IN THE SUPREME COURT OF MISSOURI
No. SC100608

CONNIE LANGE,
Plaintiff-Appellant,

v.

GMT AUTO SALES, INC.,
Defendant-Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Kristine Kerr, Circuit Judge

BRIEF OF AMICI CURIAE THE MISSOURI ORGANIZATION OF DEFENSE LAWYERS AND DRI CENTER FOR LAW AND PUBLIC POLICY IN SUPPORT OF RESPONDENT

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Interest of Amici Curiae

The Missouri Organization of Defense Lawyers ("MODL") is an association of Missouri attorneys dedicated to promoting improvements in the administration of justice and optimizing the quality of the services that the legal profession renders to society. The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing defendants in civil litigation, including defendants in products liability and mass tort litigation. An organization consisting entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

The DRI Center for Law and Public Policy is the public policy "think tank" and advocacy voice of DRI, Inc.—an international organization of around 16,000 attorneys who represent businesses in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as amicus curiae in the U.S. Supreme Court and federal courts of appeals, and also joins—at the request of its affiliated, state civil defense organizations—important amicus curiae efforts in state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system.

MODL and DRI support Respondent's position in Section II.D of its brief that the Eastern District Court of Appeals erroneously held that Defendant waived its right to

arbitration by filing a motion to dismiss. Pursuing a motion to dismiss before moving to compel arbitration serves judicial economy and the interests of the parties by resolving certain threshold questions before arbitration.

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ARGUMENT

Courts across the country treat waiver of the right to arbitration as a fact-intensive inquiry. Relevant to the analysis are the length of the invoking party's delay and the scope of the engagement in the litigation process. A rule that filing a motion to dismiss *per se* waives the right to arbitration, as the Eastern District Court of Appeals held below, is inconsistent with the holistic analysis courts employ.

I. The right to arbitration is favored, and a party does not waive its right by filing a motion to dismiss.

In *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018), the Eleventh Circuit Court of Appeals aptly summarized the benefit of arbitration and purpose of the arbitration waiver doctrine:

> Careful examination of our precedent reveals that the purpose of the waiver doctrine is to prevent litigants from abusing the judicial process. Acting in a manner inconsistent with one's arbitration rights and then changing course mid-journey smacks of outcome-oriented gamesmanship played on the court and the opposing party's dime. The judicial system was not designed to accommodate a defendant who elects to forego arbitration when it believes that the outcome in litigation will be favorable to it, proceeds with extensive discovery and court proceedings, and then suddenly changes course and pursues arbitration when its prospects of victory in litigation dim. Allowing such conduct would ignore the very purpose of alternative dispute resolution: saving the parties' time and money.

The waiver doctrine thus exists to prevent gamesmanship and to preserve arbitration's benefits: saving the parties' time and money. Parties contract for arbitration precisely to realize those benefits, and the law recognizes their value.

Missouri law reflects the nationwide policy favoring arbitration. Indeed, in its opinion below, the Court of Appeals recognized that a "strong presumption exists against

waiver," and courts are to "resolve in favor of arbitration any doubt as to whether a party has waived arbitration." *Lange v. GMT Auto Sales, Inc.*, No. ED 111498, 2024 WL 1625276 at *2 (Mo. App. E.D. Apr. 16, 2024).

While the U.S. Supreme Court's opinion in *Morgan v. Sundance, Inc.*, 596 U.S. 411, 416 (2022), clarified part of the waiver analysis, it did not create a sea-change in arbitration law. *Morgan* addressed only a narrow issue: whether courts may apply an arbitration-specific prejudice requirement to find waiver of the right to arbitrate. *Morgan* acknowledged that the Federal Arbitration Act's policy favoring arbitration means that "a court must hold a party to its arbitration contract just as the court would to any other kind" and held that a finding of prejudice is not a condition of waiver. 596 U.S. 411, 418 (2022). In emphasizing the limits of its holding, the Court specifically declined to address "the role state law might play in resolving when a party's litigation conduct results in the loss of a contractual right to arbitrate." *Id.* Accordingly, the specific question of when a party has waived its right to compel arbitration was left open by *Morgan*.

Though the Missouri Supreme Court has not addressed this issue, courts across the country have held that a party waives the right to compel arbitration where it "substantially invokes the judicial process." *See Burnett v. Nat'l Assoc. of Realtors*, 615 F.Supp.3d 948, 956 (W.D. Mo. 2022); *Tellez v. Madrigal*, 292 F.Supp.3d 749, 757 (W.D. Tex. 2019). What constitutes a substantial invocation of the judicial process is a fact-intensive inquiry. For example, the Alabama Supreme Court declined to find waiver based on substantial invocation of the litigation process even where the defendant filed a motion to dismiss, the parties engaged in limited discovery, and the defendant failed to raise arbitration as an

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affirmative defense in three of its answers. *African Methodist Episcopal Church, Inc. v. Smith*, 217 So.3d 816, 834 (Ala. 2016).

Additional factors may also bear on whether a party has acted inconsistently with its right to arbitrate, including the length of the delay in invoking the right; whether the party seeking arbitration has taken intervening steps, e.g., seeking judicial discovery procedures not available in arbitration; and whether a defendant filed a counterclaim without seeking a stay. *See Consolidated Brokers Ins. Serv., Inc. v. Pan-Am. Assur. Co., Inc.*, 427 F.Supp.2d 1074, 1079 (D. Kan. 2006). Waiver has not been found where a party's participation in the litigation consists of motions to dismiss "which were largely limited to challenging the sufficiency of the plaintiffs' pleadings and did not seek to establish the [party's] own allegations." *Baricuatro v. Indus. Pers. and Mgmt. Serv., Inc.*, 927 F.Supp.2d 348, 358 (E.D. La. 2013).

In its opinion below, the Eastern District Court of Appeals effectively created a *per se* rule that the filing of a motion to dismiss waives the right to compel arbitration. The facts in this case, and guidance from other courts around the country, illuminate why such a *per se* rule is imprudent. GMT did not substantially invoke the judicial process, and its actions in the circuit court were consistent with the right to arbitrate. Lange filed her petition on June 28, 2021, and GMT responded by filing a motion to dismiss on July 28. In its motion to dismiss, GMT "requested the circuit court interpret the statutory provisions to determine whether [Lange] submitted viable claims." *Lange*, 2024 WL 1625276, at *1. The court denied GMT's motion to dismiss on September 14, and GMT filed its motion to stay the proceedings and compel arbitration on September 20. GMT's invocation of its

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right to arbitrate within three months after the filing of the action, and within one week after the denial of the motion to dismiss, was entirely consistent with its contractual right to compel arbitration. *See Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 230 (Mo. App. W.D. 2002) (finding that "the four-month delay between the filing of the lawsuit and the application to stay the proceeding pending arbitration was not substantial").

II. The filing of a motion to dismiss is consistent with right to arbitrate and judicial economy.

The U.S. Supreme Court has explained that a "prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008). This objective is achieved by permitting a party to litigate a motion to dismiss before invoking its right to arbitration. Filing a motion to dismiss as a threshold matter, even if it engages with the merits, is not a substantial invocation of the judicial process. Rather, it is an initial test of the petition and an opportunity to narrow the issues in dispute.

While more streamlined and cost-effective than litigation, arbitration still requires time and expense. Permitting a defendant to test the sufficiency of the pleadings, without advancing its own allegations or counterclaims, may obviate the need for arbitration altogether. In the absence of complete dismissal, a motion to dismiss may narrow the issues to be tried in arbitration.

CONCLUSION

The Court should reject Appellant's theory of waiver and affirm the judgment of the circuit court.

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CERTIFICATE OF COMPLIANCE

All parties consented to the filing of this brief.

This brief was served on all parties via the Court's e-filing system. This brief includes the information required by Rule 55.03 and complies with Rule 84.06.

Relying on the word count of the Microsoft Word program, the undersigned certifies that the number of words in this brief is 1,811.

The electronic copies of this brief were scanned for viruses and found virus-free through the Symantec antivirus program.

/s/ *Clark H. Cole*