AFFIRM; and Opinion Filed March 14, 2024.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00661-CV

ZURVITA HOLDINGS, INC., ZURVITA, INC., JAY SHAFER, AND SHADRON STASTNEY, Appellants
V.
MARK JARVIS AND TRACY JARVIS, Appellees

On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause No. 219-05546-2022

MEMORANDUM OPINION

Before Chief Justice Burns, Justice Garcia, and Justice Kennedy
Opinion by Justice Kennedy

Zurvita Holdings, Inc. ("ZHI"), Zurvita, Inc. ("Zurvita"), Jay Shafer ("Shafer"), and Shadron Stastney ("Stastney") (collectively, "Appellants") appeal the trial court's interlocutory order denying their motion to compel arbitration. In two issues, Appellants assert the trial court erred by implicitly finding they waived their right to compel arbitration and urge that the issue of waiver should have been presented to the arbitrator for decision, and not to the trial court. We conclude ZHI and Zurvita substantially invoked the judicial process to the detriment of appellees,

Mark Jarvis and Tracy Jarvis,[1] and thus, waived any right they might have had to arbitrate. With respect to Shafer and Stastney, we conclude they failed to establish the existence of an agreement to arbitrate. Accordingly, we affirm the trial court's order denying Appellants' motion to compel arbitration. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

I. Relationship of the Parties

Zurvita is a multi-level marketing company, also known as a direct sales company, that sells health and wellness products through a network of sales agents known as independent business consultants. Zurvita is a wholly owned subsidiary of ZHI.

Mark Jarvis was the original founder of ZHI and its largest individual shareholder. He held various positions within the company including co-Chairman of the Board of Directors and Chief Executive Officer. He was also a founder, director, and employee of Zurvita. Mark's wife Tracy was also a founder of ZHI and Zurvita and a director of Zurvita. And she was once an independent contractor and then an employee of Zurvita.[2] At all times relevant here, Shafer and Stastney are represented to have been the directors of both ZHI and Zurvita.

[1] Because Mark Jarvis and his wife Tracy share a last name, we will refer to them by their first names for clarity in this opinion. We may sometimes refer to Mark and Tracy collectively as "Appellees."

[2] Tracy had an employment agreement with Zurvita. It contained a confidentiality agreement but did not contain an arbitration agreement.

Over time, the relationship between the parties deteriorated, and the discord among them culminated in this lawsuit.

In urging that all of the claims asserted in this lawsuit should be submitted to arbitration, Appellants rely on the January 1, 2014 Senior Executive Employment Agreement between Zurvita and Mark (the "Employment Agreement"). That agreement contains the following arbitration provision:

> Resolution of Disputes: Negotiation & Arbitration. In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of thirty (30) days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration. Thus, except for "Core Proceedings" as defined under the United States Bankruptcy Code, ***the Parties agree to submit to binding arbitration all claims, disputes and controversies between them*** **(and their respective employees, officers, directors, representatives, attorneys, and other agents), whether in tort, contract or otherwise, including, without limitation, the formation, validity, binding effect, interpretation, performance, application, breach or termination thereof, as well as all related non-contractual claims,** ***arising out of or relating in any way to this Agreement***.
>
> Any arbitration proceeding will be conducted in Houston, Texas and will be **governed by the Federal Arbitration Act[3]** (Title 9 of the United States Code), **and be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association** (or, if such rules are not then in effect, such other rules of the American Arbitration Association as may be successor to such rules

[3] The Federal Arbitration Act (FAA) may govern a written arbitration agreement clause enforced in Texas court if parties have expressly contracted for FAA's application. *See In re Advance PCS Health, L.P.*, 172 S.W.3d 603, 305–06 & n. 3 (Tex. 2005).

> or shall be generally applicable to commercial disputes). An arbitrator may award any remedy that would be available to the parties if the dispute were resolved in a court of law. The arbitrator shall determine on a case by case basis the appropriate party(ies) to pay the costs of the arbitration.

(emphasis added).

In addition, and as are relevant to some of the claims Zurvita asserted against Mark in this case, the Employment Agreement contains Non Competition, Non Solicitation and Confidentiality provisions. More particularly, with respect to these provisions the Employment Agreement provides, in part:

> Confidentiality.
> . . .
> [after recognizing Mark will have access to confidential information and trade secrets] The Parties agree that such confidential information and trade secrets will be solely and strictly used for its sole benefit and not in competition with or to the detriment of ZURVITA, directly or indirectly, by [Mark], or any of his agents, servants, future employees or future employers.
> . . .
> Non-Competition. [Mark] agrees that, during the term of this Agreement, and for a period of one (1) year thereafter, [Mark] shall not directly or indirectly:
>
> (i) Solicit or induce any individual, corporation or entity which is a client or customer of ZURVITA in an attempt to:
>
> (1) enter into a business relationship with a client or customer of ZURVITA if the business relationship is competitive with any aspect of ZURVITA's business; or
>
> (2) reduce or eliminate the business of such client or customer conducts with ZURVITA; or

(ii) Solicit or induce any ZURVITA employee . . . to cease working for ZURVITA.

Non-Disclosure. During the term of this Agreement, and for a period of one (1) year thereafter, [Mark] covenants and agrees that, except as required by the proper performance of his duties with ZURVITA, he shall not divulge, transfer, or derive any compensation or remuneration beyond the scope of this Agreement from any Confidential Information or Trade Secrets concerning any ZURVITA clients, customers, employees, to any other person.

II. Litigation History

Germaine to our determination of whether some or all of the Appellants had a right to compel arbitration, in the first instance, and whether they waived that right, is our consideration of the Employment Agreement's arbitration provision, the allegations in the case, and the conduct of the parties after an arbitrable claim was asserted. In that regard, we find the following history and conduct of the parties to be instructive.

This lawsuit originated on September 29, 2021, when Mark filed his Original Petition against ZHI, Shafer, and Stastney in Dallas County asserting a breach of contract claim against ZHI, for ZHI's alleged failure to pay promised annual compensation, and derivative claims on behalf of ZHI against Shafer (an officer and director of ZHI) and Stastney (a director of ZHI) for breach of fiduciary duty, for their alleged unauthorized, self-serving conduct. In addition, Mark, individually and on behalf of ZHI, sought temporary and permanent injunctive relief against Shafer and Stastney. On November 15, ZHI, Shafer, and Stastney filed their Original Answer, generally denying Mark's allegations.

On February 11, 2022, the parties filed a Stipulated Motion for Protective Order that provided guidelines for the exchange of confidential and personal information.

On February 14, 2022, ZHI, Shafer, and Stastney filed Special Exceptions, First Amended Answer, Verified Denials, and Affirmative Defenses.

Mark filed his First and Second Amended Petitions on April 27, 2022, and on May 20, 2022, respectively. In the Second Amended Petition, Mark, individually and on behalf of ZHI, added a request for declaratory relief against Shafer and Stastney. The amended petitions did not otherwise materially differ from the Original Petition.

On May 20, 2022, ZHI, Shafer, and Stastney served notices of intent to take the depositions of Mark and Tracy. Three days later, Mark moved to quash the deposition of Tracy. ZHI, Shafer, and Stastney responded to the motion on June 10, 2022, requesting that the court compel Tracy to appear and testify.

On May 25, 2022, Mark filed a motion for partial traditional summary judgment on his declaratory judgment action seeking declarations voiding resolutions passed by ZHI's Board of Directors in contravention of ZHI's bylaws and granting him access to ZHI's corporate records. ZHI, Shafer, and Stastney filed their response to the motion on June 23, 2022.

On June 14, 2022, ZHI filed a counterclaim against Mark and a third-party petition against Tracy and GNO Holdings, Inc. ("GNO"), a Direct Sales Company,

licensed by ZHI to sell a modified version of Zurvita's flagship product in Asia, and owned 50% by LaCore Enterprises, LLC, 25% by M&T Jarvis Enterprises, LLC, and 25% by ZHI. Zurvita joined ZHI's pleading as an intervenor. By this pleading, ZHI and Zurvita sought monetary relief in excess of $1,000,000. The crux of ZHI's and Zurvita's complaints are that Mark, Tracy and GNO engaged in unfair competition by launching a new product that would directly compete with Zurvita's products, interfered with Zurvita's contracts and prospective contracts with consultants, and misappropriated their trade secrets. As to specific claims, ZHI asserted breach of fiduciary duty claims against Mark and Tracy; fraud and fraud in the inducement claims against Mark, Tracy and GNO; and a breach of contract claim against GNO. Zurvita asserted tortious interference with existing contracts and with prospective relations against Mark, Tracy and GNO and sought a declaratory judgment against GNO. ZHI and Zurvita, collectively, asserted a claim for business disparagement against Mark and Tracy, and a claim for misappropriation of trade secrets against Mark, Tracy and GNO.

On June 29, 2022, ZHI and Zurvita amended their pleadings to include a request for injunctive relief and, on June 30, 2022, they sought expedited discovery.

On July 1, 2022, the trial court entered a temporary restraining order restraining Mark, Tracy, and GNO from wrongfully competing with ZHI and Zurvita, soliciting employees of ZHI and Zurvita, and from using proprietary, confidential and trade secret information of ZHI and Zurvita. The court granted ZHI

and Zurvita's request for expedited discovery, in part. The temporary restraining order was twice extended before the trial court heard the request for a temporary injunction on July 26, 2022.

On July 5, 2022, ZHI and Zurvita served deposition notices on Mark and the corporate representative of GNO, and in July, they filed several emergency motions seeking to compel disclosures, impose sanctions, and continue the hearing on the temporary injunction.

On July 12, 2022, ZHI and Zurvita filed their second amended pleading seeking affirmative relief. They attached the Employment Agreement as an exhibit thereto. In connection with its request for injunctive relief, Zurvita cited various provisions of the Employment Agreement and asserted Mark breached the Employment Agreement by soliciting and inducing Zurvita's Field[4] to cease working for Zurvita. On July 19, 2022, ZHI and Zurvita amended their pleadings again to add Kyle Mickleburgh, Vice-President of Marketing for GNO, as a third-party defendant. In addition, they filed a motion for contempt asserting Mark, Tracy and GNO had failed to obey the temporary restraining order, and a response to Tracy and GNO's motion to strike ZHI's and Zurvita's claims against them.

On July 20, 2022, ZHI filed a response to Mark's emergency motion to compel and for sanctions.

[4] "Zuvita Field" refers to Zurvita's independent business consultants.

On July 26, 2022, the trial court denied ZHI and Zurvita's application for a temporary injunction.

According to the sworn declaration of counsel for Appellees, attached to Appellees' response to Appellants' motion to compel arbitration, in July 2022 ZHI and Zurvita served hearing subpoenas on Mark, Tracy and LaCore Nutraceuticals, Inc., a non-party, filed emergency motions for contempt and sanctions, and participated in the merit-based depositions of Jenifer Grace, as representative of GNO, Mark, David Gutierrez[5] and Jay Shafer, and on July 27, 2022, after ZHI and Zurvita's request for a temporary injunction was denied, they served notices of intent to serve subpoenas to produce documents to non-parties. The subpoenas then issued on August 10.

On July 29, 2022, Mark, joined by Tracy, filed a Third Amended Petition adding a breach of contract claim by Tracy against Zurvita.

On August 22, 2022, ZHI and Zurvita filed a response to Mark, Tracy and GNO's motion to reconsider sanctions that had been imposed against them.

On September 2, 2022, the parties submitted an amended protective order, which was signed by the trial court on September 6, 2022.

On September 6, 2022, Appellants filed a Motion to Reset Trial and Amend Scheduling Order seeking to schedule the case for a non-jury trial the week of June

[5] It appears that David Gutierrez was affiliated with Zurvita and administered its FaceBook Group and that ZHI and Zurvita claimed Mark actively recruited Gutierrez to join his new venture.

5, 2023.

Pursuant to the declaration of Appellees' counsel, on September 9, 2020, the parties entered a Rule 11 agreement pursuant to which they agreed to transfer the case to Collin County, and the case was subsequently transferred to Collin County on October 5, 2022.

On December 6, 2022, the transferee court entered a discovery control plan and scheduling order setting the case for a bench trial on July 17, 2023. The order was approved by the parties' attorneys.

On January 6, 2023, ZHI and Zurvita filed a Motion to De-Designate Documents as Confidential.

On February 14, 2023, the trial court issued an Order Granting Motions to Strike that struck and dismissed, without prejudice, the third-party claims filed by ZHI and Zurvita against Tracy, GNO, and Mickleburgh. On that same day, ZHI and Zurvita filed a counterclaim against Tracy, by which ZHI asserted a breach of fiduciary duty claim against her and alleged she had participated in a conspiracy, and an amended counterclaim adding a breach of contract claim by Zurvita against Tracy.

On February 15, 2023, ZHI and Zurvita filed a motion for partial summary judgment as to Mark's liability for breach of fiduciary duty.

On February 17, 2023, ZHI and Zurvita filed a Supplement to Motion to De-Designate Documents as Confidential.

On February 17, 2023, Mark and Tracy filed a Fourth Amended Petition adding a breach of contract claim by Mark against Zurvita.

On February 17, 2023, ZHI, Zurvita, Shafer and Stastney filed a Fourth Amended Answer and Counterclaims and Intervention against Plaintiffs/Counter-Defendants. Again, in seeking injunctive relief, Zurvita asserted Mark breached the Employment Agreement's non-compete, confidentiality and non-solicitation provisions. While Shafer and Stastney are listed as "Plaintiff/Counter Defendants," they did not assert any counterclaims against Mark or Tracy and did not seek injunctive relief.

On February 21, 2023, ZHI and Zurvita filed a hearing notice for April 5, 2023 on their motion for partial summary judgment as to Mark's liability for breach of fiduciary duty.

On February 21, 2023, Appellants served a notice of intent to take the deposition of Lacore Nutraceutical, Inc.'s representative, Joe Wood.

On March 17, 2023, ZHI and Zurvita filed a Motion for Protective Order as to Mark and Tracy's Interrogatories and Requests for Production.

On March 20, 2023, ZHI and Zurvita filed their expert designations.

On March 21, 2023, Appellants filed a Motion for Continuance and Motion to Amend Discovery Control Plan and Scheduling Order seeking to continue the July 17, 2023 trial setting. In their motion, they reference Appellees' Fourth Amended Petition adding a claim against Zurvita for breach of the Employment Agreement

and the need to conduct additional discovery and to depose Mark with respect to this claim.

On March 24, 2023, ZHI and Zurvita filed a motion to quash Appellees' notice of intent to take the depositions of their corporate representatives.

On April 12, 2023, ZHI and Zurvita filed a motion to compel discovery responses from Appellees.

On April 14, 2023, ZHI and Zurvita filed a motion to continue hearing on Appellees' motion to compel.

On May 11, 2023, the trial court signed an order on Appellees' motions to compel ordering ZHI and Zurvita to respond to discovery and produce responsive documents.

On May 11, 2023, the trial court signed an order denying Appellants' motion for continuance of the trial setting and request for an amended discovery control plan.

On May 11, 2023, the trial court also signed an order requiring ZHI and Zurvita to pay attorney's fees, collectively in the amount of $15,892, to compensate Mark and Tracy for fees they incurred in obtaining an order on their motions to compel responses to discovery requests.

On May 12, 2023, Appellants filed their motion to compel arbitration seeking an order compelling the parties to binding arbitration and staying proceeding pending arbitration. The motion relied on the arbitration clause in the Employment

Agreement as the basis for seeking to compel arbitration. Appellants acknowledged that Tracy, Shafer and Stastney are non-signatories to the Employment Agreement and urged the claims should proceed together because Mark asserted in his petition that in their absence, complete relief cannot be afforded, and the claims are intertwined. As to ZHI, Appellants asserted Appellees are estopped to deny that Zurvita is the alter ego of ZHI, and ZHI is bound by the Employment Agreement signed by Zurvita. Appellants filed a supplemental brief in support of their motion to compel arbitration on June 5, 2023, urging the trial court to refer all issues, including the issue of waiver, to arbitration. Appellees responded arguing Appellants had waived any right to compel arbitration and that the legal theories Appellants rely on to compel arbitration of claims involving non-signatories do not apply.

On June 1, 2023, ZHI and Zurvita filed a motion to continue the hearing on Appellees' amended no evidence motion for summary judgment.

On June 12, 2023, Appellants filed a motion for reconsideration of the attorney's fees award of May 11, 2023.

On June 27, 2023, ZHI and Zurvita filed another motion to quash corporate representative depositions.

On June 30, 2023, the trial court held a hearing on Appellants' motion to compel arbitration. The trial court took judicial notice of its entire file in this case. The trial court signed an order denying the motion on July 6, 2023. The order does

not state the basis or bases for the trial court's ruling. Appellants filed their notice of appeal the same day. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.016, 171.098(a)(1) (authorizing appeal of order denying application to compel arbitration made under Section 171.021).

DISCUSSION

I. Waiver—Question for Arbitrator or Court

In their first issue, Appellants assert the trial court abused its discretion by not referring all issues, including the issue of waiver of a right to arbitrate, to the American Arbitration Association ("AAA") for decision. Appellants contend that by incorporating the AAA Commercial Arbitration Rules into the Employment Agreement, the parties delegated the issue of waiver of the right to arbitrate by litigation conduct to a AAA arbitrator. Appellants urge the United States Supreme Court's decision in *Howsam* and the Texas Supreme Court's decision in *TotalEnergies* support their position. *See Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002); *TotalEnergies E&P USA, Inc. v. MP Gulf of Mex., LLC*, 667 S.W.3d 694 (Tex. 2023). For the reasons set forth herein, we disagree.

When a party adopts the AAA rules that include the following provisions:

> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer such matters first to a court.

> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null, and void shall not for that reason alone render invalid the arbitration clause.
>
> (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

(Am. Arbitration Ass'n, Commercial Arbitration Rules & Mediation Procedures, R-7 (eff. Oct. 1, 2013)), the arbitrability of claims is a matter for the arbitrator, but waiver remains a matter for the courts. *See Perry Homes v. Cull*, 258 S.W.3d 580, 588–89 (Tex. 2008). In *Perry Homes*, the Texas Supreme Court specifically addressed the *Howsam* decision, one of the cases Appellants rely on, and rejected an argument that by stating the "presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability,'" the United States Supreme Court changed the federal arbitration landscape with respect to waiver by litigation conduct. *Id.* at 588. The Texas Supreme Court then set forth the reasons for its rejection of this argument, including the following.

> First, "waiver" and "delay" are broad terms used in many different contexts. *Howsam* involved the National Association of Securities Dealers' six-year limitations period for arbitration claims, not waiver by litigation conduct; indeed, it does not appear the United States Supreme Court has ever addressed the latter kind of waiver. Although the federal courts do not defer to arbitrators when waiver is a question of litigation conduct, they consistently do so when waiver concerns limitations periods or waiver of particular claims or defenses.

> As *Howsam* involved the latter rather than the former, its reference to waiver must be read in that context.
>
> Second, the *Howsam* court specifically stated that "parties to an arbitration contract would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters." Thus, the NASD's six-year limitations rule in that case was a gateway matter for the NASD arbitrator because "the NASD arbitrators, comparatively more expert about the meaning of their own rule, [they] are comparatively better able to interpret and to apply it." By contrast, when waiver turns on conduct in court, the court is obviously in a better position to decide whether it amounts to waiver. "Contracting parties would expect the court to decide whether one party's conduct before the court waived the right to arbitrate."
>
> Third, as the *Howsam* Court itself stated, parties generally intend arbitrators to decide matters that "grow out of the dispute and bear on its final disposition," while they intend courts to decide gateway matters regarding "whether the parties have submitted a particular dispute to arbitration." Waiver of a substantive claim or delay beyond a limitations deadline could affect final disposition, but waiver by litigation conduct affects only the gateway matter of where the case is tried.

Id. at 588–89 (citations omitted). Accordingly, Appellants' reliance on *Howsam* is misplaced.

Appellants claim that in *TotalEnergies* the Texas Supreme Court substantively changed the waiver analysis when an arbitration provision includes a reference to the AAA Commercial Arbitration Rules. Appellants contend that the issue of waiver goes to the arbitrability of the claims and to the arbitrator's jurisdiction, which is addressed in AAA Commercial Arbitration Rule 7 and is committed to the arbitrator. We disagree with Appellants' reading of *TotalEnergies*. In that case, the court was confronted with the distinct question of who decides

arbitrability when the agreement incorporates the AAA or similar rules that delegate arbitrability to the arbitrator. *TotalEnergies*, 667 S.W.3d at 697. It concluded that, "as a general rule, an agreement to arbitrate in accordance with the AAA or similar rules constitutes a clear and unmistakable agreement that the arbitrator must decide whether the parties' disputes must be resolved through arbitration." *Id.* at 707 & n.17, 712. But *TotalEnergies* did not address waiver of the right to arbitrate.

Because binding authority holds that courts, not arbitrators, determine whether a party waived the right to arbitrate by substantially invoking the judicial process to the detriment of the opposing party, and Appellants' reliance on *Howsam* and *TotalEnergies* is misplaced, we overrule Appellants' first issue. *See Perry Homes*, 258 S.W.3d at 588–89.

II. Compelling Arbitration and Waiver

Having concluded the trial court, rather than the arbitrator, determines whether a party has waived its right to arbitrate through litigation conduct, we next consider Appellants' second issue challenging the trial court's denial of their motion to compel arbitration.

A. Standard of Review

We review a ruling denying a motion to compel arbitration for an abuse of discretion. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018). Under this standard, we defer to the trial court's factual determinations if they are supported by the evidence and review its legal determinations *de novo*. *Id.* Whether a party has

waived arbitration by litigation conduct is a question of law, which we review *de novo*. *See Perry Homes*, 258 S.W.3d at 598.

B. Existence of an Agreement to Arbitrate

As an initial matter, we note that a party seeking to compel arbitration must establish two elements: (1) the existence of a valid arbitration agreement; and (2) that the claims asserted are within the scope of the agreement. *See In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 605 (Tex. 2005); *Budd v. Max Intern., LLC*, 339 S.W.3d 915, 918 (Tex. App.—Dallas 2011, no pet.); *see also JM. Davidson, Inc. v. Webster,* 128 S.W.3d 223, 227 (Tex. 2003) (although there is strong presumption favoring arbitration, presumption arises only after party seeking to compel arbitration proves a valid arbitration agreement exists). If these two showings are made, then the burden shifts to the party resisting arbitration to present a valid defense to the agreement, and absent evidence supporting such a defense, the trial court must compel arbitration. *See In re AdvancePCS,* 172 S.W.3d at 607.

In this case, the parties concede, and the record conclusively establishes, that the parties and signatories to the Employment Agreement containing the arbitration provision upon which Appellants rely are Zurvita and Mark. ZHI, Tracy, Shafer and Stashney are not parties or signatories to that agreement. Because we conclude *infra* that ZHI substantially invoked the litigation process to the detriment of Mark and Tracy, we will limit our discussion here to whether non-signatory movants Shafter and Stastney established the claims against them are within the scope of an

agreement to arbitrate.

Whether parties have agreed to arbitrate is a gateway matter ordinarily committed to the trial court. *In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011). We recognize that, notwithstanding this general rule, because arbitration is a matter of contract, the parties may agree to commit this gateway matter to the arbitrator. *See Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 631 (Tex. 2018). Nevertheless, a presumption favors adjudication of arbitrability by the courts absent clear and unmistakable evidence of the parties' intent to submit that matter to arbitration. *Id.* The unmistakable clarity standard follows the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration and protects unwilling parties from compelled arbitration of matters they reasonably expected a judge, not an arbitrator, would decide. *Id.*

When the parties incorporate the AAA rules into their arbitration agreement, the arbitrability of a dispute between the signatories of that agreement is a matter for the arbitrator. *See id.* But determining whether a claim involving a non-signatory must be arbitrated differs from a determination when the dispute is between signatories to an arbitration agreement that incorporates the AAA rules and is generally a gateway matter for the trial court, not the arbitrator. *Id.* at 631–32. Even when the party resisting arbitration is a signatory to an arbitration agreement, questions related to the existence of an arbitration agreement with a non-signatory are for the court, not the arbitrator. *Id.* at 632 (in dispute between party to arbitration

agreement and non-signatory, incorporation of AAA rules into arbitration agreement did not show clear intent to arbitrate arbitrability). The involvement of a non-signatory is an important distinction because a party cannot be forced to arbitrate absent a binding agreement to do so. *Id.* And an agreement that is silent about arbitrating claims against non-signatories does not unmistakably mandate arbitration or arbitrability in such cases. *Id.*

The arbitration provision at issue in this case provides, in part:

> [T]he Parties agree to submit to binding arbitration all claims, disputes and controversies between them (and their respective employees, officers, directors, representatives, attorneys, and other agents), whether in tort, contract or otherwise, including, without limitation, the formation, validity, binding effect, interpretation, performance, application, breach or termination thereof, as well as all related non-contractual claims, arising out of or relating in any way to this Agreement.

In addition, the agreement incorporates the AAA Commercial Rules. To the extent incorporation of the AAA rules expressed any intent to arbitrate arbitrability, it did so only with respect to Mark and Zurvita and possibly with respect to their employees, officers, directors, representative, attorneys, and other agents. And the Employment Agreement disclaimed the existence of any third-party beneficiaries.[6] *See Jody James*, 547 S.W.3d at 632–33.[7]

[6] The agreement specifically provided, "This Agreement may not be assigned, transferred or otherwise inure to the benefit of any third person, firm or corporation, by operation of law or otherwise, without the written consent by the other party hereto, except as herein specifically provided to the contrary."

[7] In *Jody James*, the court noted, "The insurance policy directly incorporates the AAA rules only for those disputes [between Jody James and Rain & Hail, LLC], not for disputes between Jody James and

With respect to non-signatories Shafer and Stastney, the record shows the claims asserted against them are derivative claims on behalf of ZHI for breach of fiduciary duty and claims by Mark, individually and on behalf of ZHI, for declaratory and injunctive relief. The derivative claims are in essence claims by ZHI against two of its directors and/or officers stemming from their alleged breach of their fiduciary duties. Mark's claims for declaratory and injunctive relief are predicated on his status as a stockholder of ZHI. These claims do implicate or trigger the "and their employees, officers, directors, representatives, attorneys or other agents" clause of the Employment Agreement's arbitration provision. Thus, whether the claims concerning Shafer and Stastney were arbitrable was a gateway matter committed to the trial court. *Id.* at 628, 632.

The claims asserted against Shafer and Stashney concern their actions as officers and/or directors of ZHI. The claims against them are not in their capacity as an officer or director of Zurvita, and they do not arise from or relate in any way to the Employment Agreement. Thus, Shafer and Stastney failed to establish the existence of an agreement to arbitrate. Accordingly, the trial court did not abuse its

unspecified third parties [such as Altman Group, Inc.]. The contract also does not 'expressly provide[] that certain non-signatories are considered parties' or otherwise expressly extend the contract's benefits to third parties." *Jody James*, 547 S.W.3d at 633. There is a presumption against conferring third party beneficiary status, which can only be overcome by the parties' clear expression of intent. *First Bank v. Brumitt*, 519 S.W.3d 95, 103 (Tex. 2017). Courts look solely to the contract's language, construed as a whole to determine whether the contracting parties intended to benefit a third party directly. *Id.* at 102.

discretion in denying the motion to compel arbitration as to the claims against Shafer and Stastney. *See id.* at 631–32.

C. Substantial Invocation of Judicial Process

With respect to the remaining claims, even if we assume without deciding that ZHI and Tracy could be bound by the arbitration clause in the Employment Agreement, we conclude the trial court did not err in denying ZHI and Zurvita's motion to compel arbitration with respect to claims asserted by and against them because they substantially invoked the judicial process to the detriment of Mark and Tracy.

Whether a party waived its right to arbitrate is a question of law. *Sivanandam v. Themesoft, Inc.*, No. 05-21-00645-CV, 2022 WL 872623, at *2 (Tex. App.—Dallas Mar. 24, 2022, pet. denied) (mem. op.) (citing *Henry*, 551 S.W.3d at 115). A party waives the right to compel arbitration if (1) the party substantially invokes the judicial process and (2) the opposing party suffers detriment or prejudice as a result. *Perry Homes*, 258 S.W.3d at 589–90 (party cannot substantially invoke litigation process and then switch to arbitration on the eve of trial); *Louisiana-Pacific Corp. v. Newport Classic Homes, L.P.*, No. 05-21-00303-CV, 2023 WL 3000579, at *6 (Tex. App.—Dallas Apr. 19, 2023, no pet.) (mem. op.). The judicial process is substantially invoked when the party seeking arbitration has taken specific and deliberate actions, after the filing of the suit, that are inconsistent with the right to arbitrate or has actively tried, but failed, to achieve a satisfactory result through

litigation before turning to arbitration." *Pilot Travel Ctrs., LLC v. McCray*, 416 S.W.3d 168, 183 (Tex. App.—Dallas 2013, no pet.) (citing *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (orig. proceeding) (per curiam)). There is a strong presumption against waiver of arbitration, but it is not irrebuttable. *Perry Homes*, 258 S.W.3d at 584.

The substantial-invocation element requires the court to consider the totality of the circumstances. *Id.* at 591. The analysis involves numerous factors, including the following:

- whether the movant is a plaintiff or a defendant in the lawsuit;
- when the movant knew of the arbitration clause;
- how long the movant waited before seeking arbitration and any reasons for delay;
- how much discovery has been conducted, who initiated it, whether it related to the merits rather than arbitration or standing, and how much of it would be useful in arbitration;
- whether the movant sought judgment on the merits;
- whether the movant filed affirmative claims for relief in court;
- the amount of time and expense the parties have expended on litigation;
- whether the discovery conducted would be unavailable in arbitration;
- whether judicial activity would be duplicated in arbitration; and
- when the case was to be tried.

RSL Funding LLC v. Pippins, 499 S.W.3d 423, 430 (Tex. 2016) (per curiam); *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 512 (Tex. 2015); *Perry Homes*, 258 S.W.3d at 591. Of course, all of these factors are rarely presented in a single case. *Perry Homes*, 258 S.W.3d at 591. Federal courts have found waiver based on a few, or even a single one. *Id.* (citing *Restoration Preserv. Masonry, Inc. v. Grove Eur. Ltd.*, 325 F.3d 54, 62 (1st Cir. 2003) (finding three-year delay alone sufficient to establish waiver); *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (finding removal to federal court alone sufficient to establish waiver)). Although substantial invocation must be decided on a case-by-case basis, in *Perry Homes*, the Texas Supreme Court suggested that the element would be satisfied if the movant conducted full discovery, filed motions going to the merits, and sought arbitration on the eve of trial. *Perry Homes*, 258 S.W.3d at 590. A party who enjoys substantial direct benefits by gaining an advantage in the pretrial litigation process should be barred from turning around and seeking arbitration with the spoils. *Id.* at 593.

Based on our analysis below of the relevant factors, we conclude that the record supports the trial court's implicit finding that ZHI and Zurvita substantially invoked the judicial process before seeking to compel arbitration.

1. Knowledge of the Arbitration Clause and Delay

ZHI and Zurvita concede they were aware of the arbitration clause in the Employment Agreement. And, in fact, ZHI and Zurvita referenced the agreement in their pleadings. They also attached and relied on the Employment Agreement as part of the relief sought by them in the litigation. Yet they did not seek to invoke arbitration until eleven months from their first request for affirmative relief and after extensive litigation in this case. Appellants contend that the operative dates for calculating the period of delay are February 17, 2023, the date Appellees filed their Fourth Amended Petition in which Mark asserted a breach of contract claim against Zurvita, and May 12, 2023, the date Appellants filed their Motion to Compel Arbitration. Appellants' contention ignores the fact that the arbitration agreement applies to more than breach of contract claims and that Zurvita brought arbitrable claims long before Mark asserted a breach of contract claim against it.

The arbitration provision at issue in this case is fairly broad as it encompasses disputes and controversies arising out of or relating in any way to the Employment Agreement. *See TMI Inc. v. Brooks*, 225 S.W.3d 783, 791 n. 7 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding that phrase "arising out of and/or relating to" in arbitration agreement is "broad form in nature, evidencing the parties' intent to be inclusive rather than exclusive.").

When Zurvita intervened in this case on June 14, 2022, it asserted claims of tortious interference with existing contracts and with prospective relations against

Mark, Tracy and GNO, business disparagement against Mark and Tracy, and misappropriation of trade secrets against Mark, Tracy and GNO. In doing so, it claimed Mark breached his duty to Zurvita as an employee, officer, and board member. It alleged that there were rumors that Mark and Tracy were calling active Zurvita consultants to solicit them to sell for GNO in the Zurvita Territory, defined as the United States, Mexico and Canada, and that Mark and GNO intended to launch a new product to directly compete with Zurvita. While ZHI and Zurvita did not specifically reference the Employment Agreement in this particular filing, it does implicate the non-compete, non-solicitation and confidentiality provisions in that agreement, and arguably triggered the arbitration provision because they constitute non-contractual claims that arise out of or relate to the Employment Agreement.

But, if any doubt existed, when ZHI and Zurvita filed their Second Amended Verified Counterclaim, Third-Party Petition, Intervenor's Petition and Application for Injunctive Relief on July 12, 2022, they specifically referenced the Employment Agreement's Confidentiality, Non-Competition, and Non-Disclosure provisions (paragraphs 8(a), 8(b), and 8(c) of the Employment Agreement), and included the Employment Agreement as an attachment. And in connection with Zurvita's request for injunctive relief, it alleged, "[Mark] Jarvis breached the 2014 Jarvis Employment Agreement by soliciting and inducing Zurvita's Field to cease working for Zurvita and/or intends to breach the 2014 Jarvis Employment Agreement with the launch of R-Zip." In connection with Zurvita's claim for tortious interference with existing

contract, for which Zurvita sought monetary damages, it alleged, "[Mark] Jarvis has actively solicited, recruited and poached Zurvita's Field to sell his new product directly interfering with the contracts with each independent consultant." In connection with Zurvita's misappropriation of trade secrets claim, for which it sought monetary damages, it alleged, "GNO, [Mark] Jarvis, and Tracy Jarvis have acquired the list of Zurvita's Field and/or list of independent consultants and have used such trade secrets in preparation for launching their own competitive business" and that Mark "has misappropriated this trade secret [Zeal] by acquiring by improper means or by using or disclosing it without consent. Specifically, [Mark] Jarvis has acquired the formula for Zeal and used such trade secrets in preparation for launching his own competitive business." There can be no doubt that these claims relate to or arise out of Mark's Employment Agreement and are subject to the agreement's arbitration provision. Moreover, it is telling that Appellants sought to compel all of Appellees' claims to arbitration, not just Mark's breach of contract claim against Zurvita.

Accordingly, we conclude that arbitrable claims existed in this case at least by June 14, 2022, and certainly no later than July 12, 2022. With respect to the relevant time period to consider when determining the delay in seeking to compel arbitration, Appellants urge, in part, that because AAA Rule 38 provides that "[a] request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate,"

the approximate one month period from June 29, 2022, the date they first sought injunctive relief, to July 26, 2022, the date the trial court considered ZHI and Zurvita's application for temporary injunction, should be omitted. *See* AM. ARBITRATION ASS'N, Commercial Arbitration Rules & Mediation Procedures, R-38 (eff. Oct. 1, 2013). But Appellants fail to acknowledge that, in addition to injunctive relief, Zurvita was pursuing arbitrable claims for which it sought monetary relief during this time. Accordingly, we conclude the trial court could have considered the time period from June 14, 2022, to May 12, 2023, as the period of delay, and all litigation activities during that span of time for purposes of waiver. *See, e.g.*, *Sivanandam*, 2022 WL 872623, at *4.

2. Discovery

Relevant discovery facts in determining whether a movant has substantially invoked the judicial process include how much discovery has been conducted and who initiated it, whether discovery relates to the merits rather than arbitrability or standing, and how much of the discovery would be useful in arbitration. *See Adams v. StaxxRing, Inc.*, 344 S.W.3d 641, 648 (Tex. App.—Dallas 2011, pet. denied).

ZHI and Zurvita not only initiated, but expedited discovery. They sought and obtained orders compelling discovery they were requesting. A large portion of the discovery was done initially in connection with ZHI and Zurvita's request for a temporary injunction, but it was also discovery on the merits of their claims for monetary relief, not discovery concerning arbitrability or standing. *Id.* More

particularly, on June 28, 2022, ZHI propounded 93 requests for production of documents to Mark and on July 1, 2022, propounded 5 interrogatories to Mark, Tracy and GNO, and an additional 10 requests for production to Mark and 10 requests for production of documents to Tracy. All of those discovery requests defined "Zurvita" as including ZHI and/or its wholly owned subsidiary Zurvita, Inc. Thus, those discovery requests can be attributed to both ZHI and Zurvita. During the month of July 2022, the depositions of Shafter, individually and as representative of ZHI and Zurvita, David Gutierrez, Jenifer Grace, and Mark were taken. And, according to Appellees' counsel's declaration, on July 27, 2022, after the trial court denied their request for a temporary injunction, ZHI and Zurvita issued a number of notices of intent to serve subpoenas to produce documents to non-parties. Those subpoenas issued on August 10, 2022. In addition, between January 1, 2023, and February 21, 2023, ZHI and/or Zurvita sent a total of 113 additional requests for production of documents to Mark, 97 requests for production of documents to Tracy, 120 requests for production of documents to GNO, and 44 requests for production of documents to Mickleburgh. Again, the requests from ZHI defined "Zurvita" to include both ZHI and Zurvita and can be attributed to both entities. On February 21, 2023, Appellants served their notice of intent to take the oral deposition of Joe Wood, a non-party to the case. While initiating and conducting their own discovery, ZHI and Zurvita filed motions for protection and moved to compel arbitration only

after the fact discovery deadline had passed.[8] It would appear that discovery was substantially completed at that time. *See Perry Homes*, 258 S.W.3d at 596. Discovery was completed except for two depositions that the court ordered would be allowed before trial. The amount of discovery in this case, and particularly the amount of discovery propounded by ZHI and Zurvita, support the substantial-invocation element of waiver.

3. Other Factors and Considerations

We note that the record here is extensive. Although we have a reporter's record for only one of several hearings, the clerk's record consists of over five thousand pages, and the trial court took judicial notice of its file. At the time appellants filed their motion to compel, the clerk's record included over forty-eight hundred pages of pleadings, motions, and other documentation, and between June 14, 2022 and May 12, 2023, over forty-four hundred pages.

Seeking judgment on the merits is indicative of waiver. *Id.* at 592. The record includes a letter from counsel for Appellants providing notice that ZHI and Zurvita's partial motion for summary judgment as to Mark's liability for breach of fiduciary duty was set for hearing on April 5, 2023.[9] This supports a conclusion of waiver.

[8] Fact discovery closed on March 29, 2023, and expert discovery closed on June 2, 2023.

[9] It appears the hearing did not go forward on April 5 because the parties agreed to mediate before Mark would be required to file a response.

Asserting claims for affirmative relief in court can support waiver. *RSL Funding*, 499 S.W.3d at 430–31. In this case, not only did ZHI and Zurvita file counterclaims against Mark, they also brought third-party actions. Thus, this factor supports a determination ZHI and Zurvita substantially invoked the judicial process.

The amount of time and expense the parties have expended in litigation is a factor bearing on the waiver issue. *Id.* at 430. As previously noted, almost a year had passed since Zurvita entered the litigation when Appellants moved to compel arbitration. Appellees' attorney indicated in his declaration that Appellees had incurred over $300,000 in attorney's fees in this litigation. This is some evidence in favor of the substantial-invocation element. *See, e.g.*, *Sivanandam*, 2022 WL 872623, at *5.

Finally, the record shows that at the time Appellants filed their motion to compel arbitration Appellees had a no-evidence motion for summary judgment pending, ZHI and Zurvita had been ordered to pay Appellees' attorney's fees as a sanction for discovery abuse, and the trial court had denied their motion to continue the trial setting of July 17, 2023, in which they indicated they needed to do additional discovery related to Mark's breach of contract claim. These facts also support a conclusion Appellants substantially invoked the judicial process before they filed their May 12, 2023 motion to compel arbitration.

As shown above, ZHI and Zurvita conducted extensive merits-based discovery, filed a dispositive motion on the merits of their breach of fiduciary duty

claim against Mark, and sought arbitration on the eve of trial,[10] after their motion for continuance of the trial setting was denied and after discovery sanctions had been imposed against them. Under *Perry Homes,* ZHI and Zurvita substantially invoked the judicial process. *See Perry Homes*, 258 S.W.3d at 590. Accordingly, the trial court did not err by implicitly concluding the substantial-invocation element had been established. *See Ideal Roofing, Inc. v. Armbruster*, No. 05-13-00446-CV, 2013 WL 6063724, at *6–8 (Tex. App.—Dallas Nov. 18, 2013, no pet.) (mem. op.) (concluding that the substantial-invocation element was met on facts comparable to the instant case); *Ellman v. JC Gen. Contractors*, 419 S.W.3d 516, 520–21 (Tex. App.—El Paso 2013, no pet.) (same).

D. Prejudice

Substantial invocation of the judicial process does not waive a party's arbitration rights unless the opposing party proves that it suffered prejudice as a result.[11] *Perry Homes*, 258 S.W.3d at 593. In the context of waiver of the right to arbitrate, prejudice generally focuses on the inherent unfairness caused by a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage. *G.T. Leach Builders*, 458 S.W.3d at 515; *Perry Homes*, 258 S.W.3d

[10] The Texas Supreme Court has emphasized that "the eve of trial" is not limited to the evening before trial. *Perry Homes*, 258 S.W.3d at 596.

[11] We recognize that recently the United States Supreme Court held that under the FAA a party no longer needs to demonstrate that invocation of the judicial process resulted in prejudice to establish waiver. *See Morgan v. Sundance*, 596 U.S. 411, 419 (2022). Nevertheless, in an abundance of caution, we will address the issue of prejudice here.

at 597. The two critical factors in determining whether a party was prejudiced by the opposing party's delay in seeking to arbitrate are (1) expenses incurred by the party during the period of delay, and (2) the effect on the parties' legal positions, including whether the party moving for arbitration would gain an unfair advantage by switching forums from litigation to arbitration. *Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 545 (Tex. 2014); *Perry Homes*, 258 S.W.3d at 597. Here, Appellees presented sufficient evidence of prejudice resulting from ZHI's and Zurvita's substantial invocation of the judicial process as described above.

The delay factor in this case includes not only the period from June 14, 2022, to May 12, 2023, that Appellees spent litigating this case, but also the fact that the case was only about two months away from a trial setting when the motion to compel was filed. *See id.* (prejudice supported by fact that parties seeking arbitration "delayed disposition by switching to arbitration when trial was imminent and arbitration was not").

Appellees presented evidence of the financial detriment to them as a result of ZHI's and Zurvita's invocation of the litigation process. Appellees' attorney represented that the fees and expenses totaled more than $300,000 in prosecuting and defending claims by and against ZHI and Zurvita. Appellees introduced evidence of the extensive discovery that had taken place in the case. The arbitration agreement does not specify that discovery conducted in the lawsuit can be utilized in arbitration without the necessity for duplication of the written discovery and

depositions.[12] *See Ideal Roofing, Inc.*, 2013 WL 6065724, at *8. If referred to arbitration, Appellees face the possibility of starting the case over. In addition to incurring additional attorney's fees, Appellees would be required to fund half of the arbitration costs. Appellees' counsel declared that a reasonable estimate for Appellees' portion of the administrative costs and arbitrator's fees would be an additional $100,000.

Finally, we consider whether Appellees showed any harm to their legal position. We conclude that they did. Appellants did not move to compel arbitration until after they had been sanctioned for discovery abuse and had unsuccessfully moved for reconsideration of same. This fact supports a finding of prejudice. *See, e.g.*, *Hogg v. Lynch, Chappell & Alsup, P.C.*, 480 S.W.3d 767, 796 (Tex. App.—El Paso 2015, no pet.) (finding prejudice where party did not move for arbitration until she lost a discovery dispute and faced the near-certainty of a sanctions order). In sum, there is evidence to support the trial court's implicit finding that Appellees were prejudiced by ZHI's and Zurvita's substantial invocation of the litigation process before moving to compel arbitration.

Because ZHI and Zurvita waived any right they might have had to arbitrate, we need not address their legal theories for extending the application of the

[12] The arbitration agreement provides that arbitration conducted pursuant to the agreement shall be conducted "to the extent not inconsistent" with the Commercial Arbitration Rules of the American Arbitration Association. However, no provision of the arbitration agreement describes what discovery is permitted under the agreement.

Employment Agreement's arbitration provision to Tracy. TEX. R. APP. P. 47.1. We overrule Appellants' second issue.

CONCLUSION

We affirm the trial court's July 6, 2023 Order Denying Motion to Compel Arbitration.

/Nancy E. Kennedy/
NANCY KENNEDY
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ZURVITA HOLDINGS, INC., ZURVITA, INC., JAY SHAFER, AND SHADRON STASTNEY, Appellants

No. 05-23-00661-CV V.

MARK JARVIS AND TRACY JARVIS, Appellees

On Appeal from the 219th Judicial District Court, Collin County, Texas
Trial Court Cause No. 219-05546-2022.
Opinion delivered by Justice Kennedy. Chief Justice Burns and Justice Garcia participating.

In accordance with this Court's opinion of this date, the trial court's order denying appellants' motion to compel arbitration is **AFFIRMED**.

It is **ORDERED** that appellee MARK JARVIS AND TRACY JARVIS recover their costs of this appeal from appellant ZURVITA HOLDINGS, INC., ZURVITA, INC., JAY SHAFER, AND SHADRON STASTNEY.

Judgment entered this 14th day of March, 2024.