**No. 15-2323**

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

**Richard A. Messina,**
*Plaintiff-Appellee,*

vs.

**North Central Distributing, Inc.,**
**doing business as Yosemite home Decor,**
*Defendant-Appellant.*

Appeal from the United States District Court
District of Minnesota

# APPELLEE'S BRIEF


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I. Was it proper for a district court, rather than an arbitrator, to determine whether the litigation conduct of North Central Distributing, Inc., doing business as Yosemite Home Decor ("Yosemite"), most of which took place in that court, which caused Yosemite to waive its contractual right to arbitrate under the arbitration agreement it had drafted? (yes) *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722, 728 (8th Cir. 1976); *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 12-14 (1st Cir. 2005); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215-21 (3d Cir. 2007); *Webster Grading, Inc. v. Granite Re, Inc.*, 879 F. Supp.2d 1013, 1019 (D. Minn. 2012).

II. Did the district court commit clear error in finding that Yosemite substantially invoked the litigation machinery before asserting its arbitration right, thus acting inconsistently with its right to arbitrate, where it removed the action to federal court, filed an answer, attended pretrial scheduling conferences, and filed a motion to transfer under 28 U.S.C. § 1404 and litigated that motion to final resolution, all before saying anything to the court or opposing counsel about an intention to arbitrate the dispute? (no) *Lewallen v. Green Tree Servicing, L.L.C.*, 487

F.3d 1085, 1091-92 (8th Cir. 2007); *Stifel, Nicolaus & Co. Inc. v. Freeman*, 924 F.2d 157, 158 (8th Cir. 1991).

III. Did the district court commit clear error in finding that Richard Messina ("Messina") was prejudiced by Yosemite's nine-month delay in invoking its right to arbitrate, during which time he obtained new counsel, attended multiple hearings, and responded to Yosemite's motion to transfer with a declaration listing witnesses who could testify to the merits of his claims? (no) *Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.*, 589 F.3d 917, 923-24 (8th Cir. 2009); *Lewallen v. Green Tree Servicing L.L.C.*, 487 F.3d 1085, 1093-94 (8th Cir. 2007); *Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003).

## STATEMENT OF THE CASE

In August of 2012, Messina traveled to Fresno, California from his home in Minnesota to negotiate and sign a contract with Rocky Bogenschutz, Yosemite's vice president and treasurer, governing the terms of his employment as Yosemite's Vice President of Sales. (Appx. 52, Appx. 82.)[1] The employment contract provided for a two-year term of employment that Messina would perform from a home office in Minnesota. (Appellee Appx. 53-54.) The negotiated contract said nothing about how future disputes would be resolved, and no one from Yosemite discussed dispute resolution procedures with Messina before he signed the contract. (Appx. 82-83.)

After signing his employment contract, Messina was given other employment-related paperwork to sign, including the Arbitration Agreement attached to the declaration of Rocky Bogenschutz in Appellant's Appendix. (Appx. 55-57.) Messina did not negotiate with anyone at Yosemite regarding the terms of the Arbitration Agreement, which was a separate document from his employment contract. (Appx. 83.) He understood the Arbitration Agreement to be akin to a W4 form that needed to be completed before starting his employment with Yosemite. (*Id.*)

[1] Citations to the Appellant's Separate Appendix will be denoted by the prefix Appx., while citations to the Appellee's Separate Appendix prepared pursuant to Eighth Circuit Rule 30A(b)(3) will be denoted by the prefix Appellee Appx.

Between August 13, 2012 and late January of 2013, Messina performed the duties of the Vice President of Sales position and was compensated in accordance with his employment contract. (*Id.*) On January 30, 2013, Rocky Bogenschutz terminated Messina's employment. When Messina complained that the termination violated the two-year employment term in his contract, Mr. Bogenschutz told him that Yosemite had "deep pockets," wished him "good luck" in suing the company, and threatened to "drag him through the court systems" if he attempted to contest his termination. (Appellee Appx. 98.)

Despite these warnings, Messina filed a Complaint in Ramsey County District Court in Minnesota on July 1, 2014 seeking damages for breach of contract, wrongful termination, and other claims. (Appx. 7-11.) Yosemite received the Summons and Complaint on July 7, 2014. (Appx. 2.)

Rather than immediately notifying Messina's counsel of the Arbitration Agreement and seeking to have the dispute moved into an arbitral forum, Yosemite instead filed a Notice of Removal on August 5, sending the dispute to the U.S. District Court for the District of Minnesota. (Appx. 1-6.) Next, Yosemite filed an Answer on August 11, 2014 that included twenty-four affirmative defenses. (Appx. 96, Appellee Appx. 1-11.) None of the affirmative defenses concerned the Arbitration Agreement, about which the Answer was completely silent.

In the ensuing months the parties met and conferred about a discovery plan and jointly drafted a Rule 26(f) case management statement. (Appx. 62.) Yosemite's portion of that statement outlining its defenses again said nothing about an intention to invoke its right to arbitrate the dispute. (Appellee Appx. 12-13.) Instead, the jointly drafted statement included a detailed discovery and motion schedule (Appellee Appx. 13-15) and stipulated that the case would be ready for trial on or after August 1, 2015. (Appellee Appx. 15.) On December 2, 2014, the parties attended a Rule 16 scheduling conference where, yet again, the issue of arbitration did not come up. (Appx. 96.)

On November 26, 2014, three and a half months after receiving Messina's Complaint, Yosemite filed a motion seeking to transfer the action to the Fresno Division of the Eastern District of California under 28 U.S.C. § 1404. (Appellant's Addendum 1-2.) Before filing that motion, Yosemite's counsel met and conferred with Messina's counsel on "several" occasions by phone, but never mentioned arbitration during any of those phone conversations. (Appellee Appx. 34.) The briefing on the motion to transfer was supported by several affidavits and touched on such merits issues as whether Messina had a signed employment contract with Yosemite or merely a "wish list," (Appellee Appx. 21), as well as what duties he performed during his employment with Yosemite (Appellee Appx. 38-39; Appellee Appx. 95.) Of particular note, Messina identified eleven nonparty

witnesses by name in opposing the motion to transfer who he might call to testify to the quality of his work for Yosemite, pointing out that these individuals lived throughout the United States and Canada and that California would be more inconvenient for them to travel to as opposed to Minnesota. (Appellee Appx. 39-41.)

The district court denied Yosemite's motion to transfer on January 27, 2015. (Appellant's Addendum 3-8.) Two weeks later, on February 10, not "immediately thereafter" as Yosemite's brief asserts, Yosemite Brief ("YB") at 5, Yosemite's counsel contacted Messina's counsel by phone and for the first time disclosed the Arbitration Agreement, asking whether Messina would stipulate to arbitration. (Appx. 49.) By this point, with venue established in the District of Minnesota, Messina's counsel had already begun drafting discovery, which he served on Yosemite's counsel on February 19. (Appx. 84.) On February 20, just ten days after first learning of the Arbitration Agreement,[2] Messina's counsel provided a written response, with caselaw, explaining why his client would not stipulate to arbitration. (Appx. 84-85.)

[2] Yosemite represents in its opening brief that Messina's counsel took nearly a month to respond to the request to stipulate to arbitration, YB at 6, but this timeline is contradicted by the declaration of Yosemite's counsel in support of its motion to compel arbitration, which establishes that all of the interactions between counsel regarding the Arbitration Agreement took place within a ten-day period between February 10 and February 20, 2015. (Appx. 49-50.)

Yosemite moved to compel arbitration on March 13, 2015 (Appx. 23-24), and a hearing was held on the motion on May 14, 2015. (Appellee Appx. 99-117.) Discussion at the hearing focused on the many events that had occurred in the litigation without Yosemite's counsel ever invoking its right to arbitrate:

> THE COURT: But, you know, you came in here, and you said, hey, . . . we want to go to California, and I understood that argument. I didn't agree with it, but it's a very valid argument to present to the Court. So, fine, we had our discussion about it. You entered an answer, and I think you put in something about 25 affirmative defenses but never said anything about arbitration. Then we had a Rule 16 conference. You and I sat in the back room. You didn't say anything about arbitration. And all of a sudden here we are almost a year later, well, we want to arbitrate. You know, at some point, that doesn't fit any more.
>
> MR. PARKER: It doesn't fit, Your Honor, when the parties have actually actively participated in litigation.
>
> THE COURT: Well, what in the world do you think we've been doing?

(Appellee Appx. 101.)

On May 20, 2015, the district court entered a Memorandum and Order denying Yosemite's motion to compel arbitration on the ground that it had acted inconsistently with its known right to arbitrate and had prejudiced Messina in the process. Specifically, the court noted:

> Now that Yosemite has come up short in its quest to transfer the matter to California through litigation, it seeks a second bite at the apple in getting there through arbitration. Yet by pursuing transfer first, and otherwise never indicating an intent to arbitrate, Yosemite demonstrated its preference to resolve this dispute in the courts. And its belated demand for arbitration, considering its inconsistent acts, does not allow it to escape that choice.

(Appx. 100.) With respect to the prejudice requirement, the court noted that the prejudice threshold "is not onerous" and concluded that Messina was prejudiced by having to obtain new counsel, attend multiple pretrial hearings, and respond to the motion to transfer—"all the while having zero notice of Yosemite's supposed intent to arbitrate." (*Id.*)

Yosemite filed a notice of appeal on June 9, 2015 (Appx. 102) and moved the district court for an order staying all proceedings pending the outcome of this appeal. That motion was granted on July 22, 2015. (Appellant's Addendum 16-19.)

**SUMMARY OF ARGUMENT**

Far from exceeding its authority or discretion by reaching the question of whether Yosemite's litigation conduct constituted a waiver of its right to arbitrate, the district court followed in a long tradition of other courts that have decided the same issue and reached the same conclusion, with their decisions often being affirmed by this Court. Although Yosemite suggests that the waiver issue should have been referred to an arbitrator instead, the sorts of waiver issues that are sent to arbitrators to decide involve procedural prerequisites to the arbitral process rather than litigation conduct in court. Waiver based on litigation conduct, which is the sort of waiver Yosemite committed here, is uniquely within the expertise of judges to determine, because they are more familiar than arbitrators with the judicial procedures at issue and can best assess whether a party's attempt to switch from a

judicial to an arbitral forum in a particular case involves improper gamesmanship. The district court found Yosemite's conduct to smack of just such gamesmanship, and that finding by the same court in which the relevant litigation conduct occurred is entitled to considerable deference.

Applying the clearly erroneous standard of review to the district court's findings of fact, this Court should conclude that the district court properly carried out the three-factor test commonly used in this Circuit to establish that Yosemite waived its right to arbitration. It knew of its rights under the Arbitration Agreement it had drafted. It acted inconsistently with those rights when it removed this case to federal court, filed its Answer with twenty-four affirmative defenses that did not mention arbitration, prepared and served initial disclosures, assisted in preparing a discovery and pretrial schedule and attended a scheduling conference, and filed and litigated a motion to transfer the case to federal court in California. Third, its inconsistent conduct prejudiced Messina by sending the case along a litigation track for nine months, during which time he found a new lawyer, spent time attending hearings, responding to motions and drafting discovery, all before having any notice of Yosemite's intent to invoke arbitration.

"To safeguard its right to arbitration, a party must do all that it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration." *Lewallen v. Green Tree Servicing,*

*L.L.C.*, 487 F.3d 1085, 1091 (8th Cir. 2007) (citations and internal quotations omitted). By staying silent about its intent to move this dispute to arbitration despite numerous opportunities to inform Messina and the district court of its plans, Yosemite failed to safeguard its right to arbitrate. Moreover, by forcing Messina to litigate a motion to transfer venue under 28 U.S.C. § 1404, in the course of which he produced a list of nonparty witnesses who could testify on his behalf on the merits of his claims, and only raising the arbitration issue after losing that motion, Yosemite has placed Messina in a position of having to duplicate his efforts and make the same arguments before an arbitrator in order to prevent any future arbitration from taking place in California under the terms of the Arbitration Agreement. (Appx. 55-57.) This sort of relitigation of issues, not to mention the uncertainty and delay in reaching the merits of his claims, have prejudiced Messina, and the district court was correct to recognize that prejudice.

## ARGUMENT

### I. The Question of Whether Yosemite's Litigation Conduct Caused a Waiver of Its Right to Arbitrate Was Properly Decided by the District Court Rather than an Arbitrator

Yosemite suggests that the district court exceeded its discretion by resolving the waiver issue because under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, the only two questions that a court may consider are whether a valid arbitration agreement exists and whether it encompasses the dispute between the

parties. YB at 14. According to Yosemite, if these two questions are answered in the affirmative, as they were here, then the dispute must go to arbitration and all other issues, such as whether Yosemite waived its arbitration rights, must be decided by an arbitrator. But this overly simplistic analysis of the FAA misapplies precedent and fails to acknowledge the dozens if not hundreds of published decisions in which federal courts, including courts in this Circuit, have found that one party waived its right to arbitrate without referring the waiver question to an arbitrator in the first instance.

Yosemite's argument seems to stem from confusion around multiple meanings of the word "waiver." Specifically, this Court and the Supreme Court have held that arbitrators should decide whether the parties have satisfied procedural prerequisites to arbitration under the terms of a given arbitration agreement, as such "intrinsic waiver" determinations derive from the terms of the agreements themselves and fall within the arbitrator's prescribed role of contract interpretation. By contrast, the question of whether a party's participation in the judicial process is inconsistent with the right to arbitrate at all is an "extrinsic waiver" determination that does not derive from the terms of the contract but rather from the parties' actions in the judicial system, and such extrinsic waiver determinations are routinely made by courts, including courts within this Circuit. Moreover, courts are uniquely well qualified to evaluate the significance of the

parties' previous litigation activity before them and whether such activity bore the hallmarks of gamesmanship or an attempt to take advantage of a litigation adversary. These considerations relate to "judicial procedures" as opposed to the considerations of "arbitration procedures" reserved for arbitrators, underscoring that questions of waiver caused by judicial conduct, like the waiver that Yosemite committed here, are properly resolved in the courts.

### A. Yosemite's Discussion of Courts' Limited Discretion Under the FAA Ignores a Large Body of Waiver Jurisprudence and Takes the Legal Authorities It Does Cite Drastically Out of Context

According to Yosemite, the district court had no business reaching the waiver issue because it is not one of the two threshold questions that the FAA permits district courts to answer. But the FAA contains no such rigid limitations on the issues courts may consider when faced with an arbitration-related motion. The FAA simply provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. And the doctrine that a party who acts inconsistently with its known rights under a contract waives the ability to assert those rights is a long-standing equitable basis for revoking contractual rights and is recognized under the law of every state. *E.g. Engstrom v. Farmers & Bankers Life Ins. Co.*, 230 Minn. 308, 312 (1950); *Waller v. Truck Ins. Exchange*, 11 Cal. 1, 31 (1995). Allowing courts to apply the waiver doctrine against a party

who seeks to enforce an arbitration agreement after litigating is just one example of the Supreme Court's admonition that "the purpose of Congress [in enacting the FAA] in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967).

Moreover, Yosemite's bold pronouncement that courts may do nothing with a motion to compel arbitration under the FAA beyond assessing the agreement's validity and scope suffers from a glaring flaw: it cannot explain why federal courts routinely reach the waiver issue, just like the district court here did, and why appellate courts routinely affirm their findings. If this question were properly within the province of arbitrators to decide, such that the district court here had exceeded its authority by reaching it, one would not expect to find quite so many judicial precedents directly on point. *See, e.g.*, *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115 (8th Cir. 2011) (affirming district court's waiver finding in a case involving an arbitration clause); *Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.*, 589 F.3d 917 (8th Cir. 2009) (same); *Southeastern Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963 (8th Cir. 2009) (same); *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085 (8th Cir. 2007) (same); *Kelly v. Golden*, 352 F.3d 344 (8th Cir. 2003) (same); *Ritzel Communs. v. Mid-Am. Cellular Tel. Co.*, 989 F.2d 966 (8th

Cir. 1993) (same).[3] In short, courts analyze litigation conduct and apply the waiver doctrine as a matter of course without their ability to do so in cases involving the FAA being in any way controversial.

Yosemite cites numerous Supreme Court and Eighth Circuit decisions to support its claim that the district court here exceeded its discretion, but with the exception of a few precedents dealing with procedural "intrinsic waivers," which will be discussed in the next section, these cases are entirely irrelevant. **Not one** deals with a finding of waiver based on the litigation conduct of the party seeking to compel arbitration.

Instead, most of the cases cited at pages 13-17 of Yosemite's opening brief concern whether compelling arbitration in a given case would interfere with statutory rights or other policy considerations. For example, in *Dean Witter Reynolds, Inc. v. Byrd*, the Supreme Court held that courts must grant motions to compel arbitration of state law claims in cases that also contain nonarbitrable federal securities claims, despite the concern that such bifurcated proceedings in

[3] *See also Menorah Ins. Co., Ltd. v. INX Reinsurance Corp.*, 72 F.3d 218 (1st Cir. 1995) (same); *PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103 (2d Cir. 1997) (same); *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912 (3d Cir. 1992) (same); *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250 (4th Cir. 1987) (same); *Nicholas v. KBR, Inc.*, 565 F.3d 904 (5th Cir. 2009) (same); *Hurley v. Deutsche Bank Trust Co.*, 610 F.3d 334 (6th Cir. 2010) (same); *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995) (same); *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig.*, 790 F.3d 1112 (10th Cir. 2015) (same); *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 722 (D.C. Cir. 1987) (same).

two different forums would be inefficient and lead to potentially inconsistent results. 470 U.S. 213, 217-18 (1985). Similarly, in *Faber v. Menard*, this Court held that a district court erred by concluding as a matter of law that a fee-splitting provision in an arbitration agreement was unconscionable without developing a full factual record on the plaintiff's ability to pay, noting that judicial review should not involve "the consideration of public policy advantages or disadvantages resulting from the enforcement of the [arbitration] agreement." 367 F.3d 1049, 1052, 1053-54 (8th Cir. 2004) (citations and internal quotations omitted). And in *Bailey v. Ameriquest Mortgage Co.*, this Court reversed a district court's order that found an arbitration clause unenforceable because some of its terms conflicted with the statutory and procedural rights the plaintiffs were asserting under the Fair Labor Standards Act, ruling that any conflict between the contract and the plaintiffs' statutory rights should be resolved by the arbitrator in the first instance. 346 F.3d 821, 824 (8th Cir. 2003). *See also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669-70 (2012) (mandatory disclosure to consumers under Credit Repair Organization Act regarding a right to sue did not preclude enforcement of arbitration agreement that covered CROA claims); *Nat'l R. R. Passenger Corp. v. Missouri Pac. R. Co.*,501 F.2d 423, 429 (8th Cir. 1974) (district court erred in reaching merits of dispute that fell within scope of arbitration clause).

Thus, what Yosemite's cited cases stand for is the proposition that district courts exceed their discretion when they look beyond the question of whether a valid arbitration agreement applies to the dispute at issue and allow their assessment of the merits of that dispute, or other public policy considerations, to influence their decision of whether or not to enforce the agreement. None of this changes the fact that courts may, and in fact have been instructed to, "apply general state-law principles governing the formation of contracts" in evaluating motions to compel under the FAA. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The doctrine of waiver of contractual rights through inconsistent actions is such a general contract law principle, and the district court was entirely within its discretion to apply it here.

### B. Waiver of the Right to Arbitrate by Failing to Satisfy Procedural Prerequisites Under the Agreement May Be Decided by an Arbitrator, but Waiver Through Inconsistent Litigation Activity, the Type of Waiver Yosemite Committed, is Always Decided by a Court

Though most of Yosemite's cited cases do not involve waiver at all,[4] some do—but they do not involve extrinsic waiver, which is the type of waiver at issue

[4] The most baffling opinion cited by Yosemite in this section of its brief is *Fleet Tire Serv. Of North Little Rock v. Oliver Rubber Co.*, 118 F.3d 619 (8th Cir. 1997), which stands for the proposition that a broadly worded arbitration clause extends to cover collateral disputes related to the agreement containing the clause. Despite Yosemite's parenthetical description invoking waiver, YB at 15-16, *Fleet Tire* has nothing to do with waiver of the right to arbitrate. Moreover, whether a party's litigation conduct is inconsistent with asserting its arbitration rights—let alone

in this case. This court described two possible meanings of the term "waiver," and the different consequences that each meaning has for whether a court or an arbitrator should resolve the issue, in its 1976 opinion in *N & D Fashions, Inc. v. DHJ Industries, Inc.*:

> The basis of the waiver claim here is unclear, because " waiver" in the present context can have two distinct meanings. First, "waiver" can mean that the party . . . is . . . in default in proceeding with such arbitration, and so under the terms of the [Federal] Arbitration Act is not entitled to a stay. This is a question for determination by the courts. A default occurs when a party actively participates in a lawsuit or takes other action inconsistent with the right to arbitration. Here, DHJ demanded arbitration and moved for a stay immediately upon the filing of the complaint; plainly, it took no action inconsistent with the right to arbitration. There has been no waiver in this sense.
>
> Alternatively, "waiver" can be used in the sense of "laches" or "estoppel." In this sense, waiver applies to bar arbitration when the process would be inequitable to one party because relevant evidence has been lost due to the delay of the other. Waiver in this "laches" sense is generally an issue for the arbitrator, and we leave it to the arbitrator here.

548 F.2d 722, 728-29 (8th Cir. 1976) (citations and internal quotation marks omitted).

But there is yet a third meaning of the term "waiver" that sometimes arises in the context of motions to compel arbitration, and this meaning refers to arbitration agreements that require the parties to take certain procedural steps in a certain order within a certain timeframe in order to invoke their rights. When one

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whether a court or arbitrator should decide that waiver issue—is a wholly separate inquiry from whether the scope of the arbitration agreement is broad or narrow.

party asserts that the other has failed to comply with these procedural requirements, the noncompliant party can be said to have waived its right to arbitrate under the agreement. Such waivers by failure to satisfy procedural prerequisites, like waivers in the laches sense recognized by *N & D Fashions*, are typically within the province of the arbitrator to decide. *See Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 870-72 (8th Cir. 2004) (holding that the plaintiff's contention that the defendant's arbitration demand was not sufficient or timely under the terms of the arbitration agreement and thus constituted a waiver of the right to arbitrate was a procedural issue presumptively for the arbitrator to decide"); *Int'l Ass'n of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Shopman's Local 493 v. EFCO Corp. and Const. Prods., Inc.*, 359 F.3d 954, 957 (8th Cir. 2004) ("the question of whether the procedural prerequisites have been complied with or, as the Union alleges, waived because of CPI's prior practice is a matter for the arbitrator and not for the court"); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 748-49 (8th Cir. 1986) (procedural questions of whether conditions precedent to arbitration were met and whether arbitration was prohibited by laches were properly resolved by the arbitrator in the first instance); *see also ATSA of California, Inc. v. Continental Ins. Co.*, 703 F.2d 172, 175 (9th Cir. 1983) (parties may refer to an arbitrator the

question of whether one of them waived its right to arbitrate by refusing to promptly nominate an arbitrator).

All of these "intrinsic" waiver determinations reserved for arbitrators turn on interpretation of the agreement itself and the procedural requirements it contains, on the rules of the arbitral forum and whether the parties complied with them, and/or on the parties' conduct in the arbitral forum. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002), Justice Breyer described this category of questions as "procedural gateway matters" and held that they are presumptively for arbitrators to decide. In further explaining the category of procedural gateway matters, and why the National Association of Securities Dealers rule imposing a six-year time limit on filing arbitration demands fell into this category, the *Howsam* opinion again referred to the "waiver" term and placed it into a decidedly procedural context:

> Thus "'procedural' questions which grow out of the dispute and bear on its final disposition" are presumptively not for the judge, but for an arbitrator, to decide. *John Wiley, supra*, at 557, 84 S. Ct. 909 (holding that an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration). So, too, the presumption is that the arbitrator should decide "allegation[s] of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital, supra*, at 24-25, 103 S. Ct. 927. Indeed, the Revised Uniform Arbitration Act of 2000 (RUAA), seeking to "incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal Arbitration Act]," states that an "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled." RUAA § 6(c), and comment 2, 7 U.L.A. 12-13 (Supp. 2002). And the

> comments add that "in the absence of an agreement to the contrary, issues of substantive arbitrability ... are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Id.*, § 6, comment 2, 7 U.L.A., at 13.

*Id.* at 84-85.

Regardless of which of the multiple possible meanings of "waiver" was intended by the Supreme Court in *Howsam*, or rather by the Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, which Justice Breyer was quoting in this portion of the *Howsam* opinion,[5] the fact remains that neither *Howsam*, *Moses H. Cone Memorial Hospital* , nor any of the other opinions cited by Yosemite for the proposition that issues of waiver are for an arbitrator to decide deal with an "extrinsic" waiver determination based on a party's activity in the judicial forum, or what this Court in *N & D Fashions* referred to as "default." Several courts have commented on this distinction in the wake of the *Howsam* decision and have held that extrinsic waiver determinations based on litigation conduct are for a court to decide. *See Webster Grading, Inc. v. Granite Re, Inc.*,

[5] *Moses H. Cone Memorial Hospital* actually does not say anything about whether waiver issues of any type should be decided by courts or arbitrators but rather points out that the liberal federal policy favoring arbitration embodied in the FAA applies to waiver as well as other issues. 460 U.S. 1, 24-25 (1983) ("The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.")

879 F. Supp.2d 1013, 1019 (D. Minn. 2012) (addressing argument that the waiver issue should be decided by an arbitrator and finding *Howsam* inapposite because the waiver at issue did not involve procedural prerequisites to arbitration under the agreement but rather an allegation of inconsistent litigation conduct in court); *see also Marie v. Allied Mortg. Corp*., 402 F.3d 1, 9-13 (1st Cir. 2005) (concluding that an issue of whether a 60-day claim filing time limit under the contract had been met was a procedural issue for the arbitrator to decide, citing *Howsam*, but that the issue of whether the plaintiff had waived her right to arbitrate by filing a charge with the EEOC was for the court to decide, based on the language of the FAA itself as well as the language of the Revised Uniform Arbitration Act relied upon in *Howsam*); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 216-19 (3d Cir. 2007) (following as persuasive the analysis in *Marie* and holding that *Howsam* did not "upset the 'traditional rule' that courts, not arbitrators, should decide the question of whether a party has waived its right to arbitrate by actively litigating the case in court" because when viewed in the context of the entire *Howsam* opinion, "it becomes clear that the Court was referring only to waiver, delay, or like defenses arising from non-compliance with contractual conditions precedent to arbitration, such as the NASD time limit rule at issue in that case, and not to claims of waiver based on active litigation in court"); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1121-22 (9th Cir. 2008) (finding *Howsam* inapplicable to an argument

that the defendant employer had breached the arbitration agreement or waived its right to arbitrate, and thus finding these issues appropriate for judicial determination, because these issues went to whether the agreement was valid, while the procedural issues discussed in *Howsam* went to the scope of a concededly valid arbitration clause).[6]

Waiver is a term that has apparently meant several different things to different courts, and certain types of intrinsic waiver defenses involving procedural prerequisites to arbitration under the agreement or forum-specific rules are indeed left to arbitrators to decide. But when the waiver at issue is extrinsic in nature and involves the parties' conduct in court, then the court rather than an arbitrator is the proper forum for resolving that issue.

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[6] This Court's decision in *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8th Cir. 2003), which Yosemite did not cite in its opening brief but which is discussed in both *Marie* and *Ehleiter*, does not aid Yosemite's position either. Although the *Transamerica* opinion does cite *Howsam* for the proposition that issues of waiver should be referred to arbitrators to decide, the waiver issue in that case involved previous arbitrations between some of the same parties over the same subject matter rather than previous litigation in court (although this is a matter of some confusion to courts reviewing *Transamerica* due to one reference in the opinion to litigation in the Oklahoma courts that has been referred to as a likely "slip of the pen"). *Parler v. KFC Corp.*, 529 F. Supp.2d 1009, 1013-14 (D. Minn. 2008) (citing to the parties' briefs in *Transamerica* to conclude that the sentence about prior litigation conduct in that opinion is dicta, because the case actually involved an allegation of waiver based on prior arbitration conduct); *see also Ehleiter*, 482 F.3d at 219-221 (analyzing *Transamerica* at length and finding its "unique procedural circumstances" inapplicable to most situations involving waiver based on participation in judicial proceedings).

### C. Just as Arbitrators Have Superior Expertise at Assessing Procedural Issues Arising in the Arbitral Forum, a Court Is Particularly Well Qualified to Judge the Intent and Effect of the Parties' Litigation Conduct in that Very Court

Another factor that led the Supreme Court in *Howsam* to conclude that arbitrators rather than courts should decide how to apply the NASD's six-year time limit rule was the matter of relative expertise: "the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively more able [than courts] to interpret and to apply it." 537 U.S. at 85. A year later, in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), a plurality of the Supreme Court, in another opinion written by Justice Breyer, again considered issues of expertise and competency in analyzing whether courts or arbitrators should decide whether an arbitration clause permitted arbitration on a classwide basis. Justice Breyer's opinion determined that the availability of classwide arbitration did not involve "judicial procedures" but rather "contract interpretation and arbitration procedures," issues that arbitrators are "well situated" to answer. 539 U.S. at 452-53.

Based upon this logic from *Howsam* and *Bazzle*, evaluating the significance of a party's previous conduct in the judicial forum is something that courts are better equipped than arbitrators to do. Not only do courts possess superior expertise and knowledge in this regard, but they also have an interest in protecting the judicial system from being abused by litigants seeking to use the courts to test their

legal theories only to retreat to an arbitral forum if things start to go south. This concern about protecting the court system itself, as well as litigation adversaries, from the tactical use of arbitration exit ramps is a theme that runs through much of the jurisprudence of waiver based on inconsistent litigation conduct. *See, e.g.*, *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 626 F.3d 156, 161 (2d Cir. 2010) ("a litigant is not entitled to use arbitration as a means of aborting a suit that did not go as planned in the district court."); *Cabinetree*, 50 F.3d at 391 (a party may not delay in invoking arbitration to first "see how the case was going in federal district court" in order to "play heads I win, tails you lose."); *Nat'l Found. for Cancer Research.*, 821 F.2d at 775 ("[Arbitration may not be used as a strategy to manipulate the legal process.").

Both before and after the Supreme Court's focus on relative expertise in *Howsam* and *Bazzle*, courts confronted with the question of whether courts or arbitrators should decide issues of waiver based on litigation conduct have pointed to the courts' superior expertise in sensing attempts at litigation gamesmanship, as well as their need to retain the power to protect themselves from such gamesmanship, as a reason for these decisions to remain with judges:

> Where the alleged waiver arises out of conduct within the very same litigation in which the party attempts to compel arbitration or stay proceedings, then the district court has power to control the course of proceedings before it and to correct abuses of those proceedings. Also, the comparative expertise considerations stressed in *Howsam* and *Green Tree* [*Bazzle*] argue for judges to decide this issue. Judges are

> well-trained to recognize abusive forum shopping. As well, the inquiry heavily implicates "judicial procedures," which *Green Tree* [*Bazzle*] suggests should be an important factor in presuming that an issue is for the court.

*Marie*, 402 F.3d at 13 (citations omitted). *See also Reid Burton Const. Inc. v. Carpenters Dist. Council of Southern Colo.*, 535 F.2d 598, 603 (10th Cir. 1976) (holding that while certain equitable defenses to arbitration are to be decided by an arbitrator, courts retain decisional authority over equitable defenses involving use of the courts themselves because "[t]o hold otherwise would unnecessarily hamper a court's control of its proceedings"); *Brothers Jurewicz, Inc. v. Atari, Inc.*, 296 N.W.2d 422, 427-28 (Minn. 1980) (holding that procedural issues of laches and waiver are generally for arbitrators to decide but that this general rule does not apply, and courts should instead resolve the issue, "in cases where the defense is not based on the underlying dispute but instead is derived from activity before the very court being urged to compel arbitration").

At the hearing on Yosemite's motion to compel arbitration, Judge Magnuson stated that Yosemite's long delay in mentioning its intention to invoke its arbitration rights, despite numerous prior chances to do so, "smell[ed] of 'gotcha'" and of "a lawyer playing little cutesy games." (Appellee Appx. 115.) This is precisely the sort of "smell test" based on litigation expertise and experience that judges are particularly well situated to conduct, and it was appropriate for the district court rather than an arbitrator to make the waiver determination here.

## II. Yosemite Waived Its Known Right to Arbitrate Where It Acted Inconsistently with that Right—Prejudicing Messina

### A. Standard of Review

Yosemite provides an overbroad and incomplete statement of the standard of review, citing to cases that did not involve review of a district court's determination that one party had waived its right to arbitrate by litigating in the court system. *See* YB at 13. In cases where such a waiver is at issue, this court has held that the waiver determination is reviewed de novo but the factual findings underlying that determination are reviewed for **clear error**. *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1090 (8th Cir. 2007) (emphasis added).

Whether the party seeking to arbitrate acted inconsistently with the right to arbitrate by substantially invoking the litigation machinery is a factual question reviewed for clear error. *See Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.*, 589 F.3d 917, 921 (8th Cir. 2009) ("Advance America argues the district court erred in finding Advance America substantially invoked the litigation machinery and acted inconsistently with its right to arbitration."). So is the question of whether those inconsistent actions prejudiced the other party. *See Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1119 (8th Cir. 2011) ("We cannot say that the district court erred in finding that Phoenix Land suffered prejudice.")

### B. Yosemite Acted Inconsistently with Its Known Rights Under the Arbitration Agreement by Moving the Dispute from State to Federal Court and Seeking to Move It to a Federal Court in California Before Ever Announcing an Intent to Resolve the Dispute in Arbitration

This Court requires that three elements be met before a party will be found to have waived its right to arbitration: the party "(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts." *Lewallen*, 487 F.3d at 1090 (quoting *Ritzel Communs. v. Mid-Am. Cellular Tel. Co.*, 989 F.2d 966, 969 (8th Cir. 1993). Here, Yosemite did not contest the fact that it knew of its right to arbitrate, given that it drafted the Arbitration Agreement at issue. (Appx. 98.) Thus most of the district court's analysis focused on the second and third factors.[7]

A party acts inconsistently with its right to arbitration when it "substantially invoke[s] the litigation machinery before asserting its arbitration right." *Ritzel*, 989 F.2d at 969 (citations and internal quotation marks omitted). Further, "[t]o safeguard its right to arbitration, a party must do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration." *Lewallen*, 487 F.3d at 1091 (citations and internal

[7] When the district court pivoted to the second factor in the analysis, it described it as "less obvious" than the first, knowledge factor (Appx. 98), rather than not "obvious" as Yosemite repeatedly paraphrases in its brief. YB at 18. To describe a factor as less obvious than one that has been conceded is not the same as describing the question as close or difficult to decide.

quotation marks omitted). Yosemite fell far short of this standard and did not safeguard its arbitration rights.

To the contrary, as the district court pointed out, Yosemite let many opportunities pass by when it could have notified Messina and the court of its intention to pursue arbitration, but did not:

> Knowing of its arbitration right from the outset, Yosemite could have asserted the right either when Messina filed his Complaint, in its Answer, during the three-and-a-half months between its Answer and its Motion to Transfer Venue, or in the alternative to its Motion to Transfer Venue. Rather, it elected to do so only after it lost its transfer motion.

(Appx. 99.) Compare *Lewallen*, 487 F.3d at 1091-92 (noting that "Green Tree had multiple opportunities to seek arbitration after Lewallen's objection put it on notice of her claims, and it let each of those opportunities pass."). In this sense, Yosemite's conduct here is not dissimilar from the conduct of the defendant in *Hooper* who, this Court found, was trying to play "heads I win, tails you lose" by first moving for substantive relief through a motion to dismiss and then moving to compel arbitration only when it lost that motion, rather than filing the two motions simultaneously or in the alternative. 589 F.3d at 922.

Yosemite suggests that the district court erred by finding substantial invocation of the litigation machinery where "the parties had not litigated any substantial issues going to the merits" and where Yosemite's litigation-related actions involved "solely . . . procedural issues, such as removal of the action from

state court to federal court, its motion to transfer venue to a federal district court in California, and the length of time that had elapsed before Yosemite filed the Motion." YB at 19. But nothing in any of this Court's precedents states that litigation of substantial issues going to the merits is necessary to a finding of conduct inconsistent with the right to arbitrate. To the contrary, litigation of the merits is only one example of inconsistent conduct that can support a waiver finding, and it is not present in all of this Court's waiver precedents. *See, e.g.*, *Stifel, Nicolaus & Co. Inc. v. Freeman*, 924 F.2d 157, 158 (8th Cir. 1991) (holding that plaintiff acted inconsistently with right to arbitrate when it engaged in discovery and waited for six months before seeking to compel arbitration of defendant's counterclaim, even though it filed no motions going to the merits during that six-month time period). Moreover, Yosemite's contention that none of the litigation in the case to date touches on the merits is debatable given some of the representations made in both parties' briefs on the motion to transfer. (Appellee Appx. 21 (denying existence of employment contract and referring to it as Messina's "wish list")); Appellee Appx. 95 (declaration of Messina describing the duties he performed for Yosemite)).

Similarly, while Yosemite contends that no discovery has taken place, the record presents a more nuanced picture. For one thing, according to Yosemite's counsel during the hearing on the motion to compel, the parties have already

exchanged initial disclosures. (Appellee Appx. 103.) For another, by filing its motion for transfer, Yosemite elicited a partial witness list from Messina in the course of opposing that motion, in which he listed eleven nonparty witnesses by name, described where they lived, and the subject matter about which he might call them to testify. (Appellee Appx. 39-41.) This is beneficial trial preparation material that Yosemite obtained was a direct result of its litigation conduct, and supports the district court's conclusion that it has substantially invoked the litigation machinery in a manner inconsistent with its right to arbitrate.

Finally, Yosemite's delay in invoking arbitration, combined with its lack of a good reason for that delay, is another factor arguing in favor of a finding that it acted inconsistently with its arbitration rights. In *Lewallen*, this Court found it significant that Green Tree waited approximately eleven months to invoke its right to arbitrate after being put on notice of Ms. Lewallen's claims and that "Green Tree fails to explain why it could not have asserted its right to arbitration earlier than it did." 487 F.3d at 1092. The district court here also found no satisfactory explanation for why Yosemite did not invoke its arbitration right in its answer, at the scheduling conference or in the course of its motion to transfer—in short, at any of the earlier junctures in the litigation when it could have done so—leading the court to conclude that its conduct smacked of "a lawyer playing little cutesy games." (Appellee Appx. 115.) To date, Yosemite has still provided no explanation

for its delay in raising the arbitration issue. Against this backdrop, notwithstanding the federal policy favoring arbitration as enunciated in *Moses H. Cone*, 460 U.S. at 24-25, the district court did not commit clear error in finding that Yosemite acted inconsistently with its arbitration rights.

### C. Yosemite's Litigation Conduct Prejudiced Messina by Requiring Him to Spend Time Preparing Discovery, Attending Scheduling Conferences, and Litigating Motions that He Would Need to Contest Again in a California-Based Arbitration

In finding that Yosemite's actions prejudiced Messina, the district court pointed to Yosemite's "inexcusable delay" and the resultant time Messina spent finding a new lawyer, attending scheduling conferences and hearings, and responding to Yosemite's transfer motion. (Appx. 100.) Yosemite complains that some of these effects on Messina do not seem very burdensome, since, for example, he may not have paid either his old lawyer or his new lawyer anything up front but may be paying on a contingency basis.[8] YB at 20. Such quibbling ignores this Court's guidance that a showing of prejudice need not be "onerous." *Hooper*, 589 F.3d at 923.

Moreover, other considerations that this Court recognized as constituting prejudice in *Lewallen* and other cases are also present here. For one thing, Messina prepared and propounded written discovery on Yosemite, and even though

[8] Yosemite refers to this comment about how Messina may have paid for his attorneys' time as a "pertinent fact" that the district court "ignored": in reality, it is nothing but speculation.

Yosemite has not yet responded, the time involved in preparing discovery is relevant to a finding of prejudice. 487 F.3d at 1093. Another source of prejudice is the potential duplication of efforts in the arbitral forum. *Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003). Here, many of the same considerations regarding his own convenience and the convenience of witnesses that caused Messina to oppose Yosemite's motion to transfer under 28 U.S.C. § 1404 would apply with equal force to an arbitration held in California under the terms of the Arbitration Agreement. (Appx. 55-57.) Thus, if Yosemite is successful in sending this dispute to arbitration, Messina would have to duplicate the efforts he expended in opposing the motion to transfer in seeking to move the arbitral proceedings back to Minnesota.

Finally, this Court in *Lewallen* noted that by waiting to move to compel arbitration for several months, Green Tree deprived both parties of "arbitration's main purpose: efficient and low-cost resolution of disputes." 487 F.3d at 1094 (citation and internal quotations omitted). The plaintiff in that case, who was in the midst of a bankruptcy proceeding, was particularly ill-equipped to weather such a delay in reaching the merits of her case. *Id.* Messina, who remains unemployed despite diligent efforts, (Appellee Appx. 97), is similarly ill-equipped to deal with the results of Yosemite's "cutesy games." (Appellee Appx. 115.) Accordingly, the

district court's finding that Messina was prejudiced by Yosemite's conduct was not clearly erroneous and should be affirmed.

## CONCLUSION

Yosemite has been making good on the threat of Rocky Bogenschutz to "drag [Messina] through the court system" for well over a year since receiving his Complaint on July 7, 2014. First it removed his claims to federal court in Minnesota; then it sought to move them to federal court in Fresno, California; when that gambit was unsuccessful, it sought to move them to arbitration in California instead. When that attempt also failed, Yosemite appealed to this Court.

The district court was the proper decisionmaker to assess whether Yosemite's litigation conduct was inconsistent with its known right to arbitrate and whether that litigation conduct prejudiced Messina. Moreover, it made the right decision and its order denying Yosemite's motion to compel arbitration should be affirmed.

Dated: October 2, 2015

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## CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(C)

The undersigned, an attorney, pursuant to both Fed. R. App. P. 32(a)(7)(C) and Eighth Circuit Rule 28, hereby certifies that the Plaintiff-Appellee's Brief contains 8,364 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Version 2010 in Times New Roman, 14 point font.

The digital version of this brief filed herewith has been scanned for viruses and to the best of my knowledge, is virus-free.

Dated: October 2, 2015

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**CERTIFICATE OF SERVICE FOR DOCUMENTS FILED USING CM/ECF**

I hereby certify that on October 2, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: October 2, 2015

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