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

BRIEF FOR PLAINTIFF-APPELLANT

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October 30, 2017

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. Vickie Forby—plaintiff-appellant
2. All persons in Illinois whom defendants-appellees enrolled in their credit monitoring program from 2008 to April 24, 2015—putative class members
3. One Technologies, LP—defendant-appellee
4. One Technologies Management LLC—defendant-appellee
5. One Technologies Capital LLP—defendant-appellee
6. One Technologies, LLC—successor to defendants-appellees
7. Alex Chang—member, successor to defendant-appellee One Technologies, LLC
8. Roger Chang—member, One Technologies, LLC
9. Mark Henry—member, One Technologies, LLC
10. Jamie Schultz—member, One Technologies, LLC
11. David C. Nelson—counsel for plaintiff-appellant in district court

12. Nelson & Nelson, Attorneys at Law, P.C. —law firm for plaintiff-appellant in district court

13. Benjamin J. Sweet—counsel for plaintiff-appellant in district court

14. Stephanie K. Goldin—counsel for plaintiff-appellant in district court

15. Edwin J. Kilpela—counsel for plaintiff-appellant

16. Kevin Abramowicz—counsel for plaintiff-appellant

17. Carlson Lynch Sweet Kilpela & Carpenter, LLP (formerly Carlson Lynch Sweet & Kilpela, LLP and Carlson Lynch Ltd.)—law firm for plaintiff-appellant

18. Emil Lippe, Jr.—counsel for plaintiff-appellant in district court

19. Law Offices of Lippe & Associates—counsel for plaintiff-appellant in district court

20. Adam R. Pulver—counsel for plaintiff-appellant on appeal

21. Scott L. Nelson—counsel for plaintiff-appellant on appeal

22. Public Citizen Litigation Group—law firm for plaintiff-appellant on appeal

23. Public Citizen Foundation, Inc.—nonprofit organization of which Public Citizen Litigation Group is a part

24. Troy A. Bozarth—prior counsel for defendants-appellees

25. W. Jason Rankin—prior counsel for defendants-appellees

26. Helperbroom LLC—prior law firm for defendants-appellees

27. Roger A. Colaizzi—prior counsel for defendants-appellees

28. Matthew R. Farley—prior counsel for defendants-appellees

29. Venable LLP—prior law firm for defendants-appellees

30. Brian E. Robison—counsel for defendants-appellees

31. Andrew P. LeGrand—counsel for defendants-appellees

32. Gibson, Dunn & Crutcher LLP—law firm for defendants-appellees

33. Jonathan R. Childers—counsel for defendants-appellees

34. Christopher J. Schwegmann—counsel for defendants-appellees

35. Russell H. Falconer—counsel for defendants-appellees

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/s/ Adam R. Pulver
Adam R. Pulver

Attorney of record for plaintiff-appellant Vickie Forby

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant Vickie Forby respectfully requests oral argument. This case presents the important issue of how district courts are to apply this Court's decision in *In re Mirant Corp.*, 613 F.3d 584 (5th Cir. 2010), which held that the filing of a substantive motion to dismiss prior to seeking to enforce an arbitration clause could (and did) justify a finding of waiver. *Mirant* has not been addressed by this Court in any detail in the intervening seven years. Oral argument would assist the Court in understanding how the district court's decision deviated from the legal principles animating *Mirant* and other decisions of this and other circuits concerning waiver. In addition, oral argument may be particularly helpful to the Court given the complex procedural history of this case, which proceeded through three different courts before the order on appeal.

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JURISDICTIONAL STATEMENT

On July 14, 2015, this putative class action arising under Illinois law was removed from the Circuit Court of St. Clair County, Illinois, to the United States District Court for the Southern District of Illinois, pursuant to 28 U.S.C § 1453. The district court had jurisdiction over the action under 28 U.S.C. § 1332(d)(2)(A). The parties are minimally diverse as named plaintiff Ms. Forby is a citizen of the state of Illinois and the defendants are citizens of Texas and Delaware. ROA.24–25. The amount in controversy exceeds $5 million, and the putative class is comprised of more than 100 members. ROA.16, 33, 38.

The Illinois court transferred the action to the United States District Court for the Northern District of Texas on March 25, 2016. On July 10, 2017, Judge Lindsay of the Northern District of Texas entered a memorandum opinion and order granting the defendants' motion to compel and dismiss. The same day, the court issued a final judgment dismissing the action. Plaintiff Vickie Forby filed a timely notice of appeal on August 9, 2017. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the defendants waived their right to compel arbitration by waiting to move to compel arbitration for more than a year after obtaining the transfer of the action for the avowed purpose of compelling arbitration, and, in the intervening time, filing a substantial motion to dismiss directed at the ultimate legal issue in the case, achieving dismissal with prejudice of one of the plaintiff's claims, and causing the plaintiff to incur significant time and expense in opposing the motion to dismiss and preparing discovery.

STATEMENT OF THE CASE AND OF FACTS

This action began in April 2015 and traveled through three courts before reaching this one. At issue is just how far a litigant can go in litigating the merits of a case and still compel an arbitral forum the moment it receives an adverse ruling. Plaintiff-appellant contends that the history of this case—involving an unjustified one-year period in which defendants-appellees did not reference arbitration; a substantive motion to dismiss based on exhibits outside the pleadings, leading to the dismissal of a claim with prejudice; and the prejudice suffered both in terms of time and expense and harm to plaintiff's legal position—shows that defendants-appellees exceeded that bar.

A. Background

Defendants-Appellees One Technologies, L.P., One Technologies Management LLC, and One Technologies Capital LLP (collectively "One Technologies") are related companies that sold products that purportedly monitored consumer credit reports for fraudulent activity, and provided consumers with access to their credit score. ROA.27.[1] One Technologies engaged in a marketing scheme for these products that deliberately portrayed the products as "free." Specifically, One Technologies sold and promoted the products through at least fifty websites with names like "FreeScore360.com" and "FreeScoreOnline.com," purchased keyword advertising on Google and other search engines so that searches for "free credit report" would lead to an ad for one of their products, and sent email solicitations stating "Your Complimentary Credit Scores Are Waiting For You." ROA.28.

When consumers clicked on links and arrived at one of One Technologies' websites, they were directed through a number of pages

[1] Unless otherwise indicated, all factual allegations are taken from Ms. Forby's complaint, and were accepted as true for purposes of the district court's ruling on One Technologies' motion to dismiss. *See* ROA.439-40.

relating to their "free" credit score, culminating in a form that asked consumers to input credit card information "to use for our $1.00 refundable processing fee." ROA.29–30. After doing so, consumers were able to view their "free" credit score. ROA.131.[2]

What many consumers—including Plaintiff-Appellant Vickie Forby—did *not* know was that clicking through the various screens and providing credit card information would enroll them in a "credit monitoring" service at a cost of $29.95/month, charged on a recurring basis. ROA.24, 31. That they were doing so was revealed only in small, de-emphasized text at the top of the landing page, *see* ROA.299, and on the fifth screen a consumer would click through, in minuscule print in the bottom corner of the page, s*ee* ROA.303. Ms. Forby and many others only discovered their "enrollment" in One Technologies' service when their credit cards were charged. ROA.24. Even then, One Technologies regularly refused to cancel "enrollments" even after consumers called to request cancellation: In the case of Ms. Forby, One Technologies charged her three times *after* she called to cancel. ROA.24. All

[2] As discussed further below, One Technologies provided "screen shots" of these pages in connection with various motions throughout the case, including its Rule 12(b)(6) motion to dismiss. *See, e.g.*, ROA.299-303.

told, over 200,000 consumers complained about One Technologies' practices in various fora. ROA.26.

B. Proceedings in Illinois

On April 24, 2015, Ms. Forby filed a lawsuit on behalf of herself and a putative class of Illinois users of One Technologies' "free" credit reporting products, alleging that One Technologies' conduct violated the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1, et seq. ("ICFA"), and constituted unjust enrichment under Illinois law. ROA.23. She alleged that One Technologies' marketing practices were deceptive insofar as they referenced "free" access to credit scores and that, in the online sign-up process, One Technologies failed to disclose, or failed to disclose adequately, that consumers who accessed their "free" credit scores would be enrolled in a recurring monthly service. ROA.23, 26, 35–39.

On July 14, 2015, One Technologies removed the action to the United States District Court for the Southern District of Illinois, invoking the jurisdictional and removal provisions of the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d)(2)(A), 1453. ROA.14, 15–17. In the notice of removal, One Technologies did not reference arbitration, but rather stated

that it "intend[ed] to show that Forby's claims are baseless and that no class should be certified in this matter." ROA.16

One week later, One Technologies filed a "motion to dismiss or transfer." ROA.56. There, for the first time, One Technologies referenced an arbitration clause buried in the "terms and conditions" linked to on its sites. ROA.64. One Technologies argued that (a) Ms. Forby was bound by the arbitration clause, which designated an arbitral venue in Dallas, Texas; (b) the court should either the dismiss the case under the doctrine of *forum non conveniens* or transfer it to the Northern District of Texas because a district court in Illinois cannot compel arbitration outside the district; and (c) if the court were disinclined to dismiss or transfer on those grounds, the court should consider Ms. Forby's claims on the merits and dismiss them with prejudice, pursuant to Rule 12(b)(6). ROA.56–57; 64–82. Ms. Forby opposed the motion, arguing both that the arbitration clause was invalid and unenforceable, and that her complaint adequately stated claims. ROA.173–197.

The Illinois court issued an opinion and order on March 25, 2016, granting One Technologies' request that the action be transferred to the Northern District of Texas so that it could move to compel arbitration.

ROA.211–34. Although the litigation promptly proceeded, One Technologies did not mention arbitration again for more than a year.

C. The Texas Motion to Dismiss

Once the action was transferred to the Northern District of Texas, One Technologies retained new counsel. ROA.212–44. Upon doing so, it filed an unopposed motion to extend its time to answer or otherwise respond to the complaint, on the basis that it needed an additional month "to investigate Plaintiff's claims and prepare an appropriate response." ROA.247. On May 9, 2016, One Technologies submitted that response: a motion to dismiss, purportedly under Rule 12(b)(6), seeking complete dismissal of the action, with prejudice. ROA. 267–389. The motion did not mention arbitration, although it obliquely referenced a "forum selection clause." ROA.276.

In its motion, One Technologies urged the court to resolve the ultimate legal issue in the case: whether the content and context of the online disclosures were sufficient to avoid liability for deceptive, immoral, or unethical conduct—the forms of conduct that give rise to claims under the Illinois Consumer Fraud Act. *See, e.g.*, ROA.272, 277–85. To assist the court in making that determination, One Technologies included a declaration from one of their employees that explained what Ms. Forby would have seen

during the "FreeScore360" sign-up process, and included "screen shots" of each of the pages she would have "clicked through." ROA.294–312. The motion also included exhibits from an unrelated lawsuit against a different defendant, and asked the Court to compare the website at issue in that case with One Technologies' website. *See* ROA. 281–82; 353-89.

Ms. Forby filed a brief in opposition, which, *inter alia*, indicated those parts of One Technologies' website and practices that she believed to be particularly egregious violations of Illinois law, ROA.401–10, distinguished the materials introduced by One Technologies in their motion to dismiss, ROA.410–12, and explained how One Technologies' conduct was unfair under the Illinois Consumer Fraud Act, ROA.412–14. Plaintiff also explained why, in her view, her unjust enrichment claim could proceed under Illinois law. ROA.415. In June 2016, One Technologies filed a reply brief in an attempt to rebut Plaintiff's arguments and to convince the district court that, as demonstrated through its exhibits, "One Technologies adequately disclosed the material terms of its 7-day free trial offer." ROA.431.

One Technologies' motion to dismiss was largely unsuccessful: On March 31, 2017, the district court issued an order denying One Technologies' motion to dismiss Plaintiff's ICFA claim. ROA.437–44. The district court

rejected One Technologies' argument that its disclosures were as conspicuous as those in the examples it provided in connection with its motion, and therefore concluded that One Technologies' website and practices could be shown to violate the ICFA. ROA.443. The district court did, however, grant One Technologies' motion with respect to Plaintiff's unjust enrichment claim and dismissed that claim with prejudice. ROA.441.

D. Post-Motion-to-Dismiss Litigation Activity and the Order on Appeal

On April 3, 2017, the district court entered an order requiring the parties to confer about discovery matters by April 18, 2017, and to submit a joint status report by May 3, 2017. ROA.10; 445–48. Eager to advance her case that had now been pending for twenty-three months, Ms. Forby began to develop a discovery plan and draft her discovery requests in anticipation of the court-ordered conference. ROA.584. Days before the parties' scheduled conference, though, One Technologies informed Ms. Forby's counsel that they intended to move to compel arbitration—more than a full year after they last referenced arbitration. ROA.583. On April 13, 2017, the parties held their court-ordered Rule 26(f) conference, and Ms. Forby served One

Technologies with the requests for the production of documents she had already prepared. ROA.476, 513.

On April 17, 2017, just shy of two years after Ms. Forby commenced her lawsuit, and more than a year after One Technologies had secured transfer of the case to the Northern District of Texas for the ostensible purpose of compelling arbitration, One Technologies filed a motion to compel arbitration. ROA.449. One Technologies did not present any explanation for the delay; it simply asserted in a footnote that the motion was timely, cited some cases regarding waiver, and stated that Ms. Forby could not establish waiver. ROA.465.

On the same date, One Technologies filed an expedited motion to stay all discovery pending the resolution of the delayed motion to compel arbitration. ROA.476–82. The court held a hearing on the stay motion on April 24, 2017. ROA.558–88. At that hearing, the court indicated its surprise at receiving the motion only after it had issued a merits ruling and expressed concern about One Technologies' one-year delay in moving to compel arbitration. ROA.561–62. The parties and the court discussed the possibility of waiver, although the issue had not been briefed yet. ROA.562–83. Ultimately, while explicitly indicating he was not making any ruling on the

merits of the waiver issue, the court granted a brief stay of discovery, indicating that it would rule within two weeks of the completion of briefing so that the case could "move expeditiously given the age of the case." ROA.586–88; *see also* ROA.506 (stay order).

After briefing was complete, the court issued its ruling on One Technologies' motion to compel. ROA.542–52. The district court applied this Court's two-part test for waiver of arbitration, which holds that "a party waives its right to arbitrate if it (1) substantially invokes the judicial process and (2) thereby causes 'detriment or prejudice' to the other party." *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 757 F.3d 416, 421 (5th Cir. 2014), *quoted at* ROA.544. As to the first question, the court found "that Defendants have invoked the jurisdiction of the court 'by seeking a decision on the merits before attempting to arbitrate.'" ROA.547 (quoting *In re Mirant Corp.*, 613 F.3d 584, 589 (5th Cir. 2010)). The district court expressly rejected One Technologies' argument that its motion to dismiss was "perfunctory," ROA.547–48, and noted the extensive, unjustified delay between the transfer of the action and One Technologies' motion to compel, ROA.548. The court therefore concluded that One Technologies had substantially invoked the judicial process.

As to the requirement of detriment or prejudice to the party opposing arbitration, although the district court found Ms. Forby had established that she "suffered some prejudice," it found she had not "suffered prejudice to the extent required by existing precedent and Fifth Circuit authority." ROA.550. The court acknowledged that Ms. Forby had suffered from One Technologies' delay, and it rejected One Technologies' argument that the delay was somehow Ms. Forby's fault. *Id.* It concluded, however, that Ms. Forby failed to present sufficient evidence that One Technologies' tactics had run up legal expenses; that the dismissal of her unjust enrichment claim with prejudice was not prejudicial because "it was barred by law"; and that her legal strategy was not sufficiently exposed to constitute prejudice. ROA.551. Accordingly, the court granted the motion to compel and dismissed the action with prejudice. This appeal followed.

SUMMARY OF ARGUMENT

This Court "do[es] not look kindly upon parties who use federal courts to advance their causes and then seek to finish their suits in the alternate fora that they could have proceeded to immediately." *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991). In this action, One Technologies has done just that: It not only waited to attempt to compel arbitration for two

years from the filing of the action (and thirteen months from the grant of a motion to transfer the action for the purported purpose of arbitration); it also waited until after it attempted to obtain judgment on the merits via a substantive motion to dismiss, complete with evidence outside the pleadings. Although the district court largely rejected One Technologies' framing of the case, it did grant the motion to dismiss in part and dismissed one of plaintiff's claims with prejudice. Only then—faced with imminent discovery—did One Technologies change strategy and ask the Court to "allow[] it to take a mulligan," *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 774 (10th Cir. 2010), by sending the remainder of the case to arbitration.

One Technologies has provided no adequate justification for its tactic of litigating the case in court until receiving a decision that did not wholly satisfy it and then "attempt[ing] … to switch judicial horses in midstream." *Walker*, 938 F.2d at 577. None of the circumstances under which this and other courts have declined to find waiver are present here. One Technologies was plainly aware of the arbitration clause. And One Technologies does not contend that the claim the district court dismissed was not arbitrable; its motion was not, in any event, limited to that claim, but included the one it later sought to arbitrate. And One Technologies' motion to dismiss—which

asked the court to rule on the ultimate question in the case on the merits—was not a "perfunctory," technical motion, nor was it styled as an alternative prayer for relief in a motion to compel. Accordingly, the district court correctly followed this court's precedent in *Mirant* by concluding that One Technologies had "substantially invoked the judicial process," satisfying the first element of waiver. *See, e.g.*, *Nicholas v. KBR, Inc.*, 565 F.3d 904, 907–08 (5th Cir. 2009). To conclude otherwise, as the district court explained, would "encourage[] litigants to delay moving to compel arbitration until they can ascertain how the case is going in federal district court." ROA.548 n.2 (quoting *Mirant*, 613 F.3d at 590).

The district court erred, though, in its consideration of the second waiver factor—whether One Technologies' use of the judicial process had caused detriment or prejudice to Ms. Forby. In so doing, the court improperly discounted the prejudice Ms. Forby identified, taking a narrow view of what evidence is required and the multiple forms prejudice can take, contrary to this Court's case law. Although the court correctly recognized that Ms. Forby suffered some prejudice from the inexcusable delay, it minimized the import of this conclusion, and failed to give full consideration to this Court's repeated holding that "delay and the extent of the moving

party's participation in judicial proceedings are material factors in assessing a plea of prejudice." *Frye v. Paine, Webber, Jackson & Curtis, Inc.*, 877 F.2d 396, 399 (5th Cir. 1989) (citing *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1161 (5th Cir. 1986)); *see also Nicholas*., 565 F.3d at 910; *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 347 (5th Cir. 2004). Moreover, Ms. Forby asserted numerous other forms of prejudice caused by defendants' strategic delay, none of which were properly evaluated by the district court.

First, the record more than adequately showed that plaintiff incurred significant time and expense in responding to the motion to dismiss, developing a discovery plan and discovery requests, and participating in other litigation activities that would be wasted should the action proceed to arbitration now. Such an expenditure of resources constitutes prejudice under this Court's precedent. *See, e.g.*, *Janvey v. Alguire*, 847 F.3d 231, 243, 243 n. 11 (5th Cir. 2017). And contrary to the district court's finding, litigants are not required to provide itemized time sheets at this stage of litigation. *Nicholas*, 565 F.3d at 910.

Second, Ms. Forby identified significant "substantive" prejudice affecting both of her claims. One Technologies seeks to take all of the upside of its partially-successful motion to dismiss, but none of the downside. As to

the ICFA claim, it would be prejudicial to Ms. Forby to allow One Technologies to pitch its strategy to a court, force Ms. Forby to reveal her best arguments, and then shift decisionmakers after it learned the district court was not receptive to its arguments. One Technologies' challenge to the merits of Ms. Forby's ICFA claim would necessarily be litigated again in arbitration, and it is detrimental to Ms. Forby to have to bear the burden of the repetitive litigation resulting from One Technologies' request for a do-over—*after* a court has indicated its views of the merits.

In addition, one of Ms. Forby's claims was dismissed with prejudice. In granting the motion to compel arbitration, the district court essentially concluded there can be no prejudice because its own ruling on that claim was correct. That circular logic runs counter to the very nature of the waiver determination. No court has held that judicial litigation of the merits of a claim cannot constitute waiver if the court has confidence that its ruling on the merits was correct. *Cf. Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1074–75 (9th Cir. 2013) (dismissal of claims did not cause prejudice where dismissal was "without prejudice" and based on standing and thus not on the merits).

Together, the prejudice identified by Ms. Forby was greater or comparable to that which this and other courts of appeals have repeatedly found sufficient to meet the "not onerous" bar of prejudice in this context. *See Hooper v. Advance Am., Cash Advance Ctrs. of Missouri, Inc.*, 589 F.3d 917, 923 (8th Cir. 2009). This Court should reverse the district court and find One Technologies waived its right to arbitrate based on its litigation conduct over a two-year period before moving to compel.

ARGUMENT

I. Standard of Review

Under this Court's longstanding precedent, a party waives its right to arbitration by litigation conduct when it "substantially invokes the judicial process to the detriment or prejudice of the other party." *Walker*, 938 F.2d at 577. "Although the waiver standard involves two prongs of analysis (substantial invocation of the judicial process and prejudice) [this Court's] precedent has recognized some overlap. … 'Substantially invoking the litigation machinery qualifies as the kind of prejudice that is the essence of waiver.'" *Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir. 2009) (quoting *Price*, 791 F.2d at 1158).

"The question of what constitutes a waiver of the right of arbitration depends on the facts of each case." *Tenneco Resins, Inc. v. Davy Int'l, AG*, 770 F.2d 416, 420 (5th Cir. 1985), *cited in Petroleum Pipe*, 575 F.3d at 480. In reviewing a district court's determination of whether a party waived its right to enforce an arbitration agreement via its litigation conduct, this Court reviews any factual findings by the district court for clear error. *See, e.g., Republic Ins.*, 383 F.3d at 344 (citing *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5th Cir. 1999)). The Court "review[s] the waiver finding itself, however, *de novo*." *Walker*, 938 F.2d at 576–77 (citing *Frye*, 877 F.2d at 398); *see also Mirant*, 613 F.3d at 588.

II. The District Court Correctly Concluded that One Technologies Substantially Invoked the Judicial Process.

The district court was correct in concluding that "Defendants substantially invoked the judicial process by: (1) filing a substantive motion to dismiss; (2) seeking and partially obtaining dismissal with prejudice of Plaintiff's claims; (3) waiting until after the court's ruling on the motion to dismiss to compel arbitration; and (4) waiting almost thirteen months after the transfer of this case to compel arbitration." ROA. 548. From the moment One Technologies retained new counsel and the action was transferred to

the Northern District of Texas, it engaged in a pattern of conduct inconsistent with an intent to arbitrate for more than a year. This pattern began with a request for a 30-day extension to "investigate" Plaintiff's claims, ROA.247—which plainly would be unnecessary for a motion to compel arbitration based on a contract One Technologies had already argued was valid—and continued with its substantive motion to dismiss the action with prejudice, accompanied by multiple exhibits and asking the court to address the ultimate legal issue in the case.

As the district court noted, this Court's decision in *Mirant*, 613 F.3d 584, compels a finding of substantial invocation of judicial remedies, based on both the untimeliness of the demand to arbitrate and the inconsistency of the steps taken before that demand with a desire to arbitrate.

A. One Technologies Unjustifiably Delayed in Invoking Its Right to Arbitrate.

A party will not be held to have waived its right to arbitrate if it moves to do so promptly after an action is commenced, or promptly after it discovers the matter is arbitrable. *See, e.g.*, *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 661 (5th Cir. 1995); *see also Sharpe v. AmeriPlan Corp.*, 769 F.3d 909, 914 (5th Cir. 2014) (no waiver where defendant filed answer invoking

arbitration shortly after case was transferred). But that was not the case here, where One Technologies claimed the case was arbitrable in July 2015, *see, e.g.*, ROA.56, and had the case transferred to a forum that undisputedly had the power to compel arbitration in March 2016, but did not move to compel arbitration until April 2017.

Below, One Technologies argued that its discussion of its desire to move to compel arbitration in July 2015 served as an indefinite prophylactic against a finding of waiver. But, as *Mirant* held, "[a] party cannot keep its right to demand arbitration in reserve indefinitely while it pursues a decision on the merits before the district court." 613 F.3d at 591. When a party's delay in seeking to compel arbitration indicates that it has no genuine intent to assert its claimed right to arbitrate rather than litigate in court, "[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." *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016). What matters is whether the party *asserts* its right to arbitrate, not whether it purports to *reserve* its right to do so while doing nothing to make good on any intent to arbitrate. *Hooper*, 589 F.3d at 923.

Here, One Technologies' dilatoriness not only gave no notice of a real intention to pursue arbitration, but affirmatively indicated abandonment of

any plan to seek arbitration. When this action was transferred to Texas, with new counsel, "instead of moving to compel arbitration, Defendants moved to dismiss the action with prejudice for failure to state a claim upon which relief can be granted." ROA.548. Thus, as the district court explained:

> As their May 2016 motion to dismiss sought dismissal with prejudice on all of Plaintiff's claims, it is reasonable that Plaintiff would not have notice of Defendants intention to compel arbitration. As Defendants did not refer to arbitration or include it as a basis to dismiss, a reasonable person could conclude that Defendants were no longer seeking arbitration.

ROA.550. Under such circumstances, the district court was correct in concluding that One Technologies' reference to arbitration in 2015 did not have the effect of protecting against waiver for eternity should it ultimately invoke the arbitration clause at some point down the road.

B. One Technologies' Litigation Activities Were Inconsistent with A Desire to Arbitrate.

In the thirteen months between the transfer of the action to Texas and One Technologies' motion to compel, One Technologies "engage[d] in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration." *Subway Equip.*, 169 F.3d at 329. The district court correctly recognized that One Technologies' litigation conduct was not meaningfully distinguishable from the conduct that this

Court held in *Mirant* amounted to substantial invocation of the litigation process.

Mirant held that filing a motion to dismiss can constitute substantial invocation of the judicial process and rejected the argument that there is a "bright-line rule" that 12(b)(6) motions "can never support" such a finding. 613 F.3d at 589. Citing the Eighth Circuit's decision in *Hooper*, 589 F.3d at 922, for the principle that "motions to dismiss are not homogeneous," the Court emphasized that the waiver inquiry focuses on the contents and context of a party's motion, not the label under which it is filed. 613 F.3d at 589. Under *Mirant*, a "perfunctory motion to dismiss," *id.* (quoting *Williams*, 56 F.3d at 661), will not trigger a finding of waiver, but a motion to dismiss that goes further and seeks "a decision on the merits" will do so, *id*. at 589 (quoting *Petroleum Pipe*, 575 F.3d at 480).[3] *See also Miller Brewing Co. v. Fort Worth*

[3] Although *Mirant* did not define perfunctory, the district court correctly relied on the ordinary meaning of the term as "characterized by routine or superficiality: MECHANICAL." ROA.547 (quoting Merriam-Webster's Collegiate Dictionary 920 (11th ed. 2014)). The definition of a "perfunctory motion to dismiss" offered by One Technologies' counsel at hearing in the district court as one "that is based on the allegations in the complaint," ROA.580, is simply incompatible with *Mirant*, since *every* proper 12(b)(6) motion to dismiss is based on the allegations in the complaint. The Court need not devise a definition of the term "perfunctory" here; under any reasonable definition, One Technologies' motion was not perfunctory.

Distrib. Co., 781 F.2d 494, 498 (5th Cir. 1986) ("[A]ny attempt to go to the merits and to retain still the right to arbitration is clearly impermissible." (quoting *Graig Shipping Co. v. Midland Overseas Shipping Corp.*, 259 F. Supp. 929, 931 (S.D.N.Y. 1966)).

The factors identified by *Mirant* as probative in distinguishing between the two kinds of motions to dismiss establish that the motion at issue here falls into the latter camp. One Technologies' motion sought dismissal with prejudice and was not "a dispositive motion only as an alternative to a motion to compel arbitration." *Mirant*, 613 F.3d at 589–90. *Mirant* also found the timing of the motion to compel in that case—coming only "after the district court had partially denied [the defendant's] … motion to dismiss, despite being fully aware of its right to compel arbitration from the outset," *id.* at 590—indicative that the motion was more than a "perfunctory" one, which is undisputedly true here as well. *See also Nicholas*, 565 F.3d at 909 (party's "belated decision to seek arbitration is particularly troubling given that it came on the heels of this adverse ruling"); *Hurley v. Deutsche Bank Tr. Co. Americas*, 610 F.3d 334, 339 (6th Cir. 2010) (fact that

(Notably, given One Technologies' exhibits, it is questionable whether its motion to dismiss would be "perfunctory" under its own definition.)

defendants "did not attempt to enforce their arbitration rights until *after* the district court entered an unfavorable decision" was probative); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prod. Co.*, 969 F.2d 585, 589 (7th Cir. 1992) ("A party may not normally submit a claim for resolution in one forum and then, when it is disappointed with the result in that forum, seek another forum."); *cf. BOSC, Inc. v. Bd. of Cty. Commissioners of Cty. of Bernalillo*, 853 F.3d 1165, 1176 (10th Cir. 2017) (finding no invocation of judicial process, but explaining "[h]ad [the defendant] attempted to submit its claims to a court for decision and only sought arbitration after being unhappy with the result, we might feel differently").

The content of One Technologies' motion to dismiss also makes clear it was anything but "perfunctory." In filing the motion, One Technologies asked the court to look at screenshots of webpages and conclude that "as a matter of law, the webpage was not fraudulent." ROA.547; *see* also ROA.267–389; 418–31 (Defendant's briefs on motion to dismiss). Whether One Technologies' website was fraudulent is the ultimate question in the case that One Technologies now wants an arbitrator to answer.[4]

[4] Although One Technologies claims it will "not seek to relitigate the sufficiency of Forby's remaining claim in arbitration," ROA.539, it will

In addition, One Technologies relied heavily on exhibits that, at the very least, pushed the limits of what may properly be considered under the "limited exception" this Court has recognized for considering documents attached to a motion to dismiss.[5] *See Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). Although this Court has not addressed the relevance to the waiver inquiry of this specific feature of a motion to dismiss, several sister courts of appeals have indicated that including materials outside the pleadings in a motion to dismiss indicates an intentional invocation of the judicial process. *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).

The district court's finding that One Technologies' conduct rose to a sufficient level of invocation of the judicial process to trigger a waiver was also consistent with numerous decisions of this and other courts, in addition to *Mirant*. *Hooper*, an Eighth Circuit case that this Court relied on extensively

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certainly relitigate the question whether the disclosures on the website were deceptive or fraudulent under Illinois law.

[5] Ms. Forby did not object to consideration of these materials on a motion to dismiss and does not do so here. She raises them only to show that the motion to dismiss was not "perfunctory."

in *Mirant*, is particularly instructive. There, the Eighth Circuit found that the defendant's filing of an "extensive" motion to dismiss seeking to dismiss the plaintiffs' claims with prejudice had "substantially invoked the litigation machinery," even though the parties had not engaged in discovery or participated in any hearings. 589 F.3d at 921–22. As in this case, the defendant there filed the motion to compel arbitration shortly after the motion to dismiss was denied in part and granted in part. *Id.* at 919–20. And as in this case, the court noted that the motion to dismiss sought an "immediate and total victory in the parties' dispute," while the timing of the motions suggested that the defendant "wanted to see how the case was going in federal district court before deciding whether it would be better off there or in arbitration." *Id.* at 922. The conduct in *Hooper* was actually less egregious than the case here, as that case had only been pending four-and-a-half months before the motion to compel was filed. *Id.*

The district court's finding of substantial invocation is also supported by this Court's decision in *Petroleum Pipe*, 575 F.3d 476. There, the court found that the defendant substantially invoked the litigation process when it waited a year after the suit was filed before seeking arbitration and, meanwhile, removed the action to federal court, filed counterclaims,

participated in discovery, and, at a status conference, effectively sought to obtain the court's views as to the proper interpretation of the contract at issue. *Id.* at 481. Even though the court had not ruled on that merits issue, the fact that the defendant moved to compel arbitration ten days after the court had "g[iven] a very clear indication" that it would rule against the defendant on the merits issue constituted an *independently sufficient* ground to determine the defendant had substantially invoked the judicial process. *Id.* at 482. If informally raising an issue in a status conference ten days before filing a motion to compel is a sufficient invocation of the judicial process, surely so too is filing a motion to dismiss on the merits and waiting until two weeks after it is denied in part to seek arbitration.

Hooper, *Petroleum Pipe*, and *Mirant* are not outliers. In many other cases, courts have found filing a motion to dismiss, or less, constitutes sufficient invocation of the judicial process to meet the first requirement of the waiver inquiry. *See*, *e.g.*, *Janvey*, 847 F.3d at 243 & n. 11 (waiver where defendant participated in discovery and filed motion to dismiss); *Messina v. North Cent. Distributing, Inc.*, 821 F.3d 1047 (8th Cir. 2016) (waiver where defendant answered and unsuccessfully moved to transfer action before seeking to arbitrate); *In re Pharmacy Ben. Managers*, 700 F.3d at 118 (waiver where

defendant filed "two motions to dismiss, with ample briefing and supporting documentation, and raised issues outside of the scope of the pleadings"); *South Broward Hosp. Dist. v. Medquist*, 258 F. App'x 466, 468 (3d Cir. 2007) (waiver where defendant "made a tactical decision to forgo moving to compel arbitration pending litigation of the motions to dismiss"); *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988) (waiver based solely on answer, motion to dismiss, and joint pretrial order); *Leal v. Sinclair Broad. Grp., Inc.*, No. A-16-CV-679 LY, 2017 WL 1458810, at *4 (W.D. Tex. Apr. 25, 2017) ("By removing this case to Federal Court and filing a substantive motion to dismiss, Defendants demonstrated a clear and unmistakable 'disinclination' to arbitrate this case."); *Jallo v. Resurgent Capital Servs., LP*, 131 F. Supp. 3d 609, 615–16 (E.D. Tex. 2015) ("Defendants, at the very least, substantially litigated this matter, filing much more than a perfunctory motion to dismiss and attempting to halt discovery until a decision was rendered on the merits of the case.").

In the proceedings below, One Technologies presented a matrix of cases where courts did not find substantial invocation of the judicial process. ROA.532. These cases are inapposite. As a preliminary matter, this Court's precedent makes clear that the relevant inquiry is one of the specific facts

and the totality of circumstances, not a mathematical one of counting motions and measuring them against some formulaic standard. *See, e.g.*, *Mirant*, 613 F.3d at 589; *see also Louisiana Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010) ("There is no rigid formula or bright-line rule for identifying when a party has waived its right to arbitration.").

The facts of each of the cases cited in One Technologies' table in the court below are readily distinguishable.[6] Several of the cases cited addressed the issue whether motions filed *concurrently* with the invocation of arbitral rights constituted waiver. *See Keytrade USA, Inc. v. Ain Temouchent M/V*, 404 F.3d 891, 898 (5th Cir. 2005) (party at issue "concurrently filed a motion to compel arbitration in the alternative to its motion for summary judgment"); *Gen. Guar. Ins. Co. v. New Orleans Gen. Agency, Inc.*, 427 F.2d 924, 926 (5th Cir. 1970) (finding defendant "did not lose its rights to arbitration by pleading

[6] In its opening brief below, One Technologies also cited this Court's unpublished decision in *Pacheco v. PCM Construction Services*, L.L.C., 602 F. App'x 945 (5th Cir. 2015). There, the motion to dismiss was "confined to a single issue" and "very brief in length," *id*. at 948, and the motion to compel arbitration was filed before any adverse rulings were issued on any pending motions, "thus avoiding one of the concerns discussed in *Mirant*." 602 F. App'x at 949.

alternatively that the contract had been abandoned and that court proceedings should be stayed pending arbitration"); *Westbrook v. JAG Indus. Servs., Inc.*, No. 3:14-CV-2080-M, 2015 WL 93447, at *5 (N.D. Tex. Jan. 7, 2015) (motions to dismiss were filed concurrently with affirmative defense invoking arbitration and had not been ruled on yet); *see also Cargill Ferrous Int'l v. SEA PHOENIX MV*, 325 F.3d 695, 700 (5th Cir. 2003) (issue was whether the failure to take an interlocutory appeal of a denial of motion to compel arbitration constituted waiver when raised on appeal post-trial). In two of the cases, the party at issue had not filed *any* motion that concerned the merits. *Walker*, 938 F.2d at 577 (relying on fact that the defendant "did not ask the court to make any judicial decisions"); *Tenneco Resins*, 770 F.2d at 420–21 (eight-month delay and participation in discovery did not alone show a substantial invocation of judicial process).

The remaining cases concerned attempts to compel arbitration shortly after discovering the arbitrability of the case, *see Williams*, 56 F.3d at 661, or shortly after the case itself was commenced, *see Fozard v. C.R. England, Inc.*, 243 F. Supp. 3d 789 (N.D. Tex. 2017); *Indus. & Mech. Contractors, Inc. v. Polk Const. Corp.*, No. CIV.A. 14-513, 2014 WL 4983486, at *3 (E.D. La. Oct. 6, 2014); *N. River Ins. Co. v. Transamerica Occidental Life Ins. Co.*, No. CIV.A. 399-CV-

0682-L, 2002 WL 1315786, at *8 (N.D. Tex. June 12, 2002), *aff'd on other grounds*, 71 F. App'x 441 (5th Cir. 2003). None of the cited cases involved a one-year delay from the time a case was transferred, during which the party filed a substantive motion to dismiss, asking a court to rule on the ultimate legal issues in the case and dismiss the action with prejudice.

As in *Mirant*, so too here, One Technologies, "having learned that the district court was not receptive to its arguments" on the ultimate issue on the merits, "should [not] be allowed a second bite at the apple through arbitration." 613 F.3d at 590 (quoting *Petroleum Pipe*, 575 F.3d at 482). "To hold otherwise would encourage litigants to delay moving to compel arbitration until they could ascertain 'how the case was going in federal district court.'" *Id.* (quoting *Hooper*, 589 F.3d at 922). One Technologies "attempted to "play 'heads I win, tails you lose,' which is the worst possible reason for failing to move for arbitration sooner than it did." *Id.*; *see also* ROA.548.

III. The District Court Erred in Finding that One Technologies' Litigation Conduct Did Not Cause Prejudice to Ms. Forby.

Although the district court correctly held that One Technologies had substantially invoked the judicial process before invoking its right to

arbitrate, it erred as to the second element of the waiver inquiry, concluding that Ms. Forby had not suffered sufficient prejudice as a result of One Technologies' delay and intervening litigation conduct. *See* ROA.548–52. The district court's conclusion imposed a standard that is inconsistent with this Court's precedent and took far too narrow a view of what constitutes cognizable prejudice.

As the Eighth Circuit noted in *Hooper*, the prejudice requirement is "not onerous." 589 F.3d at 923. *See also Joca-Roca Real Estate, LLC v. Brennan,* 772 F.3d 945, 949 (1st Cir. 2014) ("To be sure, prejudice is essential for a waiver—but the required showing is tame at best."); *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) *(citing, inter alia, Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494, 497–98 (5th Cir. 1986) for the principle that "[o]ther courts require evidence of prejudice—but not much")). Properly construed, "prejudice refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Subway Equip.*, 169 F.3d at 327 (quoting *Doctor's Associates v. Distajo*, 107 F.3d 126, 134 (2d Cir. 1997)); *see also Janvey*, 847 F.3d at 244. Thus, this Court's "precedent has recognized some

overlap" between the two prongs of waiver analysis. *Petroleum Pipe*, 575 F.3d at 476 n. 2. Because "[s]ubstantially invoking the litigation machinery qualifies as the kind of prejudice[] that is the essence of waiver," *id.* (quoting *Price*, 791 F.2d at 1158), it is unsurprising that courts rarely find a party has met its burden on the first waiver element but not shown prejudice.[7]

The "inherent unfairness" of forcing Ms. Forby to start contesting this case in arbitration so late in the game is significant, and is manifested in the three categories of prejudice she identified below, which together meet the prejudice standard.

A. One Technologies' Unjustified Delay Was Prejudicial.

As this Court explained in *Nicholas v. KBR, Inc.*:

> While delay in asserting the right to arbitrate will not alone result in waiver, such delay does bear on the question of prejudice, and may, along with other considerations, require a court to conclude that waiver has occurred. We have recognized that, where a party fails to demand arbitration and, in the meantime engages in pretrial activity inconsistent with an intent to

[7] Counsel has not been able to find *any* such case, and the only case cited by the district court in support of its finding of insufficient prejudice was a nonprecedential unpublished opinion where the court found that *neither* of the elements of waiver were met. ROA.550 (citing *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 F. App'x 462 (5th Cir. 2004)). And *not one* of the cases relied upon by One Technologies below, ROA.536-39, involved a finding that the challenging party met the substantial invocation element, but not the prejudice element.

> arbitrate, the party later opposing a motion to compel arbitration may more easily show that its position has been compromised, i.e., prejudiced.

565 F.3d at 910 (internal citations and marks omitted); *accord Price*, 791 F.2d at 1161. *See also Messina*, 821 F.3d at 1051 ("Delay can however combine with other factors to support a finding of prejudice."). Accordingly, "[b]oth delay and the extent of the moving party's participation in judicial proceedings are material factors in assessing a plea of prejudice." *Frye*, 877 F.2d at 399.

The district court correctly concluded that Ms. Forby suffered prejudice as a result of the thirteen-month delay between the transfer of the case and the filing of the motion to compel.[8] Such a delay is prejudicial for numerous reasons—beyond the basic precept that "justice delayed is justice denied." *See*, *e.g.*, *Stelly v. C.I.R.*, 761 F.2d 1113, 1116 (5th Cir. 1985). As the Third Circuit has explained, "a party's capacity to develop a litigation strategy with regard to the likelihood of arbitration diminishes the longer the case is litigated with no further indication that a motion to compel arbitration is forthcoming." *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 211 (3d

[8] The district court rightfully rejected One Technologies' argument that the delay was somehow caused by Ms. Forby. *See* ROA.550. Ms. Forby had no control over the thirteen-month delay from the transfer of the action to Texas to the belated motion to compel.

Cir. 2010). Accordingly, this court has repeatedly recognized that delay itself is inherently prejudicial. *Mirant*, 613 F.3d at 592 (finding 18-month delay between filing of answer and motion to compel "disadvantaged" plaintiff). The delay here, greater than that recognized as prejudicial in several other cases, is no different. *Compare with Nicholas*, 565 F.3d at 910 (ten-month delay); *and Joca-Roca*, 772 F.3d at 951 n. 7 (eight-month delay); *and Messina*, 821 F.3d at 1051 (eight-month delay); *and So. Broward Hosp. Dist.*, 258 F. App'x 466 (eleven-month delay).

B. One Technologies Caused Ms. Forby Unnecessary Time and Expense.

Not only was the delay itself prejudicial, but One Technologies' tactics during that delay unquestionably caused Ms. Forby unnecessary time and expense.[9] Ms. Forby's counsel was forced to prepare an opposition to One Technologies' fulsome motion to dismiss, as well as briefing focused on waiver in response to the motion to compel arbitration, along with other

[9] Some courts refer to this form of prejudice as "expense" whereas others refer to it as "time and expense" prejudice, recognizing that undertaking unnecessary motion practice and other litigation activities is not prejudicial simply because of monetary expenditures, but the expenditure of time and effort as well. *See, e.g.*, *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991).

expenses of time and energy reflected in the record, attributable to One Technologies' expressed inclination to litigate in federal court rather than arbitrate. Ms. Forby's counsel prepared a discovery plan, drafted discovery requests and initial disclosures, and attended a Rule 26(f) conference, as was their obligation pursuant to the district court's order.[10] *See* ROA.445–48.

These expenses of resources are analogous to those deemed sufficiently prejudicial to justify waiver in other cases. In *Martin v. Yasuda*, for example, the Ninth Circuit found that the plaintiffs' expenses "conferring with opposing counsel regarding how to conduct the case on the merits, analyzing how to approach discovery and class certification, and contesting the defendants' motion to dismiss on the merits" to "constitute[] obvious prejudice." 829 F.3d at 1128; s*ee also Leal*, 2017 WL 1458810, at *4 (finding plaintiff was sufficiently "prejudiced by unnecessary litigation costs in defending against the removal, the motion to dismiss, and this motion to compel arbitration").

[10] Since the Federal Rules do not apply in arbitration, the discovery plan and requests developed by Ms. Forby would be wasted if this action moves to arbitration.

These expenses were not "self-inflicted," as suggested by One Technologies below. Rather, "self-inflicted" expenses in this context are those "incurred as a direct result of suing in … court contrary to the provisions of an arbitration agreement." *Martin*, 829 F.3d at 1126. Such expenses include "costs incurred in preparing the complaint, serving notice, or engaging in limited litigation regarding issues directly related to the complaint's filing, such as jurisdiction or venue." *Id.* Ms. Forby does not assert such expenses as forms of prejudice here; she relies solely on activities engaged in after the action was transferred, and after One Technologies "sent [her] down the road of trial preparation." *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1093 (8th Cir. 2007); *see also* ROA.550 (district court's finding that, based on One Technologies' conduct, "a reasonable person could conclude that Defendants were no longer seeking arbitration"); *cf. In re Apple iPhone 3G & 3GS MMS Mktg. & Sales Practices Litig.*, 864 F. Supp. 2d 451, 458 (E.D. La. 2012) (finding prejudice self-inflicted where party filed opposition to motion to dismiss *after* opponent filed motion to stay).

The district court neither disagreed that One Technologies' conduct imposed substantial additional work on Ms. Forby's attorneys, nor concluded that any such injury was self-inflicted. Rather, it rejected the

claimed prejudice out of hand with a single sentence: "[T]he court cannot determine whether Forby incurred significant legal expenses, as she does not state the costs that she incurred while responding to Defendants' Motion to Dismiss." ROA.551. This statement reflects both a clearly erroneous view of the record and an error of law.

Ms. Forby's opposition brief expressly referenced the "time and expense associated with drafting an opposition to the motion to dismiss, serv[ing] Defendants with discovery, and confer[ring] with Defendants' counsel to craft a case management plan pursuant to Court Order." ROA.520. Although the brief did not put a dollar figure on the costs attributable to this additional work, it specifically identified the substantial tasks that formed the basis of the claim of prejudice.

The district court's view that further evidentiary submissions were required is contrary to multiple decisions of this and other courts. In *Nicholas*, for example, this Court found the defendant had been prejudiced by incurring litigation costs—"[a]lthough KBR did not put on evidence in terms of dollars and cents of its litigation costs in the district court." 565 F.3d at 910. Based on the record alone, this Court noted that the expenses associated with removal, opposition to remand, answer, propounding

discovery requests, and a single deposition were obviously significant costs, and "precisely the expenses of litigation that arbitration is designed to avoid." 565 F.3d at 911. *See also Janvey*, 847 F.3d at 244 (finding prejudice caused by "increased litigation expenses" "on the face of the record"); *Parker v. ABC Debt Relief Co.*, No. 3:10-CV-1332-P, 2011 WL 13156874, at *3 (N.D. Tex. Nov. 4, 2011) (finding prejudice based solely on party's reference to "substantial legal fees" incurred prior to motion to compel).

The record before the court was more than adequate to support the conclusion that substantial resources were expended, directly attributable to One Technologies' litigation conduct. (Moreover, if the district court had evidentiary questions, it could have requested supplemental briefing.) The complete failure to consider such expenses constitutes an independent reversible error.

C. One Technologies Caused Ms. Forby "Substantive" Prejudice.

In addition to "time and expense" prejudice such as that discussed above, "[t]he 'prejudice' that supports a finding of waiver can be 'substantive' prejudice to the legal position of the party opposing arbitration, such as when the party seeking arbitration loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration."

Doctor's Assocs., 107 F.3d at 131. Ms. Forby's complaint included two claims; she has suffered substantive prejudice with respect to both, and the district court's cursory discussion of this issue was erroneous. With respect to the two claims in Ms. Forby's complaint, One Technologies seeks to achieve the ultimate "heads I win, tails you lose" scenario, *Mirant*, 613 F.3d at 590: Moving to arbitration now, Ms. Forby reaps no benefit of defeating One Technologies' challenge to her ICFA claim, but suffers the consequences of its successful challenge to her unjust enrichment claim.

In denying One Technologies' motion to dismiss as to the ICFA claim, the district court expressed its position on One Technologies' ultimate position on the merits far more than in a typical Rule 12(b)(6) ruling. Here, One Technologies asked the court not only to look at Ms. Forby's complaint to determine if she had alleged deceptive conduct, but to look at actual photographs of the website at issue and decide the question, central to Ms. Forby's allegations, whether the website's design deceptively concealed that One Technologies was signing consumers up for an expensive subscription service in the guise of a "free" credit report.

A core principle of waiver jurisprudence is that "[a] party may not delay seeking arbitration until after the district court rules against it in whole

or in part; nor may it belatedly change its mind after first electing to proceed in what it believed to be a more favorable forum." *Martin v. Yasuda*, 829 F.3d 1118, 1128 (9th Cir. 2016). While as a formal matter the court's ruling on the motion would not have any preclusive effect on summary judgment, One Technologies understandably might prefer a different arbiter than one that stated: "The placement of [Defendants'] Offer Details Disclosures may not be as conspicuous as the cases that Defendants cite to support their position." ROA.443. Thus, it is of little solace that One Technologies maintains that it "will not file another motion to dismiss Forby's remaining claim in arbitration," ROA.536,[11] as it will surely ask the arbitrator to rule that the Offer Details Disclosures were sufficiently conspicuous to defeat Ms. Forby's claim. One Technologies now seeks a chance at obtaining a more sympathetic adjudicator, after it got a "free preview" of Ms. Forby's more detailed arguments as to the merits of her claim.[12] *See Leal*, 2017 WL 1458810,

[11] At a hearing, One Technologies' counsel also indicated that if Ms. Forby in any way amended her complaint in arbitration, One Technologies "would renew this motion to dismiss based upon the sufficiency of our [*sic*] allegation." ROA.574. This statement also suggests an intent to take a second bite of the apple.

[12] Such attempts to get a second bite at the apple also raise concerns of judicial economy and efficient dispute resolution. As noted by the Second

at *4 (finding prejudice where response to motion to dismiss gave "Defendants a preview of [Plaintiff]'s litigation strategy"); *Mirant*, 613 F.3d at 592 (finding prejudice where opposition to motion to dismiss gave opponent "a full preview of [party's] evidence and litigation strategy"). Ms. Forby will be "prejudiced by having to re-litigate in the arbitration forum the … issue already decided by the district court in [her] favor." *Nicholas*, 565 F.3d at 911. Courts of appeals "routinely have found this factor dispositive because the plaintiffs would be prejudiced if the defendants got a mulligan on a legal issue it chose to litigate in court and lost." *Martin v. Yasuda*, 829 F.3d 1118, 1128 (9th Cir. 2016) (citing *Hooper* and *Mirant*).

In addition, the district court actually *dismissed* one of Plaintiff's claims with prejudice—her unjust enrichment claim. In granting the motion to compel arbitration, the district court held that such a dismissal was not prejudicial because the claim "was barred by law." ROA.551. But the court's

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Circuit, "for a court to preview the issues that a party seeks to present to the arbitrator, and decide the merits of some of those issues in advance, risks delaying the arbitration process, and divides the issues to be resolved between two decision-makers, where the parties selected a unitary dispute resolution process in the hopes that such a procedure would be more expeditious than litigation in court." *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 901 (2d Cir. 2015).

reasoning is circular: Whether the court's merits decision on an issue that would have gone to arbitration had arbitration been timely sought was prejudicial does not depend on whether the court's decision was correct; the question is whether Ms. Forby is worse off than she would have been had One Technologies timely invoked the arbitration clause. She plainly is. There is no certainty that the arbitrator would have ruled the same way,[13] and Ms. Forby likely would have proceeded differently in an arbitration that began with two claims than she will if she only has one. *See also Gonsalves v. Infosys Techs., Ltd.*, No. C 3:09-04112, 2010 WL 3118861, at *4 (N.D. Cal. Aug. 5, 2010) (noting inherent prejudice that results from dismissal of a claim with prejudice).

D. The Combined Prejudice Exceeds the Relevant Standard.

To reverse the district court's finding of insufficient prejudice, this Court need not conclude that any one form of prejudice discussed above

[13] The dismissed claim was not frivolous. "Under Illinois law, plaintiff may allege unjust enrichment as well as the existence of a governing contract when the claim is based on defendant's tortious conduct." *Am. Hardware Mfrs. Ass'n v. Reed Elsevier, Inc.*, No. 03 C 9421, 2004 WL 3363844, at *16 (N.D. Ill. Dec. 28, 2004); *see also Williamson v. S.A. Gear Co., Inc.*, No. 15-CV-365-SMY-DGW, 2017 WL 283373, at *9 (S.D. Ill. Jan. 23, 2017); *Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 923 (N.D. Ill. 2013); *Peddinghaus v. Peddinghaus*, 692 N.E.2d 1221, 1225 (Ill. App. Ct. 1998).

cleared the prejudice bar. Under the holistic inquiry required, the three types of prejudice—delay, expense, and substantive prejudice—are sufficient in combination to meet the requirement for waiver. The prejudice identified here is greater than that found sufficient in numerous cases. In *Petroleum Pipe*, for example, this Court held that the prejudice of a one-year delay in invoking arbitration, combined with the "substantive" prejudice associated with attempting to get a "second bite" at a legal issue was sufficient to find waiver. 575 F.3d at 482. Similarly, in *In re Pharmacy Benefit Managers*, 700 F.3d at 120–22, the Third Circuit found sufficient prejudice based solely on a ten-month delay in moving to arbitrate, a motion to dismiss raising issues beyond the pleadings, a motion to reconsider, and a handful of largely uncontested, "non-merits" motions. The court explicitly held that the prejudice requirement can be met even where no discovery has taken place, and even if the plaintiff's legal position was the same as it was "at the starting gate of the litigation." *Id.* at 120–21. Here, by contrast, Ms. Forby had already begun the discovery process, and she has *lost* a claim that she had at the start—and would be losing the benefit of a legal ruling in her favor on another claim. *See also Janvey*, 847 F.3d at 244; *Martin*, 829 F.3d at 1118; *Messina v. N. Cent. Distrib., Inc.*, 821 F.3d 1047 (8th Cir. 2016) (eight-month

delay, opposition to motion to dismiss and drafting of discovery requests, resulting in "thousands of dollars" in legal expenses, constituted waiver); *Hooper*, 589 F.3d at 923 (finding sufficient prejudice resulting from four-and-a-half month waiver and time and expense involved in drafting and filing an amended complaint); *Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 428 (D.C. Cir. 2008) (finding waiver based on the "significant prejudice" caused by being "forced to expend time and resources to oppose two motions in the district court and to brief two appeals").

* * *

The question in this case is whether defendants get one "free" motion to dismiss, targeted at the merits of the complaint, and testing the court's receptiveness to their argument, before they decide whether to proceed in a judicial forum or in arbitration. Such a tactical advantage is not required by the federal policy favoring the enforcement of arbitration agreements. "A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and *expeditious* results." *Preston v. Ferrer,* 552 U.S. 346, 357 (2008) (emphasis added). Here, One Technologies' path to arbitration has been anything but streamlined or expeditious. In light of this Court's express disapproval of "attempt[s] to game the system by seeking a decision on the

merits while keeping the arbitration option as a backup plan," *Mirant*, 613 F.3d at 590, the Court should find that One Technologies' thirteen-month delay, attempts to litigate the merits of the case, and the ensuing prejudice to Ms. Forby constituted a waiver.

CONCLUSION

The Court should reverse the judgment of the district court and remand the action for further proceedings in that court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 9,735 words.

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

October 30, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2017, the foregoing brief has been served through this Court's electronic filing system upon counsel for the Defendants-Appellees:

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