No. 17-10883

# In the United States Court of Appeals for the Fifth Circuit

VICKIE FORBY, individually and on behalf of all others similarly situated in Illinois,
*Plaintiff-Appellant*,

v.

ONE TECHNOLOGIES, L.P.; ONE TECHNOLOGIES MANAGEMENT, L.L.C.; ONE TECHNOLOGIES CAPITAL, L.L.P.,
*Defendants-Appellees*.

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division

## REPLY BRIEF FOR PLAINTIFF-APPELLANT


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Pages(s)**

### CASES

## OTHER AUTHORITIES

## INTRODUCTION

One Technologies concedes that it was aware of the arbitration clause it seeks to enforce from the beginning of this litigation, nearly two years before it filed a motion to compel arbitration.[1] It concedes that it did nothing that demonstrated an intent to arbitrate at any point between March 2016 and April 2017 and, in the interim, filed a substantive motion to dismiss, complete with exhibits beyond the complaint. And it concedes that it turned to its back-up strategy and moved to arbitrate only *after* its attempt to secure dismissal of Plaintiff-Appellant Vickie Forby's claims on the merits largely failed. Thus this appeal is not about setting "a trap for unwary defendants." Appellees' Br. at 2. This appeal is about a strategic defendant holding the right to arbitrate in its back pocket, forcing a plaintiff to litigate in court for years, and then "taking a mulligan" when its litigation strategy fails. *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 774 (10th Cir. 2010).

The district court—which had an intimate view of One Technologies' use of the judicial process—correctly concluded that One Technologies

[1] This brief refers to all three defendants-appellees collectively as "One Technologies."

substantially invoked that process. One Technologies asked the district court for a merits decision, which is sufficient to show invocation of the judicial process under this Court's precedent. One Technologies' request that this Court adopt one of two novel bright-line rules about "defensive" motions or require discovery or litigation of affirmative defenses as prerequisites to a finding that a defendant invoked the judicial process should be rejected. Such rules contradict this Court's precedents and find no support in the law of other circuits. Moreover, they would create perverse incentives for defendants to label motions artfully, and encourage all defendants to use courts as testing grounds by filing motions to dismiss for failure to state a claim, waiting for them to be decided, and only then invoking an arbitration clause. Waiver doctrine is designed to prevent just this.

As to the issue of prejudice, One Technologies seeks to recharacterize the district court's adoption of an incorrect legal standard as a factual determination, while also imposing evidentiary burdens unsupported by this Court's case law. Under the correct standard, the delay, time and expense, and substantive prejudice identified by Ms. Forby are sufficient

when considered together, and in conjunction with One Technologies' litigation tactics, to establish waiver.

## ARGUMENT

### I. Standard of Review

One Technologies spills much ink on the applicable standard of review. Appellees' Br. at 10-13. But the standard of review is straightforward: "The Fifth Circuit treats waiver as a question of law, which we review *de novo,* although we review the factual conclusions underlying that finding for clear error." *Dwyer v. Fid. Nat. Prop. & Cas. Ins. Co.*, 565 F.3d 284, 287 (5th Cir. 2009).

### II. One Technologies substantially invoked the judicial process.

The ultimate question as to substantial invocation is whether a party "engage[d] in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration." *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999). This Court has repeatedly stated that "[a] party waives arbitration by seeking a decision on the merits before attempting to arbitrate." *Petroleum Pipe Ams. Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir. 2009); *see also In re Mirant*, 613

F.3d 584, 589 (5th Cir. 2010) (quoting *Petroleum Pipe*). One Technologies does not contest that it sought a merits decision; rather, it urges this Court to ignore its holdings, in favor of one of two bright-line standards it has created out of whole cloth. This Court's precedents, however, compel affirmance of the district court's conclusion that the substance of One Technologies' motion to dismiss, its timing, and other litigation conduct over a thirteen-month period evinced a desire to litigate this case in court.

### A. A party substantially invokes the judicial process by seeking a decision on the merits.

One Technologies writes off this Court's "decision-on-the-merits" standard, set out in *Petroleum Pipe* and reaffirmed in *Mirant*, as "loose language" and "overbroad," argues with its logic, calls it "unworkable," and suggests the Court should disregard it. Appellees' Br. at 23, 26-27. But the standard is binding, well-reasoned, supported by earlier Circuit precedent, consistent with decisions of other circuits, justified by the policies that underlie waiver doctrine, and consistently applied by courts in this circuit without difficulty.

That a party cannot litigate a case in court on the merits and then later seek to compel arbitration after an unfavorable decision is not radical.

Rather, *Petroleum Pipe* relied on a 1986 opinion of this Court that stated, "[a]ny attempt to go to the merits and to retain still the right to arbitration is clearly impermissible." *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 498 (5th Cir. 1986), *quoted in Petroleum Pipe*, 575 F.3d at 480-81; *see also Subway Equip.*, 169 F.3d at 328 (a party "invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate").

*Petroleum Pipe*'s decision-on-the-merits standard accords with decisions of other circuits. Indeed, *Petroleum Pipe* cited two such cases. *See* 575 F.3d at 483 (citing *Khan v. Parsons Global Servs.*, 521 F.3d 421, 427 (D.C. Cir. 2008), and *Kramer v. Hammond*, 943 F.3d 176, 179 (2d Cir. 1991)). More recently, the Eighth Circuit, in a case citing *Petroleum Pipe* and in turn favorably quoted in *Mirant*, held that a motion to dismiss that seeks "a final decision from the district court upon the merits of the parties' dispute," establishes waiver, even if there has been no discovery. *Hooper v. Advance Am., Cash Advance Centers of Mo., Inc.*, 589 F.3d 917, 921-22 (8th Cir. 2009), *cited in Mirant*, 613 F.3d at 589, 590; s*ee also Degidio v. Crazy Horse Saloon & Rest. Inc*, 880 F.3d 135, 141 (4th Cir. 2018) (waiver satisfied by "litigation activity aimed at obtaining a favorable ruling on the merits of the case");

*Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 132 (2d Cir. 1997) (waiver where party "litigated 'substantial issues going to the merits'").

Prohibiting litigants from seeking merits rulings and only afterwards seeking to compel arbitration is completely sensible. This approach allows litigants to raise procedural and jurisdictional issues within the province of the courts, without, as *Mirant* explained, "encourag[ing] litigants to delay moving to compel arbitration until they could ascertain 'how the case was going in federal district court.'" 613 F.3d at 590 (quoting *Hooper*, 589 F.3d at 922). And it reinforces this Court's maxim that "arbitration is not an annex to litigation, but an alternative method for dispute resolution." *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 619 F.3d 458, 461 (5th Cir. 2010).

One Technologies' argument that the standard is "unworkable" as applied to motions to dismiss is belied by *Mirant*'s identification of multiple factors to guide courts in determining whether a motion to dismiss seeks a decision on the merits (*i.e.*, whether it is "perfunctory" or substantive).[2] As One Technologies notes, *Mirant* held that a motion to

[2] One Technologies points to cases predating *Mirant* for the proposition that "perfunctory" refers to motions to dismiss filed before

dismiss based on affirmative defenses fell into the latter category—but it by no means suggested that this motion was the *only* one that would do so. The court explicitly discussed two other factors relevant to the inquiry—whether the motion included a request for dismissal with prejudice, 613 F.3d at 589, and whether it was filed in the alternative to or concurrently with a motion to compel, *id.* at 589-90.[3] In other cases, this Court has identified several other factors that bear on this inquiry, including whether the motion entailed litigation of "a very significant legal question," *Nicholas v. KBR, Inc.*, 565 F.3d 904, 909 n.4 (5th Cir. 2009), and whether it was directed at arbitrable claims, *Subway Equip.*, 169 F.3d at 329. *See also Pacheco v. PCM Constr. Servs., LLC*, 602 F. App'x 945 (5th Cir. 2015) (motions to dismiss that were "confined to a single issue," "were very brief in length," and were filed after motion to compel arbitration did not substantially invoke judicial remedies).

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answering. Appellees' Br. at 24. But *Mirant* did not use the term "perfunctory" in that way. Because the decisions do not actually conflict, there is no basis for disregarding *Mirant*.

[3] Arguing that it was wrong for the district court to consider the first factor, Appellees' Br. at 25-26, One Technologies ignores that this Court has explicitly stated otherwise.

One Technologies argues that all motions to dismiss seek to litigate the merits. On the contrary, "merits" in this context distinguishes substantive challenges from those focused on such matters as jurisdiction and venue. *See, e.g., Hooper*, 589 F.3d 917 (8th Cir. 2009); *Dumont v. Saskatchewan Gov't Ins. (SGI)*, 258 F.3d 880, 886–87 (8th Cir. 2001). That it may be difficult, in some borderline cases, to determine whether a motion raises a "merits" issue reflects only that the standard is *not* a "bright-line" one. Even so, the merits/non-merits distinction is familiar in arbitration cases: Courts frequently distinguish between "gateway" issues—which may be considered by courts—and "merits" issues reserved for arbitrators. *See, e.g.*, *Hous. Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 407 (5th Cir. 2014); *Tittle v. Enron Corp.*, 463 F.3d 410, 425 n.12 (5th Cir. 2006).

Many decisions in this Circuit illustrate the ability of district courts to distinguish between merits and non-merits motions. *See, e.g.*, *Tellez v. Madrigal*, No. EP-15-CV-304, 2017 WL 5507696, at *7 n.4 (W.D. Tex. Nov. 9, 2017) ("Whereas a dismissal for failure to state a claim with prejudice amounts to a decision on the merits, a dismissal based on lack of personal jurisdiction does not."); *Leal v. Sinclair Broad. Grp., Inc.*, No. A-16-CV-679,

2017 WL 1458810, at *3 (W.D. Tex. Apr. 25, 2017) (motion to dismiss with prejudice for failure to state a claim sought a merits decision); *Elite Precision Fabricators, Inc. v. Gen. Dynamics Land Sys., Inc.*, No. CV H-14-2086, 2015 WL 9302843, at *13 (S.D. Tex. Dec. 18, 2015) (motion to consolidate does not seek merits decision); *Hanchett v. Port of Hous. Auth.*, No. 4:11-CV-1695, 2013 WL 5530671, at *2 (S.D. Tex. Sept. 30, 2013) ("A determination of whether Hanchett can maintain a Title VII sexual harassment claim against Local 28 necessarily comprehends the merits of this case."); *Electrostim Med. Servs., Inc. v. Health Care Serv. Corp.*, No. CIV.A. H-11-2745, 2012 WL 5373462, at *6 (S.D. Tex. Oct. 30, 2012) (motion to dismiss on grounds of preemption, immunity, and failure to exhaust sought merits decision); *see also Badgerow v. REJ Props., Inc.*, No. CV 17-9492, 2018 WL 354297, at *3 n.6 (E.D. La. Jan. 10, 2018) (where motion to dismiss and motion to compel filed concurrently, "this Court will not act on Ameriprise's merits-based arguments and instead leaves all of them for the arbitration").

**B. One Technologies' proposed bright-line standards lack support.**

Instead of contesting that it requested a ruling on the merits, One Technologies proposes two new standards. Even while acknowledging that this Court's precedent on substantial invocation "eschews 'bright line

rules' in favor of a flexible, case-specific approach," Appellees' Br. at 15 (quoting *Subway Equip.*, 169 F.3d at 329), One Technologies advances two such bright-line rules: (1) a "defensive" motion does not invoke the judicial process; and (2) there is no waiver unless a defendant "substantially participated in discovery or affirmatively sought to enforce its own claims or affirmative defenses." *Id.* at 19-20. Neither standard is supported by precedent or sound policy.

**1. Substantial invocation does not have a "defensive" motion exception.**

Neither this Court nor any other has held that a merits-based motion does not invoke the judicial process if it is "defensive"—a word not defined by One Technologies but apparently referring to motions directed at a plaintiff's claims. A defendant who files such a motion invokes the judicial process because it affirmatively asks the court to rule on the merits. Indeed, *whenever* a defendant files a motion in court, it can say it is merely "defend[ing] itself against a plaintiff's court claims." Appellees' Br. at 16. Thus, One Technologies' proposed rule would make the waiver doctrine a nullity.

One Technologies' assertion that this Court has "repeatedly held that the defendant has not substantially invoked the judicial process if it has 'merely defended itself against [a plaintiff's] court claims,'" *id*., relies on *Gulf Guaranty Life Insurance Co. v. Connecticut General Life Insurance Co.*, 304 F.3d 46 (5th Cir. 2002). That *Gulf Guaranty* establishes no such rule is revealed by the full sentence that One Technologies selectively quotes: "Connecticut General did not *initiate any litigation action* in this case; it merely defended itself against Gulf Guaranty's court claims." 304 F.3d at 485 (emphasis added). The defendant had not filed any motion at all. Thus, the court's point was that there was no affirmative action by the defendant, explaining that "participation in the dispute over the composition of the arbitration panel" was not "the type of overt act that would indicate Connecticut General's desire to resolve the underlying reinsurance dispute via litigation rather than arbitration." *Id*. *Gulf Guaranty* did not address a defendant that filed a dispositive motion, "defensive" or otherwise.

Neither of the other two cases cited by One Technologies speak to analogous situations. In *Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co.*, 767 F.2d 1140 (5th Cir. 1985), the defendant had similarly taken no overt action; the "conduct" at issue was a delay before filing an answer

invoking arbitration. And in *Precision Builders, Inc., v. Olympic Grp., L.L.C.*, 642 F. App'x 395 (5th Cir. 2016), where this Court *did* find waiver, the full sentence partially quoted by One Technologies did not apply any bright-line rule: "While failing to assert the right to demand arbitration in an answer or counterclaim does not necessarily waive the right, standing alone, Defendants' actions here went far beyond simply defending themselves against Precision's lawsuit." *Id*. at 400 (internal citations omitted). One Technologies attempt to re-write this sentence to create a "defensive" motions carve-out must fail.

One Technologies does not explain what a "non-defensive" motion to dismiss might be. Nor could it. A motion to dismiss that invokes an affirmative defense, such as the motion in *Mirant*, is no less "defensive" than any other motion asserting that a plaintiff failed to state a claim. The key distinction between an affirmative defense and other defenses is that the affirmative defense *must* be raised in a responsive pleading. *See* Fed. R. Civ. P. 8(c). If anything, raising an affirmative defense before filing a motion to compel arbitration in order to avoid waiver is a *less* substantial invocation of the judicial process than other forms of "defensive" motions.

### 2. A discovery or affirmative defense/counterclaim requirement is unsupported by precedent or logic.

One Technologies' assertion that waiver requires either discovery or the assertion of an affirmative defense or counterclaim, Appellees' Br. at 19-20, reflects its attempt to reverse-engineer a legal standard based on facts cherry-picked from cases without regard to the legal standards those cases apply. Such a standard would radically alter this Court's precedent—which has never indicated that discovery, affirmative defenses, or counterclaims are *more* probative than the other factors identified in *Mirant* and the other cases discussed above and in Ms. Forby's opening brief. Appellant's Br. 23-25.

Adopting such a bright-line rule would create a direct conflict with the Eighth Circuit's decision in *Hooper*, which involved facts remarkably similar to this case. *Hooper* found waiver based on a motion to dismiss under Rule 12(b)(1) and 12(b)(6) that, among other things, asked the court to examine whether the defendant's practices violated Missouri's consumer protection laws. 589 F.3d at 919-20. No affirmative defense or counter-claim was at issue. The lower court granted the motion in part and denied it in part, and the defendant moved to compel arbitration two weeks later. *Id.*

The Eighth Circuit held that the "extensive and exhaustive" motion to dismiss showed invocation and rejected arguments that the lack of discovery or the fact that plaintiffs had commenced the litigation precluded finding waiver. *Id.* at 921.

Notably, the delay in *Hooper* was substantially shorter than that here—with only three months between filing of the motion to dismiss and the motion to compel. In addition, the motion to dismiss "reserve[d] the right" to arbitrate—something One Technologies did *not* do.

Appellees argue that *Hooper* lacks "persuasive value," Appellees' Br. at 29 n.8, but this Court has already held otherwise, citing *Hooper* repeatedly in *Mirant*. *See* 613 F.3d at 589, 590; *see also Ruiz v. Donahue*, 784 F.3d 247, 249 n.11 (5th Cir. 2015) (citing *Hooper*). The wedge One Technologies tries to drive between the standards applied by this Court and the Eighth Circuit does not exist. The two Circuits have repeatedly endorsed each other's reasoning. *See Hooper*, 589 F.3d at 921 (citing *Petroleum Pipe*); *Mirant*, 613 F.3d at 589-90 (citing *Hooper*); *see also Ritzel Commc'ns, Inc. v. Mid-Am. Cellular Tel. Co.*, 989 F.2d 966, 969 (8th Cir. 1993) (citing *E.C. Ernst, Inc. v. Manhattan Constr. Co.*, 559 F.2d 268, 269 (5th Cir. 1977)).

One Technologies' contrary argument that the Eighth Circuit, unlike this Court, "requires" defendants to invoke arbitration at the earliest possible moment, relies on a quotation in a parenthetical in a string cite in *Hooper*. That quotation reflects only the general principle that parties ideally should invoke arbitration clauses as soon as they can—a principle supported by longstanding Fifth Circuit case law. *See, e.g.*, *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991). Moreover, *Hooper* invoked that principle in support of its statement that it was significant that the defendant "did not, for example, file a motion to dismiss Count I for lack of jurisdiction and simultaneously move to compel arbitration on Counts II through VII pending the district court's ruling." 589 F.3d at 922. This same distinction between cases where a party files simultaneous motions to dismiss and motions to compel arbitration, and those where it moves to compel only after a decision on a motion to dismiss appears in Fifth Circuit case law as well. *See, e.g.*, *Keytrade USA, Inc. v. Ain Temouchent M/V*, 404 F.3d 891, 898 (5th Cir. 2005).

### C. One Technologies' conduct was inconsistent with an intent to arbitrate.

One Technologies repeatedly asserts that Ms. Forby relies "exclusively" on the "single act" of its motion to dismiss. Appellees' Br. at 9. Although its assertion is inaccurate, the motion to dismiss alone would be enough to show invocation of the judicial process under this Court's precedents. Ms. Forby, however, like the district court, relies on One Technologies' broader course of conduct over thirteen months, including multiple overt acts, combined with inaction and delay, all evincing intent to litigate in court.

#### 1. One Technologies' motion to dismiss was sufficient to trigger waiver.

One Technologies' motion to dismiss, which asked the district court to look at pictures of a website and conclude that the disclosures it included comply with the Illinois Consumer Fraud Act, sought a decision "on the merits." It was "substantive" rather than "perfunctory." Under either phrasing of the standard, the issue is not a close call. The factors this

Court has considered relevant strongly support the conclusion that One Technologies' motion to dismiss was sufficient to trigger waiver.[4]

In particular, One Technologies' motion was filed before a motion to compel arbitration, rather than concurrently, after, or in the alternative. *See Keytrade USA*, 404 F.3d at 898; *Pacheco*, 602 Fed. App'x at 948; *Gen. Guar. Ins. Co. v. New Orleans Gen. Agency, Inc.*, 427 F.2d 924, 928 (5th Cir. 1970). It was directed at arbitrable claims. *See Subway Equip.*, 169 F.3d at 329. The motion sought dismissal with prejudice. *See Mirant*, 613 F.3d at 589. It was lengthy. *See Pacheco*, 602 F. App'x at 947. And it sought resolution of "significant" legal issues. *See Nicholas v. KBR, Inc.*, 565 F.3d 904, 909 n.4 (5th Cir. 2009). And One Technologies waited until after the court revealed its view on the

[4] One Technologies wrongly suggests that Ms. Forby, by not raising an objection in this appeal to the district court's decision on a different motion, has "conceded" the propriety of the submission of and consideration of these exhibits. Appellees' Br. at 25. The relevant point for this appeal is not whether it was proper to include such exhibits in a Rule 12 motion. Rather, because "motions to dismiss are not homogenous," *Mirant*, 613 F.3d at 589, the inclusion of pages of exhibits beyond the pleadings distinguishes One Technologies' motion from others it cites, a distinction that has been noted by other courts of appeals in the waiver context. *See, e.g.*, *In re Pharmacy Ben. Managers Antitrust Litig.*, 700 F.3d 109, 118 (3d Cir. 2012); *Winston & Strawn, LLP v. Doley*, 384 F. App'x 1, 2 (D.C. Cir. 2010).

merits issue (via a ruling) before filing its motion to compel. *See Pacheco*, 602 F. App'x at 949; *Petroleum Pipe*, 575 F.3d at 481.

That One Technologies' motion to dismiss bore so many of the hallmarks of waiver set out in this Court's precedents highlights the absurdity of One Technologies' "fair notice" argument. Appellees' Br. at 15-16. Indeed, the fair notice doctrine—which concerns punishments and penalties for unlawful conduct—does not apply here. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (concerning punitive damages); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (deeming noise ordinance void for vagueness). Litigation of this action in federal district court instead of an arbitral venue is not a "penalty" or "punishment" for misconduct. *See Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017) ("A 'penalty' is a 'punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws.'" (quoting *Huntington v. Attrill*, 146 U.S. 657, 667 (1892))).

Equally misguided is One Technologies' argument that its motion to dismiss did not "invoke" the judicial process because "common sense" indicates that a "motion that sought to *halt* the judicial process" does not "invoke[] the judicial process." Appellees' Br. at 22. That argument would

immunize any dispositive motion filed by a defendant from the waiver doctrine. Of course, *any* dispositive motion—or even a jury trial—may ultimately "halt" the judicial process. But by taking an affirmative "overt act" and asking the district court to give it total victory on the merits, One Technologies substantially invoked the judicial process.

**2. One Technologies' other actions and inactions were inconsistent with an intent to arbitrate.**

Beyond the features and timing of One Technologies' motion to dismiss, other aspects of the record show a pattern of conduct inconsistent with an intent to arbitrate from the time this case was transferred to Texas and first reference to arbitration thirteen months later. One Technologies' attempts to shift the blame onto "Seventh Circuit law," Ms. Forby, and the district court are baseless.

One Technologies wrongly asserts that the "only" reason this case did not proceed promptly to arbitration is "a quirk in Seventh Circuit law." Appellees' Br. at 32. Nothing, however, precluded One Technologies from moving to compel arbitration promptly after this action was transferred to Texas in March 2016. Instead, One Technologies sought an extension of time to respond to the complaint so that it could "investigate Plaintiff's

claims," ROA.247—conduct this Court and others have cited as supporting waiver. *See Unity Commc'ns Corp. v. Cingular Wireless*, 256 F. App'x 679, 681 (5th Cir. 2007); *see also Lewallen v. Green Tree Servicing, L.L.C.*, 4877 F.3d 1085, 1093 (8th Cir. 2007). One Technologies now seeks to write off its representation to the court that it needed an extension as "routine" and "ministerial," Appellees' Br. at 25, but if it had intended to move for arbitration rather than litigate the merits in court, it would have had no need to "investigate."

One Technologies' attempt to blame the district court for the delay likewise fails. The court did nothing to block or even deter One Technologies from moving to compel arbitration while its motion to dismiss was pending (or concurrently with its motion to dismiss). The *only* reason not to do so was its hope of using the court to resolve the dispute in its favor.

One Technologies contends that the reference to arbitration in its 2015 motions in Illinois put Ms. Forby on notice of an intent to arbitrate and immunized One Technologies from waiver, no matter how long it waited to seek arbitration. Appellees' Br. at 29. As this Court has held, however, "[a] party cannot keep its right to demand arbitration in reserve

indefinitely while it pursues a decision on the merits before the district court." *Mirant*, 613 F.3d at 591; *see also Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016) ("A statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver."). One Technologies' conduct over a thirteen-month period indicated that it no longer sought to arbitrate, and instead had chosen to use the federal courts to resolve the dispute.

## III. Ms. Forby demonstrated prejudice.

The waiver inquiry considers three kinds of prejudice: "delay, expense, [and] damage to a party's legal position." *Subway Equip.*, 169 F.3d at 327; *see also Nicholas*, 565 F.3d at 910. In determining the sufficiency of a showing of prejudice, this Court has repeatedly recognized that the prejudice and substantial invocation inquiries overlap, *Petroleum Pipe*, 575 F.3d at 480 n. 2 (quoting *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1158 (5th Cir. 1986)), and has applied a sliding-scale approach. Where, as here, a party does not demand arbitration until after it "engages in pretrial activity inconsistent with an intent to arbitrate," the opposing party "may more easily show that its position has been compromised, i.e., prejudiced."

*Nicholas*, 565 F.3d at 910 (quoting *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 347 (5th Cir. 2004)). *See also Frye v. Paine, Webber, Jackson & Curtis, Inc.*, 877 F.2d 396, 399 (5th Cir. 1989). Here, One Technologies' deliberate decision to delay moving to arbitrate until the district court ruled on the merits of Ms. Forby's claims prejudiced her in each of these three ways.

**A. One Technologies caused the lengthy, prejudicial delay.**

The district court correctly concluded that One Technologies' delay prejudiced Ms. Forby. One Technologies does not dispute that the delay was lengthy or that such a delay is properly considered in the prejudice analysis. Rather, it blames Ms. Forby and the district court for the delay. *See* Appellees' Br. at 35-36. One Technologies, however, was solely responsible for the timing of its motion to compel. And the district court's factual determination that One Technologies, not Ms. Forby, caused the delay, ROA.550, was not clear error. One Technologies' suggestion that Ms. Forby had an obligation to file motions or seek discovery while the dispositive motion was pending is not only baseless, but also inconsistent with its own assertion that Ms. Forby's discovery requests, served concurrently with the

parties' Rule 26(f) conference and promptly *after* the resolution of that motion, were premature. Appellees' Br. at 7.

**B. Ms. Forby suffered "time and expense" prejudice.**

Contrary to One Technologies' assertion, the district court did *not* conclude that Ms. Forby suffered no time and expense prejudice. Rather, it stated that "the court cannot determine whether Forby incurred significant legal expenses" because her identification of specific tasks unnecessarily undertaken was insufficient as a matter of law. ROA.551. This Court reviews that legal conclusion *de novo*. Because this Court's precedents do not require a detailed recording of hours or dollars to establish prejudice, and because ample record evidence showed that One Technologies' conduct caused unnecessary expense, the district court's conclusion was reversible error.

**1. A new evidentiary standard is not warranted.**

This Court has never suggested that the only way to show time and expense prejudice is to introduce affidavits, bills, or other similar evidence as to the precise hours and dollars spent as a result of a delaying party's

litigation tactics. [5] *See Tellez v. Madrigal*, --- F. Supp. 3d ---, No. EP-15-CV-304-KC, 2017 WL 5507696, at *9 (W.D. Tex. Nov. 9, 2017) (summarizing Fifth Circuit case law and "reject[ing] Defendant's assertion that Plaintiff cannot demonstrate prejudice because she did not quantify her costs"). Rather, this Court has *repeatedly* concluded that evidence of prejudice can be found "on the face of the record," looking at the quantity and character of litigation activities that obviously require the expenditure of time and money. *Janvey v. Alguire*, 847 F.3d 231, 244 (5th Cir. 2017); s*ee also Nicholas*, 565 F.3d at 910 (finding prejudice despite lack of "evidence in terms of dollars and cents"); *Price*, 791 F.2d at 1159 (basing prejudice finding on review of docket activity); *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945, 950 (1st Cir. 2014) (prejudice may be appraised by "assaying … the litigation activities engaged in during [the period of delay]" and inferring "the necessary expenditures over that period").

[5] The only decision to mention such evidence is an unpublished, two-paragraph *per curiam* opinion from nearly twenty-five years ago that "ha[s] no precedential value." *Barrientos v. El Paso Auto Truck Stop, Inc.*, 35 F.3d 561, 1994 WL 500070, at *1, n.* (5th Cir. 1994). That opinion's cursory reference to the absence of "affidavits or other evidence of prejudice" cannot fairly be read to suggest an evidentiary requirement.

One Technologies attempts to distinguish these decisions on the ground that they involved more litigation activity and thus more prejudice. That distinction conflates two distinct questions: (1) what kind of evidence is needed to determine time and expense prejudice; and (2) how *much* time and expense is needed to establish prejudice. The district court never reached the second question because it concluded, contrary to *Janvey* and *Nicholas*, that record evidence quantifying hours and dollars spent is required. That ruling reflected legal error, not a "permissible view of the evidence." Appellees' Br. at 41.

**2. The record sufficiently shows time and expense prejudice.**

Although Ms. Forby did not submit timesheets in connection with her opposition to One Technologies' motion to compel, the record contains ample evidence demonstrating Ms. Forby was required to undertake the time and expense of several litigation activities that would not have been required had One Technologies acted in a timely manner—including drafting multiple briefs, developing a discovery plan, and preparing for and attending a court-ordered Rule 26(f) conference. *See* ROA.445-48. "The

time and expense" of such activities "is obvious." *Tellez*, 2017 WL 5507696, at *10.[6]

One Technologies' assumption that Ms. Forby "would have" incurred the same expenses in arbitration is unsupported. The discovery plan and requests were drafted consistent with the Federal Rules of Civil Procedure and the Local Rules of the Northern District of Texas. That an arbitrator might direct *some* discovery by no means indicates that this work would be useful or would not have to be redone.[7] *Cf. Joca-Roca*, 772 F.3d at 951 (noting that no evidence is necessary to conclude that discovery in arbitration is limited).

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[6] One Technologies' statement that Ms. Forby's argument below on this point was limited to a single quoted sentence, Appellees' Br. at 37, is inaccurate. Ms. Forby listed each individual litigation activity unnecessarily undertaken. *See* ROA.520. Because the district court did not address these activities, it made no findings as to whether they created unnecessary expense to which this Court can defer.

[7] One Technologies accuses Ms. Forby of "try[ing] to manufacture an appearance of prejudice" because she did not serve discovery requests until "two days after" One Technologies announced it would seek arbitration. Appellees' Br. at 42. The requests were served on the day of the Rule 26(f) conference, two weeks after the district court resolved the dispositive motion and ten days after it ordered the conference. The conjecture that all Ms. Forby's discovery planning and drafting occurred in the 48 hours between One Technologies' announced course-change and the Rule 26(f) conference is baseless.

Likewise, the arbitration rule One Technologies cites hardly establishes that the time and expense spent responding to One Technologies' Rule 12(b)(6) motion would have been incurred regardless of One Technologies' two-bite strategy. Appellees' Br. at 39. The full rule states:

> The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.

Am. Arb. Assoc. Consumer Arb. R. R-33. The rule offers no guarantee that an arbitrator would have permitted One Technologies to file a dispositive motion. Moreover, the rule limits each party to a *single* dispositive motion, but Ms. Forby could end up having to defend against two because One Technologies chose to litigate first, before moving to compel arbitration.[8]

**3. One Technologies' conjecture about Ms. Forby's fee arrangement is irrelevant.**

No court has ever held that a party must disclose its fee arrangement with counsel to demonstrate time and expense prejudice, or indicated that whether prejudice is acceptable depends on what member of the plaintiff's

[8] Although One Technologies has disclaimed an intent to file a second dispositive motion directed at the complaint, it has not waived a right to file a second dispositive motion more generally.

team bears the financial hit. One Technologies' suggestion that those who cannot afford hourly legal services may be subjected to abusive litigation tactics is inconsistent with the prejudice inquiry's focus on "inherent unfairness." *Subway Equip.*, 169 F.3d at 327. Even in those cases where parties *have* submitted timesheets and billing statements, there has never been a suggestion that a court must examine the details of a party's fee arrangement.

**C. Ms. Forby suffered substantive prejudice**

**1. Ms. Forby is prejudiced as to her ICFA claim.**

Citing *Mirant*, one court of appeals has explained that the prejudice to a party of "relitigat[ing] a key legal issue on which the district court has ruled in [its] favor" is "dispositive." *Martin*, 829 F.3d at 1128. Moving to arbitration now threatens such prejudice to Ms. Forby. Although One Technologies maintains it will not file another 12(b)(6) motion—unless Ms. Forby amends her complaint in arbitration, as she may be required to do because different rules apply—it does not deny that it will ask the arbitrator to review the same sorts of evidence that it submitted to the district court in connection with its motion to dismiss (i.e., printouts of its website,

affidavits of its employees) and ask the arbitrator to conclude that the disclaimers on its website were not misleading or otherwise in violation of Illinois law. *See* Appellees' Br. at 45 ("*Of course* One Technologies will ask the arbitrator to rule in its favor on the merits of Forby's ICFA claim" (emphasis in original)). That it may not do so in a document labeled a "motion to dismiss" is not relevant. What matters is not procedural nomenclature, but whether the motion in court raised "the same legal and factual issues as those the party now wants to arbitrate." *Distajo*, 107 F.3d at 133.

One Technologies' claim that there is "no overlap" between its motion to dismiss "and the merits questions that will arise at later stages of the proceedings" is not credible given the nature of the motion. The motion did not address, for example, the lack of particularity in a pleading or a statute of limitations. Rather, it asked the judge to interpret Illinois law and apply it to photographic evidence of the disclosures on One Technologies' website. The arbitrator will, necessarily, be called upon to address exactly the same issues.

As one example, the motion to dismiss asked the court to determine whether the "Offer Details Disclosures" on One Technologies' website

were sufficient to absolve it of liability under the ICFA. ROA.443. Several pages of Ms. Forby's response explained why the disclosures were insufficient. *See* ROA.407-10. The district court explicitly, albeit briefly, agreed with Ms. Forby. One Technologies now has a chance to (1) persuade a different adjudicator that these disclosures were facially adequate; and/or (2) to change its argument.[9] At the same time, Ms. Forby is prejudiced by having to alter her strategy. *See Raju v. Murphy*, 709 F. App'x 318, 319 (5th Cir. 2018) (finding prejudice to party who "had to gear her legal strategy to court proceedings instead of arbitration").

**2. Ms. Forby was prejudiced by dismissal of her unjust enrichment claim.**

It is hard to imagine a clearer example of prejudice than having an arbitrable claim dismissed by a court on the merits, as the court dismissed Ms. Forby's unjust enrichment claim. That Ms. Forby did not appeal that ruling does not preclude her from relying on it to establish prejudice. Her argument does not hinge on an evaluation of the merits of that decision.

[9] Determining whether Ms. Forby has been prejudiced in this respect does not depend on speculation about how the arbitrator will rule, as One Technologies suggests, but on the need to relitigate issues already decided and the risk of a different ruling. This Court has held that such circumstances constitute prejudice. *See, e.g.*, *Mirant*, 613 F.3d at 592.

Rather, she is prejudiced by having One Technologies pick off claims on the merits one by one, switching to different fora for each claim if it does not like the way the case is going.

*Mirant* forecloses One Technologies' argument that Ms. Forby cannot rely on dismissal of a claim to establish prejudice. There, the district court had dismissed one of the plaintiff's claims while refusing to dismiss others. 613 F.3d at 588. This Court rejected the argument that the plaintiff suffered no prejudice "because it could not obtain any relief" on the dismissed claim, and found that the plaintiff was substantially prejudiced because it was "placed in a weaker position than it would have been had [defendant] timely moved to compel arbitration." 613 F.3d at 591-92. The loss of this claim is the clearest example of One Technologies' manipulation of the judicial process—seeking to win as much as it could in the federal courts and retain those benefits while resorting to arbitration only for those claims on which it did not prevail in court. "By treating arbitration as a backstop and as a last resort rather than as a substitute for judicial proceedings, [One Technologies] pushed this case further and further from the FAA's mandate of helping parties resolve disputes expeditiously." *Degidio*, 880 F.3d at 142.

## CONCLUSION

For the reasons stated herein and in Appellant's opening brief, the Court should reverse the judgment of the district court and remand the action for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f) and the Rules of this Court, it contains 6,433 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Book Antiqua.

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