel arbitration, IBC filed an application for attorney's fees and costs and a motion to recover damages which both related to Merit's application for an emergency temporary restraining order and injunctive relief.

¶33 After Merit was allowed to amend its petition for the second time, IBC filed a second motion to dismiss for failure to state a claim, again asking the trial court to address this motion first and reserve the motion to compel arbitration for secondary consideration if the motion to dismiss partially or wholly failed. A few months later, IBC filed a supplement to its alternative motion to compel arbitration.[5]

[5] Merit, in its motion to reconsider the trial court's order finding no waiver of arbitration, argued that nearly two years had passed between Merit filing suit and IBC finally asking the

¶34 We agree with the position pronounced by the 10th Circuit in *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litigation*, 790 F.3d 1112, 1119 (10th Cir. 2015): "[A] party must do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration." IBC's acquiescence and participation in continuing to litigate is inconsistent with its right to arbitrate. This evinces IBC's desire to resolve this dispute through litigation rather than arbitration, relying on arbitration as a backup, should litigation prove unsuccessful. *Forby*, 909 F.3d at 784.

2. Significant Preparation for Litigation

¶35 The next factor requires us to determine whether IBC raised the issue of arbitration "only after there had been significant preparation for litigation." *Howell's*, 2021 OK 25, ¶ 15. The first and second factors often "depend on much the same evidence." *Willco Enters., LLC*, 2010 OK CIV APP 18, ¶ 28. IBC filed its alternative motion to compel arbitration contemporaneously with a motion to dismiss for failure to state a claim. Merit filed its original petition on June 22, 2022. IBC filed its responsive motions on October 24, 2022. Although the issue was no doubt raised at the beginning of the case, IBC specifically asked the trial

court to rule on its alternative motion to compel arbitration. ROA at 2339. Merit summarizes IBC's conduct in the trial court case by arguing that IBC "litigated injunction proceedings (which are subject to arbitration), conducted discovery, mediated the case, and sought and obtained affirmative relief in the form of damages and attorney fees." ROA at 2328.

court not to consider its arbitration motion until it first addressed the motion to dismiss, which did not occur until several months later in July 2023 after the trial court disposed of Merit's application for a temporary restraining order and injunctive relief, which included IBC's emergency motion to compel discovery. IBC later filed an application for attorney's fees and costs, a motion to recover damages and to forfeit Merit's bond, and a request for an evidentiary hearing. In August 2023, IBC filed a second motion to dismiss for failure to state a claim, again seeking disposition of its motion to dismiss before taking up the alternative motion to compel arbitration. It is difficult to deny that the parties significantly prepared for litigation on the merits of Merit's claims after IBC asked the trial court to defer its request for arbitration.

3. Trial Date and/or Delay in Raising Right to Arbitrate

¶36 Both parties agree a trial date had not been set when IBC filed its alternative motion to compel arbitration. Although the record shows that this motion to compel was filed early in the case before any scheduling order had been entered, IBC specifically asked the trial court to delay considering this motion until it decided its motion to dismiss for failure to state a claim. As Merit points out in its appellate brief, the "'offensive posture' of IBC's filings goes far beyond the pleading in *Howell's Well Serv., Inc.* where the party's 'only proactive pleading was their motion to compel arbitration." *See Howell's*, 2021 OK 25, ¶ 21.

4. Stay

¶37 The fourth factor is whether "the party invoking the arbitration right has filed pleadings in the litigation without seeking a stay of the proceedings." *Howell's*, 2021 OK 25, ¶ 15. In its appellate brief, IBC admits it did not request a stay of the proceedings but argues it makes no difference because "Oklahoma law requires a trial court to enter a stay upon compelling arbitration" pursuant to 12 O.S. § 1858(G). If seeking a stay truly made no difference, it would be pointless for the Supreme Court to adopt the *Northland* factor requiring consideration of whether "the party invoking the arbitration right has filed pleadings in the litigation without seeking a stay of the proceedings." Requesting a stay along with filing a motion to compel arbitration further demonstrates that the party requesting arbitration genuinely wishes to arbitrate. But here, IBC pursued the lawsuit on its merits to dismiss Merit's claims, engaged for months in the issues arising from Merit's quest for a temporary restraining order and injunctive relief, and filed a motion to compel discovery and an application for attorney's fees and costs. These steps were all taken without seeking a stay in the proceedings for the purpose of allowing the trial court to determine IBC's motion to dismiss before ever addressing IBC's motion to compel arbitration, a sequence IBC requested. On these facts, the fourth factor weighs in favor of concluding IBC waived its right to compel arbitration.

5. Prejudice

¶38 The final factor in *Howell's* is "[w]hether the opposing party has been prejudiced by the delay." *Howell's*, 2021 OK 25, ¶ 15. Merit asserts it is not necessary to consider this factor because, subsequent to *Howell's*, the U.S. Supreme Court in *Morgan v. Sundance*, 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022), found this factor is inapplicable in determining whether arbitration has been waived. IBC responds that "Oklahoma courts have yet to address or adopt *Morgan*, and until then, ceasing to use prejudice in the analysis is a matter of unsettled law for this Court to eventually decide."

¶39 Our review of *Morgan* and its very clear pronouncement on prejudice to the opposing party playing no part in evaluating whether the right to arbitrate has been waived persuade us that this approach is correct. *Morgan* says, "Waiver . . . 'is the intentional relinquishment or abandonment of a known right.'" *Id.* at 1713 (quoted citation omitted). The Court continues, "To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party." *Id.* The Court cites Section 6 of the FAA as instructing "that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA." *Id.* at 1714. The Court then held that the Eighth Circuit's imposition of a showing of prejudice to establish waiver was incorrect

and that its waiver inquiry, "[s]tripped of its prejudice requirement," would properly focus on the right-holder's conduct, not on the effect on the opposing party. *Id.* We find no contrary indication in the OUAA.

¶40 If we are to treat agreements to arbitrate as we would any other contract (*i.e.*, not prefer such agreements by applying rules favoring arbitration), then following the Supreme Court's guidance in *Morgan* would require us to disregard the question of prejudice to the opposing party and simply focus on the conduct of the party holding the right being examined for waiver. For these reasons, following *Morgan*, we will not consider *Howell's* factor no. 6—whether the delay in these proceedings has prejudiced Merit.

¶41 This results in the application of the first four factors outlined in *Howell's*, all of which pertain to IBC's conduct and persuade us that IBC has waived its right to arbitrate.

CONCLUSION

¶42 After reviewing the record and balancing the above factors in *Howell's*, we conclude it was error to find Merit fell short in meeting its burden to show waiver of the right to arbitrate. We conclude Merit satisfied its burden to show sufficient evidence of IBC's waiver of its right to compel arbitration, and we must reverse the trial court's order to the contrary. Based on this conclusion, we reverse both

orders appealed by Merit and remand for further proceedings. This issue is dispositive, and no further issues on appeal will be addressed.

¶43 **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

BLACKWELL, J., concurs, and FISCHER, J., dissents.

BLACKWELL, J., concurring:

¶1 I concur in full in the Court's opinion. I write separately to note a further reason that denial of the defendants' motion seeking arbitration would have been appropriate.

¶2 Oklahoma follows the Uniform Arbitration Act in requiring a motion seeking to compel arbitration to allege *two* distinct facts. An applicant must file a motion that both "show[s] an agreement to arbitrate *and* alleg[es] another person's refusal to arbitrate pursuant to the agreement . . . ." 12 O.S. § 1858(A) (emphasis supplied). A review of the record reveals that the defendants never made any allegations regarding the plaintiffs' refusal to arbitrate. This makes sense, as it is clear that the defendants had not initiated arbitration proceedings or even indicated an intent to do so. Instead, as detailed in the Court's opinion, the defendants were content to first test their defenses in court and resort to arbitration as a backup. Such is not permitted by the plain language of § 1858, which requires an allegation

a "refusal to arbitrate." *Id.*[1] Because the defendants never made any such allegation, summary denial of defendants' motion seeking arbitration would have been appropriate.[2]

FISCHER, J., dissenting:

¶1 Reliance on *Howell's Well Service, Inc. v. Focus Group Advisors, LLC,* 2021 OK 25, 507 P.3d 623, and the *Northland Insurance Co. v. Kellogg*, 1995 OK CIV APP 84, 897 P.2d 1161, test to resolve the waiver of arbitration issue in this case is problematic. The *Northland* Court, citing previously well-settled federal circuit court of appeals decisions, identified six factors to determine when a party had waived the right to compel arbitration. In essence, *Howell's Well Service* adopted five of those six factors. The *Northland* factors are quoted in the Majority and need not be repeated here.

¶2 However, both *Northland* and *Howell's Well Service* were decided before the United States Supreme Court's most recent decision on this issue in *Morgan v.*

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[1] The Federal Arbitration Act contains somewhat analogous language in its § 4. *See* 9 U.S.C. § 4 (requiring an applicant to be "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate"). Of this language, the United States Supreme Court has said: "An indispensable element of [the applicant's] cause of action under § 4 for an arbitration order is the [opposing party's] refusal to arbitrate.").

[2] It might be argued that the plaintiffs' response to the motion seeking arbitration indicates a refusal to arbitrate. After all, the plaintiffs argued in its response that there was no agreement to arbitrate and that arbitration had been waived, among other things. However, § 1858's requirements go to the application to compel arbitration alone. One need not look beyond the application itself to determine the allegations it contains.

Sundance, Inc., 596 U.S. 411, 142 S. Ct. 1708 (2022). *Sundance* holds that, in an action subject to the Federal Arbitration Act and decided on the basis of federal waiver law, a court cannot use an arbitration-specific procedural rule to determine whether a party has waived the right to compel arbitration of the dispute. *Northland* and the federal cases on which it relies created a prohibited "arbitration-specific" waiver analysis. *Sundance*, 596 U.S. at 417, 142 S. Ct. at 1712.

¶3 Specifically, the *Sundance* Court rejected part of an Eighth Circuit waiver test requiring proof of prejudice to the party opposing arbitration before a court could find a waiver by the party seeking to compel arbitration. The Supreme Court reasoned that a "prejudice requirement . . . is not a feature of federal waiver law generally." *Id.* at 415, 142 S. Ct. at 1712. As the Majority notes, prejudice to the opposing party is also one factor of the *Northland* test, and that factor is no longer viable after the *Sundance* decision. I agree. "Section 6 [of the Federal Arbitration Act] instructs that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA." *Id.* at 417, 142 S. Ct. at 1714.

¶4 But the impact of the *Sundance* decision on the *Northland* analysis is not limited to abrogation of the prejudice requirement. The Supreme Court reached the result in *Sundance* because "a court must hold a party to its arbitration contract just as the court would to any other kind." *Id.* at 418, 142 S. Ct. at 1713. "The

Supreme Court has made clear that the FAA's policy 'is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism.'" *Id.* at 418-19, 142 S. Ct. at 1714 (quoting *Nat'l Found. for Cancer Research v. A. G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987)). Consequently, "[i]f an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id.* at 418, 142 S. Ct. at 1713.

¶5 The Plaintiffs (collectively Merit), cite *Sundance* but argue that the "applicable factors" are the *Northland* factors approved in *Howell's Well Service.* In essence, *Howell's Well Service* approved five of the *Northland* factors, eliminating the fifth "discovery factor," noting it had been abrogated by statute. *Howell's Well Serv., Inc. v. Focus Grp. Advisors, LLC,* 2021 OK 25, n.4, 507 P.3d 623, n.4 (citing *Willco Enters., L.L.C. v. Woodruff*, 2010 OK CIV APP 18, ¶ 19, 231 P.3d 767, 773-74).[1] And as the Majority holds, *Northland's* sixth "prejudice" factor is no longer viable after *Sundance.* However, Merit's argument that *Northland* provides the applicable factors is too narrow. It avoids the analysis now

[1] The Oklahoma Supreme Court also observed that the *Northland* factors were developed before the enactment of Oklahoma's current Arbitration Act, 12 O.S. §§ 1851 through 1881.

required by *Sundance* because the remaining *Northland* factors are only relevant to the extent that they are consistent with a traditional waiver analysis in contract cases.

¶6 In ordinary contract cases decided pursuant to federal law, a waiver consists of "the intentional relinquishment or abandonment of a known right." *Sundance*, 596 U.S. 411, 417, 142 S. Ct. 1708, 1713 (quoting *U.S. v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777 (1993)). The arbitration agreement in this case provides: "[t]he Federal Arbitration Act shall govern (i) the interpretation and enforcement of these Arbitration Provisions . . . ." Prior to *Sundance*, "[t]he provisions of arbitration agreements [were] examined under general principles of state contract law." *Oklahoma Oncology & Hematology, P.C. v. U.S. Oncology, Inc.*, 2007 OK 12, ¶ 26, 160 P.3d 936, 946 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995)). It does not appear that the *Sundance* Opinion overruled the *Kaplan* holding except, perhaps, where state law is contrary to federal law. *See Thompson, Next Friend of Hughes v. Heartway Corp.*, 2025 OK 65, ¶ 16, ___ P.3d ___.

¶7 Nonetheless, on this issue Oklahoma and federal waiver law are essentially the same. "A waiver is defined as the voluntary or intentional relinquishment of a known right." *Faulkenberry v. Kansas City S. Ry. Co.*, 1979 OK 142, ¶ 6, 602 P.2d 203, 206-07. *Accord Guinn v. Church of Christ of Collinsville*, 1989 OK 8,

¶ 31, 775 P.2d 766, 777 ("The intentional and voluntary relinquishment of a known right [is] required for a finding of an effective waiver . . . ."). Further, the *Faulkenberry* Court cited *Cordova v. Hood*, 84 U.S. 1 (1872), for the proposition that "'waiver' is a matter of intention as well as action." *Faulkenberry*, 1979 OK 142 at n.11, 602 P.2d at n.11. A waiver analysis "focuses on the actions of the person who held the right . . . [and] seldom considers the effects of those actions on the opposing party. That analysis applies to the waiver of a contractual right, as of any other." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417, 142 S. Ct. 1708, 1713 (2022).

¶8 The initial inquiry then is whether the Bank voluntarily and intentionally relinquished the right to arbitrate. The answer to that question is clearly, "no." First, the parties' contract requires one to file a request to arbitrate within 180 days if the other party initiated litigation. The Bank did so, and Merit does not argue otherwise. Second, as the Majority points out, the Bank sought to preserve its right to arbitrate with its very first substantive filing. *See* Defendants' Alternative Motion To Compel Arbitration And Brief In Support, filed in the district court at the same time the Bank filed Defendants' Motion to Dismiss. *Cf.*, *Tulsa Ambulatory Procedure Ctr., LLC v. Olmstead*, 2024 OK 57, ¶ 16, 558 P.3d 374, 381 ("A waiver generally occurs when a party fails to raise an affirmative defense in a timely manner through an original responsive pleading, amendment of an

answer, filing a motion (such as a motion for summary judgment or a motion to dismiss), or by consent of the opposing party."). Although *Howell's Well Service* holds that arbitration is not an affirmative defense, the Bank filed its motion to compel arbitration at the outset of this litigation and it set the motion for hearing with Merit's consent.

¶9 In no case relied on by Merit to support its waiver argument did a defendant file an alternative motion to compel arbitration with some other motion or pleading at the outset of the litigation. And it is no longer determinative that the Bank took "actions that are inconsistent with a right to arbitrate." *Howell's Well Service, Inc. v. Focus Grp. Advisors, LLC,* 2021 OK 25, ¶ 15, 507 P.3d 623, 627. What matters is whether the Bank took actions voluntarily relinquishing the right to arbitrate. But the clearly expressed intention of the Bank not to waive its right to arbitrate is not necessarily the end of the inquiry. Waiver is also "a matter of . . . action." *Faulkenberry v. Kansas City S. Ry. Co.,* 1979 OK 142, n.11, 602 P.2d 203, n.11. In my view, the action that the Bank took was insufficient to contradict its expressed intention to arbitrate Merit's claim.

¶10 First, and despite its contractual agreement to arbitrate certain disputes with the Bank, Merit elected to seek a resolution of this dispute in a judicial forum. The Bank did not initiate this litigation. *Cf., Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) (Posner, C. J., for the Court)

("[A]n election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate."). Further, the Bank did not initiate the injunctive proceedings; Merit did. Merit set those matters for emergency hearing, before it was determined what claim Merit might have against the Bank and what evidence Merit should produce to decide its right to any emergency relief. The Bank defended Merit's request for emergency relief and it did so successfully. Merit's request for a permanent injunction was eventually denied.

¶11 Second, the Bank filed its motion to dismiss and motion to compel arbitration before it filed an answer or sought any affirmative relief and before the case was even at issue, much less set for trial. Although the Bank sought to have its motion to dismiss Merit's petition resolved before Bank simultaneously filed motion to compel arbitration, the Bank filed both motions on the same day and at the outset of this litigation. Merit filed a response to both motions and argued that the Bank had waived its right to arbitrate. More importantly, Merit did not insist that the arbitration issue be resolved first, although Merit knew from the beginning that the Bank intended to assert its right to arbitrate.

¶12 In addition, the Bank's motion to dismiss was not a dilatory, unnecessary litigation tactic – the Bank's first and second motions to dismiss were successful in eliminating some plaintiffs and some theories of recovery. As a result, and not

until Merit filed its Second Amended Petition, was the Bank able to determine what the claims were and who would be asserting them. At that point, the Bank was in a position to make an informed decision about whether to join Merit in its election to resolve Merit's claims in a judicial forum or proceed with arbitration of those claims. As the Seventh Circuit observed, "it is easy to imagine situations . . . in which [invoking judicial process] does not signify an intention to proceed in court to the exclusion of arbitration." *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995). This, in my view, is one of those situations.

¶13 In my view, the Bank's participation in the litigation to the point it did cannot be construed as a waiver of the right to arbitrate. Until the actual pleading the Bank had to defend was filed, "[t]he shape of the case might so alter as a result of unexpected developments during discovery or otherwise that it might become obvious that the party should be relieved from its waiver and arbitration allowed to proceed." *Cabinetree*, 50 F.3d at 391. The Bank did not seek "two bites at the apple," as Merit argues. The Bank's motion to dismiss sought to determine whether the Bank was defending against an apple, an orange, or some other fruit. The Bank did not seek a determination of the merits of any valid claims in the petition. It sought only to test the law that governed Merit's frivolous claims, not the facts asserted in support of those claims. *Kirby v. Jean's Plumbing Heat & Air*,

2009 OK 65, ¶ 5, 222 P.3d 21, 24 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957)).

¶14 Third, Merit points to the length of time that lapsed between the filing of its petition and the decision on the Bank's request for arbitration. This is more of a forfeiture argument than a waiver argument. A "forfeiture is the failure to make the timely assertion of a right, [whereas] waiver is the 'intentional relinquishment or abandonment of a known right.'" *U.S. v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777 (1993). Nonetheless, a forfeiture analysis may be appropriate, as suggested by the *Sundance* Court. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 419, 142 S. Ct. 1708, 1714 (2022). Filing a request to arbitrate within 180 days of being sued, and with the Bank's first substantive pleading, is "the timely assertion of [that] right" in my view. *Olano,* 507 U.S. at 733, 113 S. Ct. at 1777.

¶15 Further, the lapse of time was not solely caused by the Bank. It took more than a year to litigate Merit's unsuccessful request for injunctive relief and for Merit to file a petition that satisfied the requirements of 12 O.S.2021 § 2008. In a July 6, 2023 order granting the Bank's motion to dismiss in part, the district court directed Merit to file an amended petition and allowed the Bank twenty days to respond to that petition. At the same time, the court ruled that the Bank's motion to compel arbitration would be "held in abeyance until after the amended pleadings

are allowed," preventing the Bank from moving forward with its request for arbitration at that time.

¶16 Merit filed its second amended petition on July 26, 2023. The Bank filed its second motion to dismiss on August 25, 2023, and in footnote one, noted that it did not intend to waive its right to arbitration. On September 1, 2023, the district court was informed that one of the plaintiffs had filed for bankruptcy and that a stay of this case had been entered. On November 1, 2023, Merit sought and was granted leave to amend its second amended petition. That pleading deleted all the claims of certain plaintiffs. On December 12, 2023, the Bank filed a supplement to its motion to compel arbitration to address issues raised by Merit's second amended petition. A hearing on the Bank's second motion to dismiss and renewed motion to compel arbitration was held on February 8, 2024. At that hearing, the court held that the viability of Merit's claims must be determined "before moving to the next stage of litigation."

¶17 The court's February 8 order was not filed until May 13, 2024. In that order, the district court dismissed nine of the claims in Merit's second amended petition and gave Merit twenty days to file another amended petition if it chose to do so. It did not. During the February 8 hearing, the district court also ruled that the Bank had not waived its right to arbitrate and set the motion to compel arbitration for evidentiary hearing. On April 26, 2024, Merit filed a motion to reconsider the

finding that the Bank had not waived arbitration. The evidentiary hearing on the Bank's motion to compel arbitration was held on June 11, 2024. The district court granted the Bank's motion to compel arbitration in an order filed on June 25, 2024.

¶18 Consequently, to the extent that the Bank invoked the judicial process, it did so for two reasons: (1) to defend against Merit's request for emergency injunctive relief, and (2) to determine exactly what claims Merit was asserting and who was going to prosecute those claims. Once the latter issue was settled, the district court proceeded to rule on the Bank's motion to compel arbitration. And the court did so before a trial date was set, before discovery related to the substance of Merit's remaining claims was conducted and before the case was ever at issue.

¶19 Further, Merit had agreed that the Bank could do so. Not only did Merit fail to insist on a determination of the Bank's motion to compel arbitration before the Bank's motion to dismiss was resolved, but also Merit signed a contract providing that "[a]ctive participation in any pending litigation . . . shall not in any event be deemed a waiver [of a party's] right to compel arbitration." As the Majority points out, this kind of anti-waiver provision can also be waived. I agree that a general anti-waiver clause is subject to waiver. But this anti-waiver clause was specific to arbitration, and the issue is whether the Bank voluntarily relinquished its right to enforcement of that clause, the analysis required by *Sundance*. And as Merit points out, citing *S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 85

(2d Cir. 1998), a no-waiver clause like this one was "intended to permit parties to seek provisional remedies or other judicial proceedings that would not function to displace arbitration on the underlying dispute." That said, a party can certainly defend against the opposing party's effort to seek provisional remedies without waiving its right to arbitration. And invoking "other judicial proceedings" to determine who is suing you and what they are suing you for, before deciding to arbitrate or litigate, does not automatically constitute a waiver of the right to arbitrate. It certainly does not in this case.

¶20 Finally, *Sundance* teaches that "a court must hold a party to its arbitration contract . . . ." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418, 142 S. Ct. 1708, 1713 (2022). That includes Merit. Although the court "seldom considers" the actions of the party opposing arbitration, those actions are relevant when that analysis is necessary to treat the waiver of a contractual right to arbitrate as any other. *Id.* at 417, 142 S. Ct. at 1713. In my view, Merit is estopped from asserting that the Bank litigated too long before asserting its right to arbitration.

> Equitable estoppel is the result of the voluntary conduct of a party whereby he is absolutely precluded from asserting rights which might have otherwise existed as against a person who, in good faith, relied on such conduct and has been thereby led to change his position to his detriment, and who has acquired some corresponding right. It holds a person to a representation made, or a position assumed, where otherwise inequitable consequences would result to another, who

having a right to do so under the circumstances has in good faith, relied thereon.

Apex Siding & Roofing Co. v. First Fed. Sav. & Loan Assoc. of Shawnee, 1956 OK 195, ¶ 6, 301 P.2d 352, 355 (cited with approval in *Sullivan v. Buckhorn Ranch P'ship*, 2005 OK 41, n.32, 119 P.3d 192, n.32).

¶21 Here, the Bank proceeded to have its motion to dismiss resolved first, relying on the fact that this "participation" in the litigation would "not in any event be deemed a waiver [of a parties'] right to compel arbitration." Merit did not ask the district court to decide the arbitration issue first; it merely asserted that doing so constituted a waiver of the right to arbitrate. If Merit did not intend to honor its contractual anti-waiver agreement, it was required to have so informed the Bank at a time when the Bank could have chosen not to "participate" in litigation. *Sutton v. David Stanley Chevrolet, Inc.*, 2020 OK 87, ¶ 6, 475 P.3d 847, 851 (quoting *Croslin v. Enerlex, Inc.*, 2013 OK 34, ¶ 17, 308 P.3d 1041, 1047 ("[W]here the peculiar circumstances give rise to a duty on the part of one of the parties to a contract to disclose material facts and the party remains silent to his or her benefit and to the other party's detriment, the failure to speak constitutes fraud."). *See also* 15 O.S.2021 § 59 ("[c]onstructive fraud consists: (1) [i]n any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault . . . by misleading another to his prejudice . . . ."). Further, the implied

covenant of good faith and fair dealing in this contract required Merit "to abstain from taking unfair advantage of another." *Embry v. Innovative Aftermarket Sys., L.P.*, 2010 OK 82, ¶ 14, 247 P.3d 1158, 1161 (citing 25 O.S.[2021] § 9). Because Merit did not disclose its intent to ignore the anti-waiver provision of this contract when the Bank could have proceeded to have the arbitration issue resolved first, Merit cannot now argue that the Bank's "participation" in the litigation waived its right to arbitrate this dispute.

¶22 I would affirm the order granting the Bank's motion to compel arbitration and, therefore, respectfully dissent.

December 22, 2025