FILED
03/25/2025
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 24-0760

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 24-0760

MONARCH HEATING AND COOLING, LLC,

Petitioner and Appellee.

v.

PETRA, INC.,

Defendant and Appellant,

BOZEMAN WEST APARTMENTS, LP; SACCOCCIA LANDS III, LLC; BCRH AVION VENTURE, LLC; STOCKMAN BANK OF MONTANA; WCW OLYMPUS BOZEMAN, LLC; and JOHN DOES 1-10,

Defendants.

BOZEMAN WEST APARTMENTS, LP; SACCOCCIA LANDS III, LLC; and PETRA, INC.

Counterclaimants,

v.

MONARCH HEATING AND COOLING, LLC,

Counter-Defendant.

BOZEMAN WEST APARTMENTS, LP; and SACCOCCIA LANDS III, LLC,

Cross-Claimants,

v.

PETRA, INC.,

Cross-Defendant.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County, Cause No. DV-16-2024-126, the Honorable Andrew Breuner Presiding.

Appearances:

Edward J. Guza
Lance F. Carl
E.J. GUZA & ASSOCIATES
25 Apex Drive, Suite A
Bozeman, MT 59718
Telephone: (406) 586-2228
eguza@ejguzalaw.com
lcarl@ejguzalaw.com
Attorneys for Appellant

Cherche Prezeau
Jackson Maynard
CHRISTENSEN & PREZEAU, PLLP
24 W. 6th Avenue, Suite 501
Helena, MT 59601
Telephone: (406) 442-3690
cherche@cplawmt.com
jackson@cplawmt.com
Attorneys for Appellee

Trent Baker
DATSOPOULOS, MacDONALD & LIND, PC
201 West Main, Suite 201
Missoula, MT 59802
Telephone: (406) 728-0810
tbaker@dmllaw.com
Attorney for Defendants Bozeman West Apartments, LP, and Saccoccia Lands III, LLC

Jon A. Wilson
Nathan A. Burke
BROWN LAW FIRM, PC
315 North 24th Street
P.O. Box Drawer 849
Billings, MT 59103-0849
Telephone: (406)-248-2611
Jwilson@brownfirm.com
nburke@brownfirm.com
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Sources

ARGUMENT

Monarch Heating and Cooling, LLC ("Monarch") argues that it has satisfied the three-prong test set forth in *Downey v. Christensen* to establish that Petra, Inc.

("Petra") impliedly waived its right to arbitration. The parties do not dispute the first prong of the *Downey* test that Petra had knowledge of its right to arbitration. As to the second prong, Monarch's Response Brief enumerates six alleged acts by Petra that it argues were inconsistent with Petra's right to arbitrate. Finally, Monarch argues that federal law no longer requires Monarch to show prejudice under *Downey's* third prong, but, that it was prejudiced nonetheless.

Monarch's arguments are without merit. First, Monarch has not established that Petra acted inconsistently with its right to compel arbitration. Monarch misconstrues the facts of this case and what actions or inactions constitute waiver. The six enumerated "acts" or "inactions" that Monarch relies on to argue in favor of waiver fall well short of what is required under Montana law to establish waiver. Implied waiver via a course of conduct must be unequivocal. Monarch has failed to explain or draw any causal connection between any of its enumerated acts and Petra's unequivocal waiver of its right to arbitration.

Second, the Court should reject Monarch's argument that it is no longer required to show prejudice in determining whether the right to arbitration has been waived. As addressed below, the Supreme Court case *Morgan v. Sundance* relied on by Monarch, still allows prejudice to be considered as a factor in determining whether waiver has occurred and does not conflict with Montana's law.

Third, Monarch has failed to show that it was prejudiced by Petra's invocation

of its right to arbitration.

I. Monarch has failed to establish that Petra acted inconsistently with its right to arbitrate.

a. Monarch's six enumerated "acts" or "inactions" that it argues constitute waiver do not support the conclusion that Petra unequivocally waived its right to arbitration. Monarch has failed to overcome the strong presumption in favor of arbitration and against waiver.

Monarch enumerates six "acts" or "inactions" that it claims were inconsistent with Petra's right to compel arbitration and constitute waiver. As addressed individually below, none of these allegations, whether true or not, support the conclusion that Petra unequivocally waived its right to arbitration. Notably, Monarch cannot point to any active participation by Petra in this lawsuit other than filing an Answer and Counterclaim. Petra has filed no dispositive motions. Petra has taken no depositions. Petra has conducted no written discovery and Petra has not responded to any written discovery. Petra has only attempted to enforce its right to move this dispute to arbitration.

Rather, Monarch's entire Brief suggests that Petra impliedly waived its right to arbitration by not communicating its intent to enforce the arbitration clause at the absolute earliest moment possible. As explained below, this is not what the law requires, and Monarch has failed to overcome the strong presumption in favor of arbitration and against waiver. "Any doubts regarding waiver are resolved in favor of arbitration." *See Holmes, Woods & Diggs v. Gentry*, 333 S.W.3d 650, 654 (Tex.

App. 2009); *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985); ("Waiver of arbitration is not a favored finding and there is a presumption against it.").

1. *Monarch alleges that Petra waived its right to arbitration by "failing to timely assert its right to arbitration in response to Monarch's First Amended Complaint."*

This allegation is factually inaccurate and does not support waiver. Monarch would have the Court believe that if a party does not assert its right to arbitration at the earliest possible moment, this constitutes an automatic waiver of the right to arbitrate. This is not what the law requires. Monarch fails to address or grapple with the Montana case law cited in Petra's Opening Brief specifically addressing the timeliness of asserting the right to arbitration. Namely, *Holm-Sutherland*, *Mont. Pub. Empl's Ass'n*, *Downey*, and *Peeler*. *See Holm-Sutherland Co. v. Town of Shelby*, 1999 MT 150, ¶ 30, 295 Mont. 65, 982 P.2d 1053 (holding that the defendant waived its right to arbitration by waiting until only a few weeks before trial to file its motion to compel arbitration approximately two and one-half years later); *Mont. Pub. Empl's Ass'n v. City of Bozeman*, 2015 MT 69, ¶¶17-19, 378 Mont. 337, 343 P.3d 1233 (holding that the plaintiff had not waived its right to arbitration when it waited four years before filing action to compel arbitration); *Downey v. Christensen*, 251 Mont. 386, 389-92, 825 P.2d 557, 559-61 (1992) (holding that the defendant had not waived its right to arbitration by answering on the merits, asserting a counterclaim,

and participating in limited discovery before compelling arbitration); *Peeler v. Rocky Mountain Log Homes Canada, Inc.*, 2018 MT 297, ¶ 24, 393 Mont. 396, 431 P.3d 911 (holding the defendant did not waive its right to arbitration by waiting until after plaintiff had initiated litigation to demand arbitration).

In this case, the timeline of events does not support finding that Petra waived its right to arbitration by delaying assertion of that right. Unlike the defendant in *Holm-Sutherland*, Petra did not sleep on its right to arbitration until a few weeks before trial. Monarch initiated this litigation and Petra moved to compel arbitration before any meaningful litigation occurred in the District Court. Furthermore, Petra notified Monarch via letter of its intent to compel arbitration well in advance of filing its Motion. As such, there is no support for Monarch's argument that Petra intentionally waived its right to arbitration by delaying in asserting its right.

2. *Monarch alleges that Petra waived its right to arbitration by "failing to assert its intent to arbitrate in response to Monarch's First Combined Discovery Requests."*

This allegation lacks any context and does not support waiver. Petra did not assert its right to arbitration in discovery because Petra has never responded to <u>any</u> discovery requests issued by Monarch. Petra has not engaged in any discovery specifically to avoid the implication that it was availing itself of the discovery process in the District Court. A number of courts have determined that participation in discovery, can militate in favor of finding waiver of the right to arbitrate. *See*

Citibank v. Stok & Assocs., 387 F. App'x 921, 924 (11th Cir.2010).

Petra's position has always been that Monarch is entitled only to the limited discovery allowed in arbitration. Petra informed Monarch that it would seek a protective order if Monarch sought to compel discovery in the present litigation, and in fact, Monarch took no steps to compel discovery. Petra's refusal to engage in discovery cuts against Monarch's argument that Petra intentionally waived its right to arbitration.

3. *Monarch alleges that Petra waived its right to arbitration by "failing to inform Monarch of its intent to elect arbitration when it sought Monarch's consent to set aside Petra's default."*

This allegation and argument are irrelevant to the issue of waiver. Monarch makes no effort to connect the fact that Petra's default was set aside to waiver except to point out that Petra did not attempt to enforce the arbitration clause sooner. However, the mere passage of time, without more, has never been a relevant fact under Montana law.

Petra's default is a red herring. When Petra learned of this lawsuit and the default that had been entered against it, Petra's first and most important objective was to set aside the default. Obviously, if Monarch obtained a default judgment against Petra, it would not matter if Petra later demanded arbitration. Furthermore, as a defaulted party Petra could not move to compel arbitration until the default was set aside. Both the District Court and Monarch agreed that good cause existed to set

aside the default due to the fact that Petra's registered agent never forwarded Monarch's Complaint or informed Petra of the lawsuit at all. As such, the fact that Petra sought Monarch's stipulation to set aside the default before informing Monarch of its intent to compel arbitration is not inconsistent with its right to arbitration.

4. *Monarch alleges that Petra waived its right to arbitration by failing to assert its intent to elect arbitration when moving to set aside its default.*

Again, Monarch implies that it would have been appropriate to address in the Stipulated Motion to Set Aside Default that Petra intended to compel arbitration. Monarch provides no analogous case law where any litigant has ever taken this step or where a court has found that not raising a future intent to compel arbitration in a motion to set aside a default constitutes waiver. Petra's default and its decision to compel arbitration are wholly unrelated. As stated above, Petra could not have moved to compel arbitration unless its default was set aside first. Informing Monarch or the District Court that it intended to compel arbitration before its default was set aside is putting the cart in front of the horse and does not support waiver.

5. *Monarch alleges that Petra waived its right to arbitration by failing to assert arbitration as an affirmative defense in its Answer.*

This allegation is inaccurate and still does not constitute a waiver of the right to arbitration. Petra did assert arbitration as an affirmative defense by reference and, even if it did not do so directly in its initial Answer, promptly amended its Answer

to include arbitration as a defense.

The rationale for requiring Rule 8(c), M.R.Civ.P., defenses to be affirmatively pled are the underlying principles of fairness and notice. *Rolan v. New W. Health Servs.*, 2017 MT 270, ¶ 14, 389 Mont. 228, 405 P.3d 65. "However, Rule 8(c) is not absolute; a district court may allow a defendant to amend its answer to include an affirmative defense pursuant to M.R.Civ.P. 15." *Id.* (citing *Keller v. Dooling*, 248 Mont. 535, 542, 813 P.2d 437, 441 (1991)). Rule 15 allows a party to amend once as a matter of course within 21 days after serving a pleading or only with the opposing party's written consent or the court's leave. Rule 15(a)(1)-(2), M.R.Civ.P. Parties' have an "absolute right" to amend as a matter of course regardless of how defective the pleading is. *Eliason v. Evans*, 178 Mont. 212, 218, 583 P.2d 398, 402 (1978).

In this case, Petra amended its Answer pursuant to Rule 15 to raise arbitration as an affirmative defense promptly as a matter of course within 21 days after serving it. As such, Petra did not require Monarch's written consent or the Court's leave to do so. Monarch argues that Petra's incorporation of arbitration as an affirmative defense by reference to other pleadings was inconsistent with the fair notice requirements of Rule 8(c)(1), M.R.Civ.P. However, even if the Court agrees, Monarch ignores that Petra timely amended its Answer to assert arbitration as a defense pursuant to Rule 15(a)(1), M.R.Civ.P. Certainly, by amending as a matter

of course within the permitted 21 days, which was its "absolute right," Petra has satisfied the principles of fairness and notice that underly the purpose of pleading affirmative defenses.

Furthermore, numerous courts have found that not asserting arbitration as an affirmative defense in an initial pleading is not a waiver of the right to arbitrate. "A party's failure to assert the existence of an arbitration clause in an initial pleading does not irrevocably bar that party from subsequently invoking that clause." *Hoover Gen. Contractors-Homewood, Inc. v. Key*, 201 So. 3d 550, 553 (Ala. 2016) (quoting *Ex parte Hood*, 712 So. 2d 341, 346 (Ala. 1998) ("[W]e would also affirm that simply failing to plead in one's answer that a plaintiff's claims are subject to arbitration will not in itself constitute a waiver."); *Ex parte Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 So.2d 1, 3 (Ala.1986) ("'It has been held that the service of an answer in an action on the contract does not constitute waiver of the right to arbitration, even though the answer does not set up the arbitration clauses as a defense.'") (quoting 6 C.J.S. Arbitration § 37 (1975) (emphasis added)).

In *Hoenig*, the court found that the employer defendant did not waive its right to arbitration when it amended its answer and affirmative defenses in order to invoke its right to arbitrate only one month after it filed its initial answer and three months after the plaintiff filed the complaint. *Hoenig v. Karl Knauz Motors, Inc.*, 983 F. Supp. 2d 952, 966 (N.D. Ill. 2013).

In *U.S. Bank*, the court held that the defendant bank did not waive its right to arbitration by amending its answer to assert arbitration as an affirmative defense and then moving to compel arbitration. *U.S. Bank, N.A. v. Wilkens*, 2010-Ohio-262, ¶ 44. The court also found significant that the defendant bank's attorney sent a letter to opposing counsel of its intent to amend its answer to include the defense of arbitration. *Id.* at ¶ 38 ("relevant to the question of waiver is whether the party seeking to compel arbitration has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion").

Furthermore, delay in asserting arbitration as a defense waives the defense only where the delay is "to such an extent that the opposing party incurs actual prejudice." *Gen. Star Nat. Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002). The "delay" that Monarch claims Petra caused is on an order of magnitude smaller than what other courts have required to find waiver. *Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218, 222 (1st Cir.1995) (concluding that the defendant waived its right to arbitrate where it "chose not to invoke arbitration from July 1992 until October 1993 and [the plaintiff] bore the costs of proceeding to try to obtain the sums it thought owed"); *Stone v. E.F. Hutton & Co.*, 898 F.2d 1542, 1543 (11th Cir.1990) (per curiam) (holding that the defendant waived its right to arbitrate where it delayed its assertion of that right for 20 months).

In this case, Petra did not delay in asserting its right to arbitration as a defense

or advising Monarch that it intended to compel arbitration. On August 20, 2024, Petra filed an Answer to Monarch's Complaint. On August 29, 2024, (only nine (9) days after filing its Answer) Petra sent a letter advising Monarch that Petra intended to file a motion to stay the proceeding and compel arbitration. (Dkt. No. 44, Ex. A). Then, on September 10, 2024 (only twenty-one (21) days after the filing its Answer), pursuant to Rule 15(a)(1), M.R.Civ.P., Petra amended its Answer to Monarch's First Amended Complaint withdrawing its request for a jury trial and specifically asserting the affirmative defense of arbitration. (Dkt. No. 40).

Monarch glosses over the fact that Petra sent a letter notifying Monarch of its intent to compel arbitration and quickly amended its Answer to assert arbitration as an affirmative defense. Petra did not wait years to assert its right to arbitration, it did so in a matter of days and specifically informed Monarch's counsel of its intent to compel arbitration before doing so. As such, Petra did not delay in asserting its right to arbitration as a defense.

6. *Monarch alleges that Petra waived its right to arbitration by asserting counterclaims against Monarch, including breach of contract.*

Monarch's allegation that filing counterclaims is an implied waiver of Petra's right to arbitration cuts directly against established case law in Montana and other courts. This Court has already established that answering on the merits and asserting counterclaims, without more, is insufficient to constitute waiver. *Downey*, 251 Mont. at 391.

Further, Petra did not become the instigator of this lawsuit by filing a compulsory counterclaim against Monarch for breach of contract. Monarch argues that Petra became the instigator of this lawsuit by filing a counterclaim against Monarch for breach of contract. Monarch relies on a quote from *Holm-Sutherland* that "[w]hen a party instigates litigation on a contract without the mention of a right to arbitrate, that party presumptively waives the right to later demand arbitration pursuant to a clause in the contract." *Holm-Sutherland*, ¶ 28 (citations omitted)

As explained in Petra's Opening Brief, in each of the cases cited by *Holm-Sutherland*, it was the plaintiff who decided to instigate litigation over a contract and then later moved to compel arbitration under the same contract. Each of these cases is factually distinguished from this case. Petra did not voluntarily instigate this litigation. Rather, Petra responded to Monarch's Complaint and was compelled to assert compulsory counterclaims in order not to waive them. "A pleading must state as a counterclaim any claim that, at the time of service, the pleader has against an opposing party if the claim... arises out of the transaction or occurrence that is subject of the opposing party's claim." Rule 13(a)(1)(A), M.R.Civ.P. If a compulsory counterclaim is not pleaded it will be barred. *Zimmerman v. Connor*, 1998 MT 131, ¶ 12, 289 Mont. 148, 958 P.2d 1195.

In the context of waiver of the right to arbitration, the Sixth Circuit has addressed the distinction between bringing compulsory as opposed to permissive

counterclaims. The Court stated:

> A counterclaim, while adding a claim into existing litigation, affirmatively requests relief only in the broadest sense. Moreover, the extent to which asserting a counterclaim is inconsistent with arbitration depends, in part, on whether the counterclaim is permissive or compulsory. In the case of a permissive counterclaim, the party is willfully expanding the scope of litigation. In the case of a compulsory counterclaim, the party is required to respond to the litigation or waive the right to bring that claim.

Schwebke v. United Wholesale Mortg. LLC, 96 F.4th 971, 976 (6th Cir. 2024).

The Court in *Schwebeke* further drew a distinction between affirmative conduct and responsive conduct. "Responsive conduct is less relevant to the [waiver] analysis than affirmative conduct." *Id.* A party's responsive conduct in litigation is less inconsistent with reliance on arbitration than affirmative conduct, for purposes of determining whether the party waived a contractual right to arbitrate through its participation in litigation. *Id.* at 975. Filing a compulsory counterclaim is responsive conduct. *Id.* at 976.

In this case, Monarch sued Petra for breach of contract under the Subcontract. Petra was then forced to respond by filing its compulsory counterclaim for breach of contract against Monarch or risk having the claim barred. It is undisputed that Monarch's claims and Petra's counterclaims all arise out of the same operative facts and transaction, which was the construction of the Bozeman West Apartments. Petra's conduct was responsive to Monarch's instigation of litigation. As such, Petra did not act inconsistently with its right to arbitration by protecting its own

compulsory counterclaims against Monarch.

This case is factually similar to *MPACT*. In that case, a contractor was involved in litigation with its subcontractors and the property owner, including actions for lien foreclosure and breach of contract. *MPACT Const. Grp., LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 903 (Ind. 2004). The contractor did not initiate the lawsuit. *Id.* After about six months of "preparing for litigation," the contractor moved to compel arbitration under its contracts with the owner and subcontractors. *Id.* at 904. In assessing whether the contractor waived the right to arbitration by participating in litigation, the Indiana Supreme Court stated, "The filing of counterclaims and cross-claims does not always indicate active participation in litigation." *Id.* at 910. Rather, "[a] party should not be held to have waived its right to arbitrate when, in response to a complaint filed against it, it raises counterclaims in order to preserve them." *Id.* at 910–11. The court also noted that the contractor had stated in its original answer that it was not waiving its right to arbitration and that it had never filed a motion to dismiss or for summary judgment before asserting its right to arbitration. *Id.* at 911. The court concluded that the contractor acted consistently with its right to arbitrate. *Id.*

Like the contractor in *MPACT*, Petra did not instigate this litigation. Petra responded to Monarch's Complaint by filing its own compulsory counterclaims in order to preserve them. Petra has never filed dispositive motions seeking affirmative

relief on the merits of its counterclaims. As the *Schwebeke* Court noted, a counterclaim only requests affirmative relief in the broadest sense. Petra's counterclaims were compulsory and, thus, did not willfully expand the litigation instigated by Monarch. As such, the fact that Petra asserted compulsory counterclaims against Monarch, including for breach of contract, is not inconsistent with Petra's right to compel arbitration.

II. Monarch is still required to prove that it was prejudiced by Petra's demand for arbitration.

Monarch argues that the Subcontract at issue in this case involves "interstate commerce" and, therefore, the Federal Arbitration Act and federal law preempt Montana law with respect to the requirements to find waiver of the right to arbitration. This argument is without merit.

Unless a contract has a substantial relation to interstate commerce, it is not regulated by federal law. *City of Cut Bank v. Tom Patrick Const., Inc.*, 1998 MT 219, ¶ 14, 290 Mont. 470, 963 P.2d 1283. Section 2 of the FAA ensures a case by case inquiry of whether the activity is one "involving [interstate] commerce." *Id.* at ¶ 15 (citing 9 U.S.C. § 2). In *Cut Bank*, the Court found that a local construction contract with all work to be performed in Bum Coulee, Montana, did not involve interstate commerce. *Id.* at ¶¶ 18, 21.

Like the construction contract in *Cut Bank*, the Subcontract at issue in this case was for work that took place entirely in Bozeman, Montana. As such, the

Subcontract does not substantially involve interstate commerce and is not subject to the FAA.

Even if the Court finds that the Subcontract is subject to federal law, the Court may still consider prejudice in its waiver analysis. In 2022, the Supreme Court granted certiorari in *Morgan* to resolve a conflict among circuit courts about the propriety of a prejudice requirement with respect to waiver of the right to arbitration. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 416, 142 S. Ct. 1708, 1712, 212 L. Ed. 2d 753 (2022). The Court in *Morgan* held that it was incompatible with the policies of the FAA to impose an absolute requirement of prejudice in establishing waiver of a right to arbitration. *Id.* at 419. The Court accordingly ruled in *Morgan* the circuit "was wrong to condition a waiver of the right to arbitrate on a showing of prejudice." *Id.* at 417.

However, since the *Morgan* decision, multiple courts have found that *Morgan* does not require state courts to abandon state law that calls for consideration of prejudice in determining waiver of contractual rights. *See, e.g., Desert Reg'l Med. Ctr., Inc. v. Miller*, 87 Cal. App. 5th 295, 321-22, 303 Cal. Rptr. 3d 412, 432 (2022) (declining to apply *Morgan* in a case involving arbitration of claims asserting violations of state labor law because the plaintiff had sued under state law); *F.T. James Constr., Inc. v. Hotel Sancho Panza, LLC*, 657 S.W.3d 623, 635 (Tex. App. 2022) (refusing to apply *Morgan* on state-law grounds); *White v. Samsung Elecs.*

Am., Inc., 61 F.4th 334, 339 (3d Cir. 2023) (holding that *Morgan* only disallows under the FAA "tests that placed prejudice to the party not seeking arbitration as the focus of the waiver inquiry").

Further, allowing Montana courts to take prejudice into consideration is not at odds with *Morgan* or the FAA. *See Marmo & Sons Gen. Contracting, LLC v. Biagi Farms, LLC*, 478 N.J.Super. 593, 606-07, 317 A.3d 947, 955-56 (App. Div. 2024) (holding that New Jersey case law that allowed courts to consider prejudice in the totality-of-the-circumstances waiver analysis did not conflict with *Morgan* because considering prejudice is not the same as requiring prejudice).

Under Montana law, in the context of arbitration, prejudice is considered the unfairness caused by delay, expense, or damage to a party's legal position when a party attempts to arbitrate an issue after engaging in litigation. *Holm-Sutherland*, ¶¶ 32-33. Considering prejudice in a waiver analysis is appropriate because, under Montana law, determining whether there has been a waiver of the right to arbitrate is based on the particular circumstances of each case. *Holm-Sutherland*, ¶¶ 31-33. The Court "examines inconsistent acts on a case-by-case basis to determine if they are prejudicial." *Firestone v. Oasis Telcoms., Data & Records*, 2001 MT 297, ¶ 22, 307 Mont. 469, 38 P.3d 796 (*citing Downey*, 251 Mont. 386, 391).

Because the FAA favors allowing parties to contract for arbitration, federal courts facing waiver issues have considered whether a party has been prejudiced by

another party's invocation of the litigation process. *Morgan*, 596 U.S. at 416, 142 S.Ct. 1708. Thus, this Court obviously found that precedent persuasive and an appropriate factor in the case-by-case waiver analysis. As such, the Court should find that there is no conflict with the Supreme Court's holding in *Morgan* and prejudice may still be properly considered in the waiver analysis.

III. Monarch has failed to establish that it was prejudiced by Petra's demand for arbitration.

Monarch has failed to establish that it was prejudiced by Petra's demand for arbitration. Monarch claims that it has been prejudiced in three ways. First, Monarch alleges that if this case is stayed pending arbitration with Petra, its claims against parties other than Petra will be prejudiced by delay. Second, Monarch claims that it was prejudiced by agreeing to set aside Petra's default under the faulty assumption that Petra would not enforce the arbitration clause in the Subcontract. Third, Monarch claims that it has spent significant time and resources pursuing litigation.

Monarch's first two claims of prejudice are irrelevant to the waiver analysis at issue. In the context of arbitration, prejudice is the unfairness resulting from delay, expense, or damage to a party's legal position when an opposing party changes course and attempts to arbitrate. *Holm-Sutherland*, ¶¶ 32-33. The effect of staying the underlying litigation while arbitration is pending has never factored into this analysis. Monarch cites no case law in support of its argument. In fact, Montana law requires the underlying litigation to be stayed unless the arbitrable issues are

severable from the greater litigation. *See* § 27-5-115(4), MCA. Monarch did not argue to the District Court that the underlying litigation should not be stayed while arbitration is pending between Petra and Monarch. Furthermore, other than citing general delay as a concern, Monarch has presented no concrete facts in support of its argument that its claims against other defendants would be prejudiced by a stay of the litigation. Monarch's argument is pure speculation and should be disregarded.

Next, the fact that Monarch stipulated to set aside Petra's default is likewise irrelevant to the waiver analysis and finding prejudice. Monarch essentially argues, without evidence, that it was tricked into stipulating to set aside of Petra's default and would not have done so had it known that Petra intended to demand arbitration under the Subcontract. As addressed above, the two issues are wholly unrelated. The causal connection that Monarch is attempting to draw between the setting aside of Petra's default and alleged prejudice as a result of Petra invoking its right to arbitration is difficult to follow. Assumedly, Monarch is arguing that if it had not stipulated to set aside Petra's default, then Petra would have been prevented from demanding arbitration causing prejudice to Monarch. The logic here does not track. Monarch and the District Court agreed that good cause existed to set aside Petra's default. There is no evidence that the District Court would not have granted Petra's motion to set aside the default even without Monarch's stipulation. Monarch's own decision to stipulate to set aside Petra's default did not suddenly become prejudicial

when Petra invoked its right to arbitration.

Finally, Monarch argues that it has been prejudiced by spending time and money in pursuit of litigation. Specifically, Monarch claims that it has: (1) retained counsel; (2) filed two complaints; (3) served those complaints; (4) entered and set aside default against Petra; and (5) retained new counsel.

In the grand scheme of litigation, what Monarch has described barely scratches the surface of pretrial litigation. The bulk of time spent on this case has been litigating the present dispute over arbitration. Other than in the initial pleadings, the parties have not addressed the merits of the case. Other than one set of discovery sent by Monarch (and not answered by Petra), the parties have not attempted to engage in any written discovery or take depositions. No list of witnesses or exhibits has been exchanged. No experts have been named or retained. No dispositive motions have been filed. No scheduling order has even been issued. Simply put, litigation has not even started. If Monarch has truly spent significant resources on this case, outside of the present dispute over arbitration, it is a mystery what Monarch is spending its money on. To the extent Monarch's attorneys are preparing for a trial that has not been scheduled, such preparation will translate into preparing for arbitration and, thus, is not prejudicial. Undoubtedly, if this matter proceeds in District Court, as with most large scale construction project disputes, dozens of witnesses will be deposed and numerous expert witnesses will be retained by all

parties. Site inspections will be conducted and thousands upon thousands of documents will be exchanged and examined. To date, none of this has happened. As such, the Court should find that Monarch was not prejudiced by Petra asserting its right to arbitration.

CONCLUSION

Petra did not engage in a course of conduct that was inconsistent with its right to arbitration. Waiver of an otherwise valid agreement to arbitrate must be clear, convincing, and unequivocal. Nothing about Petra's conduct in this litigation was a clear, convincing, and unequivocal waiver of its right to arbitration. Furthermore, Monarch has not been prejudiced by Petra enforcing its right to arbitrate this dispute. As such, Petra respectfully requests that the Court reverse the order of the District Court and order the parties to arbitration.

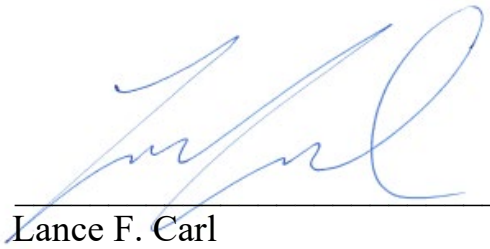
DATED this 25th day of March 2025.

E.J. GUZA & ASSOCIATES
A PROFESSIONAL LAW CORPORATION

By: _____
Edward J. Guza
Lance F. Carl
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

This brief is proportionately spaced, together with the typeface, point size, and word count requirements of Rule 11 of the Montana Rules of Appellate Procedure. This brief was generated using Microsoft Word on white paper not exceeding 8½ by 11 inches with margins on the right and left side and on top and bottom not less than 1 inch wide. The font is Times New Roman size 14. The brief is double spaced. The brief has 4,995 words excluding the cover page, table of contents, table of authorities, and certificate of compliance as calculated by Microsoft Word.



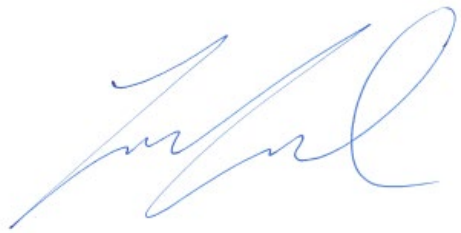
Lance F. Carl

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon the following counsel of record, by the means designated below, this 25th day of March 2025.

☒ E-Service	Cherche Prezeau Jackson Maynard CHRISTENSEN & PREZEAU, PLLP 24 W. 6th Avenue, Suite 501 Helena, MT 59601 Telephone: (406) 442-3690 cherche@cplawmt.com jackson@cplawmt.com Attorneys for Appellee
☒ E-Service	Jon A. Wilson Nathan A. Burke BROWN LAW FIRM, PC 315 North 24th Street P.O. Box Drawer 849 Billings, MT 59103-0849 Telephone: (406)-248-2611 Jwilson@brownfirm.com nburke@brownfirm.com Attorneys for Appellee
☒ E-Service	Trent Baker DATSOPOULOS, MacDONALD & LIND, PC 201 West Main, Suite 201 Missoula, MT 59802 Telephone: (406) 728-0810 tbaker@dmllaw.com Attorney for Defendants Bozeman West Apartments, LP, and Saccoccia Lands III, LLC
☒ Mail	BCRH AVION VENTURE, LLC 251 Little Falls Drive Wilmington, DE 19808 Has not appeared

☒ Mail	STOCKMAN BANK OF MONTANA 700 Main Street P.O. Box 250 Miles City, MT 59301-0250 Has not appeared
☒ Mail	WCW OLYMPUS BOZEMAN, LLC 1501 S. Mopac Expy, Suite 220 Austin, Texas 78746 Has not appeared



By: _____
Edward J. Guza/Lance F. Carl
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Lance F. Carl, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-25-2025:

Jackson T. Maynard (Attorney)
24 W. 6th Ave., Suite 501
Helena MT 59601
Representing: Monarch Heating and Cooling, LLC
Service Method: eService

Nathan Andrew Burke (Attorney)
315 North 24th Street
Billings MT 59101
Representing: Monarch Heating and Cooling, LLC
Service Method: eService

Jon A. Wilson (Attorney)
315 North 24th Street
P. O. Drawer 849
Billings MT 59103-0849
Representing: Monarch Heating and Cooling, LLC
Service Method: eService

Cherche Prezeau (Attorney)
The Montana Club Building
24 West 6th Avenue
Suite 501
Helena MT 59601
Representing: Monarch Heating and Cooling, LLC
Service Method: eService

Joseph Ray Casillas (Attorney)
627 Woody Street
Missoula MT 59802
Representing: Monarch Heating and Cooling, LLC
Service Method: eService

Trent Baker (Attorney)
201 W. Main, Suite 201
Missoula MT 59802

Representing: Monarch Heating and Cooling, LLC
Service Method: eService

Edward J. Guza (Attorney)
25 Apex Drive
Suite A
Bozeman MT 59718
Representing: Petra Incorporated
Service Method: eService

Electronically signed by Leslie Taylor on behalf of Lance F. Carl
Dated: 03-25-2025