Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-22-00472-CV

Jonathan **EADES** and Saint Mary's Hall, Inc.,
Appellants

v.

Jane **DOE** 1; M.D.L., Individually and as Next Friend of John Doe 1, a Minor; V.S., Individually and as Next Friend of Jane Doe 2; and John Doe 2, Minors,
Appellees

From the 224th Judicial District Court, Bexar County, Texas
Trial Court No. 2022-CI-00552
Honorable Mary Lou Alvarez, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: December 29, 2023

REVERSED AND REMANDED

In this interlocutory appeal, appellants Jonathan Eades and Saint Mary's Hall, Inc. appeal the trial court's order denying their motion to compel arbitration and plea in abatement. The appellants argue the parties are subject to a valid and enforceable arbitration agreement, the claims at issue in this case fall within the scope of the arbitration agreement, and the appellants did not implicitly waive their rights to arbitration. We reverse the trial court's order denying the appellants' motion to compel arbitration and plea in abatement and remand the cause for further proceedings consistent with this opinion.

BACKGROUND

Saint Mary's Hall, Inc. ("SMH") is a private school located in San Antonio, Texas. Jonathan Eades was the head of school at Saint Mary's Hall when the actions alleged in this lawsuit occurred. On August 11, 2020, Jane Doe 1, a former student, filed suit in Harris County against SMH and Eades for intentional infliction of emotional distress, negligence, gross negligence, and conspiracy alleging she was sexually harassed, sexually assaulted, and bullied by other students while attending Saint Mary's Hall. She also asserted a fraud claim against SMH alleging SMH fraudulently represented it would provide a caring school environment, and she asserted a breach of contract claim alleging SMH's failure to address the harassing and bullying conduct denied her the full benefits of her education. Over the next two and a half months, M.D.L., individually and as next friend of John Doe 1, and V.S., individually and as next friend of Jane Doe 2 and John Doe 2, joined in the suit. We refer to these parties collectively as "the Students."

On October 2, 2020, SMH and Eades answered the lawsuit subject to their motions to transfer venue wherein they asserted venue is proper in Bexar County. In its motion, SMH argued, among other things, that venue is proper in Bexar County because the school contracts for enrollment contain arbitration clauses that provide for mandatory arbitration in San Antonio, Texas. SMH also argued the arbitration procedures state the parties submit to jurisdiction of the courts of Bexar County for the enforcement of any arbitration award. The students never filed a response to the motions to transfer venue and the record reflects SMH and Eades actively pursued a ruling on their motions to transfer venue; however, the hearing was continued several times throughout the first half of 2021. On June 9, 2021, the Harris County District Court denied the Students' second motion for continuance on the venue hearing and ordered the Students to file a response on or before June 23, 2021. The order also provided that SMH and Eades may file a reply on or before July 30, 2021. On July 8, 2021, the Students filed a motion to retain jurisdiction

in lieu of their response to the motion to transfer venue. In the motion to retain jurisdiction, the Students asserted they were not opposed to the motion to transfer venue but nonetheless requested the Harris County District Court retain jurisdiction until SMH supplemented outstanding discovery propounded by the Students.

The Harris County District Court did not grant the motions to transfer venue until December 29, 2021. The case was transferred to Bexar County on January 10, 2022. On March 28, 2022, SMH filed a motion to compel arbitration and requested the trial court abate the case pending arbitration. Eades later joined in the motion. On June 14, 2022, the trial court held a hearing on the motion to compel arbitration and denied the motion on August 1, 2022. SMH and Eades appeal.

STANDARD OF REVIEW

In general, we review a trial court's decision to grant or deny a motion to compel arbitration for an abuse of discretion. *Metso Mins. Indus., Inc.* v. *Maverick Aggregates, Inc.*, No. 04-15-00532-CV, 2016 WL 3022060, at *2 (Tex. App.—San Antonio May 25, 2016, pet. denied) (mem. op.). 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.* The existence and the applicability of an arbitration agreement is a question of law we review de novo. *City of San Antonio v. Cortes*, 468 S.W.3d 580, 583 (Tex. App.—San Antonio 2015, pet. denied).

"As a threshold matter, the party moving to compel arbitration must establish the existence of a valid and enforceable arbitration agreement between the parties." *Metso Mins.*, 2016 WL 3022060, at *2. After the moving party establishes a valid and enforceable arbitration agreement, the trial court must then determine whether the claims presented fall within the scope of that agreement. *Id.* "In determining 'whether a party's claims fall within an arbitration agreement's scope, we focus on the petition's factual allegations rather than the legal causes of action

asserted.'" *Cortes*, 468 S.W.3d at 583 (alterations omitted) (quoting *In re FirstMerit Bank*, 52 S.W.3d 749, 754 (Tex. 2001) (orig. proceeding)). "If the arbitration agreement includes the claims at issue and the opposing party cannot prove any defense preventing arbitration, 'the trial court has no discretion but to compel arbitration and stay its own proceedings.'" *Cortes*, 468 S.W.3d at 583 (quoting *FirstMerit Bank*, 52 S.W.3d at 754).

Whether a party has waived its right to arbitrate is a question of law we review de novo. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018). We look at the "totality of the circumstances" to determine waiver on a "case-by-case basis." *Perry Homes v. Cull*, 258 S.W.3d 580, 591 (Tex. 2008).

DISCUSSION

Because the trial court did not specify a reason for its denial of the motion to compel arbitration, we must uphold the trial court's decision on any appropriate legal theory urged below. *See Louisiana-Pacific Corp. v. Newport Classic Homes, L.P.*, No. 05-21-00330-CV, 2023 WL 3000579, at *3 (Tex. App.—Dallas Apr. 19, 2023, no pet.) (mem. op.). First, we address whether the Students, as non-signatories, are subject to the arbitration agreement that was signed by their parents. Next, we determine whether SMH and Eades waived their right to arbitration by substantially invoking the judicial process before moving to compel arbitration.

ARBITRATION AGREEMENT BINDING THE PARTIES

A party seeking to compel arbitration must establish two elements: (1) the existence of a valid and enforceable arbitration agreement; and (2) that the disputed claims fall within the scope of the agreement. *Wagner v. Apache Corp.*, 627 S.W.3d 277, 284 (Tex. 2021).

SMH and Eades argue there is a binding and enforceable arbitration agreement between the parties and that the disputed claims fall within the scope of that arbitration agreement. The Students do not dispute their parents signed an arbitration agreement with SMH that would bind

the signatories to arbitration nor do they dispute that the disputed claims fall within the scope of the arbitration agreement. However, the Students argue that they cannot be compelled to arbitration because they did not sign the arbitration agreement. We recently addressed this very issue regarding an arbitration agreement—between SMH and another student—that is identical, or nearly identical, to all the arbitration agreements at issue here. *See St. Mary's Hall, Inc. v. Garcia*, No. 04-21-00073-CV, 2022 WL 789498, at *1–3 (Tex. App.—San Antonio Mar. 16, 2022, no pet.) (mem. op.).

In *Garcia*, we held the student was bound to arbitrate her claims because she was a third-party beneficiary of the school enrollment contract signed by her father, which included an arbitration clause. *See id.* at *3. At the hearing in this case, the Students conceded that the trial court is bound by our precedent in *Garcia*. The Students acknowledged, under *Garcia*'s precedent, they must arbitrate their claims as third-party beneficiaries of the school enrollment contracts unless the trial court finds SMH and Eades waived their rights to arbitration. However, the Students argue *Garcia* was wrongly decided in light of *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), a recent U.S. Supreme Court decision.

Historically, most federal courts held that a party waives its right to arbitration only when it knew of the right to arbitrate, acted inconsistently with that right, and prejudiced the other party by its inconsistent actions. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 415–16 (2022). In *Morgan*, the Supreme Court held a federal court cannot "condition a waiver of the right to arbitrate on a showing of prejudice." *Id.* at 417. In other words, the Court dispensed with the prejudice requirement in federal courts. In support of its holding, the Court determined "the [Federal Arbitration Act's] policy favoring arbitration does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Id.* at 418 (internal quotation marks omitted).

Here, the arbitration agreement is governed by the Federal Arbitration Act. The Students argue that *Morgan* dispenses with all rules favoring arbitration when the agreement is governed by the Federal Arbitration Act. The Students further argue *Garcia* was decided under caselaw favoring arbitration that has since been abrogated by *Morgan*. We disagree.

In *Garcia*, we clearly based our reasoning upon "ordinary principles of state contract law." *Garcia*, 2022 WL 789498, at *2 (alteration omitted) (quoting *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738 (Tex. 2005) (orig. proceeding)). We stated: "*Like other contracts*, arbitration agreements may be enforced against third-party beneficiaries if the parties to the contract intended to secure a benefit to that third party and the parties entered the contract directly for the third party's benefit." *Garcia*, 2022 WL 789498, at *2 (emphasis added). We further analyzed the school enrollment contract under the third-party beneficiary analysis applicable to all contracts. We do not see how the holding in *Morgan* has any impact on our third-party beneficiary analysis in *Garcia* regarding the very same, or substantially similar, school enrollment contracts that are at issue here. We do not believe this court's reasoning in *Garcia* is flawed and we are bound by our own precedent. *See Mitschke v. Borromeo*, 645 S.W.3d 251, 256 (Tex. 2022) (holding a court is bound to its own precedent and "three-judge panels must follow materially indistinguishable decisions of earlier panels of the same court unless a higher authority has superseded that prior decision"). Accordingly, we hold that the Students here—like the student in *Garcia*—are bound by the arbitration agreements in the student enrollment contracts. *See id.*; *see also Garcia*, 2022 WL 789498, at *2–3.

IMPLIED WAIVER OF RIGHT TO ARBITRATION

Having concluded the Students' claims are subject to a valid and enforceable arbitration agreement, the only remaining legal theory presented to the trial court that may support its decision is whether SMH and Eades impliedly waived their rights to arbitration by substantially invoking

the litigation process. *See Louisiana-Pacific Corp.*, 2023 WL 3000579, at *3 (holding when the trial court does not specify a reason for its denial of a motion to compel arbitration, the reviewing court must uphold the trial court's decision on any appropriate legal theory urged below); *Henry*, 551 S.W.3d at 116 (declining to address express waiver when the party opposing arbitration did not assert the defense).

A. Applicable Law

"A party asserting implied waiver as a defense to arbitration has the burden to prove that (1) the other party has substantially invoked the judicial process, which is conduct inconsistent with a claimed right to compel arbitration, and (2) the inconsistent conduct has caused it to suffer detriment or prejudice."[1] *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511–12 (Tex. 2015). "Due to the strong presumption against waiver of arbitration, this hurdle is a high one."[2] *Perry Homes*, 258 S.W.3d at 590. "Whether a party has substantially invoked the judicial process depends on the totality of the circumstances." *G.T. Leach Builders*, 458 S.W.3d at 512. In this analysis, we consider the following factors:

- whether the movant was plaintiff (who chose to file in court) or defendant (who merely responded);

[1] Because the Students failed to establish that SMH and Eades substantially invoked the judicial process, we need not consider whether a party is required to establish prejudice in light of *Morgan*. *See Morgan*, 596 U.S. at 419 (holding a party is not required to show a federal court it was prejudiced when claiming another party waived its right to arbitration under an agreement governed by the Federal Arbitration Act); *see also Louisiana-Pacific Corp.*, 2023 WL 3000579, at *6 n.3 (declining to address *Morgan*'s effect on the prejudice prong when party failed to establish that appellants substantially invoked the judicial process).

[2] As mentioned above, the Students argue that the *Morgan* decision did not just dispose of the prejudice requirement, but did away with all judicial presumptions in favor of arbitration. To support their position, the Students cite the Supreme Court's reasoning that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Morgan*, 596 U.S. at 418. First, we believe the Students read *Morgan* too broadly. In our view, *Morgan* simply held that federal courts could no longer require a party to show prejudice in order to invoke the waiver defense to arbitration. Second, at least one court of appeals has declined to follow *Morgan* on state law grounds. *See F.T. James Constr., Inc. v. Hotel Sancho Panza, LLC*, 657 S.W.3d 623, 635 (Tex. App.—El Paso 2022, no pet.). And third, it remains an open question how our supreme court will interpret and apply *Morgan* to Texas state law. *See Munro v. Jagpal*, No. 05-21-00125-CV, 2023 WL 3914554, at *6 n.4 (Tex. App.—Dallas June 9, 2023, no pet.) (mem. op.) ("Whether our supreme court will [remove the arbitration-preferring prejudice prong] is an open question.").

- how long the party moving to compel arbitration waited to do so;
- the reasons for the movant's delay;
- whether and when the movant knew of the arbitration agreement during the period of delay;
- how much discovery the movant conducted before moving to compel arbitration, and whether that discovery related to the merits;
- whether the movant requested the court to dispose of claims on the merits;
- whether the movant asserted affirmative claims for relief in court;
- the extent of the movant's engagement in pretrial matters related to the merits (as opposed to matters related to arbitrability or jurisdiction);
- the amount of time and expense the parties have committed to the litigation;
- whether the discovery conducted would be unavailable or useful in arbitration;
- whether activity in court would be duplicated in arbitration; and
- when the case was to be tried.

Perry Homes, 258 S.W.3d at 591; *G.T. Leach Builders*, 458 S.W.3d at 512. "Implying waiver from a party's actions is appropriate only if the facts demonstrate that the party seeking to enforce arbitration intended to waive its arbitration right." *San Antonio Eye Ctr., P.A. v. Vision Assocs. of S. Tex. P.A.*, No. 04-22-00078-CV, 2022 WL 3908843, at *5 (Tex. App.—San Antonio Aug. 31, 2022, pet. denied) (mem. op.).

B. Analysis: Substantial Invocation of the Judicial Process

The Students, who bore the burden of proof on their waiver defense, assert SMH and Eades substantially invoked the judicial process because they: (1) waited twenty months to move to compel arbitration; (2) filed an answer requesting a jury trial; (3) asserted affirmative defenses in their answers; (4) allegedly requested affirmative relief in their answers by praying they receive all court costs and legal or equitable relief to which they are entitled, and the Students take nothing; (5) signed a Rule 11 agreement and moved for protective orders during discovery; and (6) propounded discovery.

1. Delay[3]

The Students argue SMH and Eades pursued a zealous litigation strategy and, after twenty months, moved to compel arbitration to obtain a strategic advantage. The record does not support the Students' contention. Although SMH and Eades did not move for arbitration until nearly twenty months after the Students filed their original petition, the record shows they were not to blame for the delay and that their delay in filing the motion to compel arbitration can be reasonably explained.

Jane Doe 1 filed her original petition on August 11, 2020, and a first amended petition adding M.D.L., individually and as next friend of John Doe 1, was filed on August 26, 2020. On October 2, 2020, SMH and Eades each answered the lawsuit subject to their motions to transfer venue to Bexar County. SMH's answer stated the school enrollment contracts all include an arbitration provision providing that arbitration shall take place in San Antonio. SMH's general arbitration procedures were attached to the answer and state: "Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The Parties expressly submit to the jurisdiction of the courts of Bexar County, Texas . . . for the enforcement of any arbitration award."

The original and first amended petition did not include the identities of the students asserting the claims against SMH and Eades. Therefore, on October 13, 2020, SMH filed a motion to strike the pseudonyms so that it could identify the students. One obvious obstacle SMH faced with the anonymity of the plaintiffs is that it could not produce a valid and enforceable arbitration

[3] The Students' argument that SMH and Eades delayed moving to compel arbitration until it received a favorable ruling from *Garcia* is inapposite. We do not speculate on whether SMH waited until this court's decision in *Garcia* to file its motion to compel arbitration. Instead, we determine whether SMH and Eades substantially invoked the judicial process by looking at the appellate record and analyzing the implied waiver factors.

agreement until it could identify the students filing the lawsuit and pull their specific school enrollment contracts.

On October 29, 2020, the Students filed a second amended petition adding V.S., individually and as next friend of Jane Doe 2 and John Doe 2. At this point, two additional students had been added as plaintiffs, and SMH and Eades still did not know the identities of any of the students or the parents filing the lawsuit. At the hearing on the motion to compel arbitration, the Students admitted they would not disclose the names of the plaintiffs until the trial court entered a protective order precluding SMH or Eades from disclosing the Students' identities outside the litigation. The trial court did not enter the protective order until March 11, 2021.

Meanwhile, SMH continued to pursue its request to transfer venue. On December 2, 2020, SMH filed a notice of hearing on its motion to transfer venue scheduled for January 25, 2021. The record shows that the Students requested discovery on the venue issue and the parties agreed to continue the hearing. Eades filed another notice on January 20, 2021, setting a hearing for February 22, 2021. The February 22, 2021 hearing was continued due to the statewide winter storm.

As discussed in more detail below, SMH declined to disclose confidential information in response to the Students' discovery requests until there was a protective order requiring the information to remain confidential. On March 4, 2021—prior to the entry of a protective order—the Students filed a motion to continue the hearing on the motion to transfer venue until fourteen days after SMH and Eades produced responses to the Students' discovery requests and presented Eades for deposition. SMH opposed the motion to continue. The trial court granted the continuance, set a deadline for Eades's deposition, ordered the Students to respond to the venue motion by May 7, 2021, ordered SMH and Eades to file their reply by May 14, 2021, and set the venue hearing for May 17, 2021.

On May 7, 2021, the Students filed a second motion to continue the venue hearing claiming they had not received supplemental discovery. On May 14, 2021, SMH filed a response opposing the continuance stating it had responded to all discovery requests related to the limited venue issue. On June 9, 2021, the trial court denied the Students' second motion to continue the venue hearing and again ordered the Students to file a response to the venue motion and to supplement the venue record on or before June 23, 2021. The trial court ordered SMH and Eades to file their reply on or before July 30, 2021. The Students did not file a response. Nevertheless, on June 28, 2021, SMH filed a reply that stated it conferred with the Students' counsel regarding the lack of response, and counsel represented—for the first time—the Students did not oppose the motion to transfer venue but would seek to keep the case in Harris County until SMH responded to outstanding discovery.

On July 8, 2021, the Students filed a motion to retain jurisdiction "in lieu of [the overdue] response to [SMH's] Motion to Transfer Venue" stating they did not oppose to transfer venue to Bexar County[4] but sought to retain jurisdiction in Harris County until SMH answered discovery. On July 9, 2021, SMH filed a response outlining how the Students had delayed the venue hearing since October 2020. The response also stated the outstanding discovery was the subject of a pending motion for protective order that had not been ruled on by the court, and that the outstanding discovery did not create a basis for retaining the case in an improper venue because it was not relevant to the venue issue. The Harris County District Court did not grant the motion to transfer venue until December 29, 2021.[5]

[4] The motion actually stated the Students "are generally not opposed to transferring the venue to Dallas County." We presume this was a mistake because the record does not reflect a request to transfer venue to Dallas County was made by any party.

[5] The record does not reflect any rulings made by the Harris County District Court after June 9, 2021 until its order granting the venue motion on December 29, 2021. SMH, on the other hand, filed a Notice of Status Conference Concerning Defendant [SMH's] Amended Motion to Transfer Venue on November 30, 2021.

The record reflects the case was officially transferred to Bexar County on January 10, 2022. SMH filed its motion to compel arbitration and plea in abatement on March 28, 2022—only two and a half months after the case was officially transferred.

At the hearing and in their brief, SMH and Eades assert they desired to transfer the case to Bexar County so that any issues that may arise regarding arbitration could be handled by a Bexar County court. The Students argue SMH and Eades could have filed a motion to compel arbitration subject to their motion to transfer venue in the Harris County District Court. This argument would have placed SMH and Eades in a difficult position. SMH and Eades are entitled to arbitrate the Students' claims unless they have waived their right to arbitration. The enrollment contracts also provide for the arbitration award to be enforced in a Bexar County court. Either SMH and Eades would have had to file their motion to compel arbitration in Harris County and risk waiving their contractual right to venue in Bexar County, or they would have to wait to file their motion to compel arbitration until after the case was transferred to Bexar County and risk waiving their right to arbitrate due to the delay. The Students' position essentially required SMH and Eades to potentially waive one contractual right in favor of another. We cannot say SMH and Eades acted inconsistently with their right to arbitrate the Students' claim when they spent the first seventeen months of the case pursuing the motion to transfer the case to the venue with exclusive jurisdiction to enforce an arbitration award.

SMH filed its motion to compel less than three months after the case was transferred to Bexar County. We do not believe this less-than three-month delay constitutes a substantial invocation of the judicial process. Furthermore, under the facts of this case, we do not believe the twenty-month passage of time from the Students' original petition to the filing of the motion to compel arbitration constitutes a substantial invocation of the judicial process given that most of the delay was either caused by the Students or the Harris County District Court. The delay factors

here do not support waiver of arbitration. *See RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 431 (Tex. 2016) ("And while delay by the party seeking arbitration may be a factor, we have found no waiver in cases where there were delays of as much as eight months and even two years.").

2. Affirmative Relief

The Students assert SMH requested affirmative relief from the trial court when it demanded a jury trial, asserted affirmative defenses, and generally requested court costs and all other relief to which it may be entitled in its answer. Eades's answer also included these requests except his answer did not contain a jury demand. The Students argue these requests indicate that SMH and Eades substantially invoked the judicial process. We disagree.

At the outset, we note that SMH and Eades did not elect to resolve their disputes in court; rather, they are only in this lawsuit because the Students sued them. *See Perry Homes*, 258 S.W.3d at 591 (stating a factor to consider when addressing implied waiver of arbitration is "whether the movant was plaintiff (who chose to file in court) or defendant (who merely responded)").

The alleged requests for relief in the answers are components that any prudent defendant would include in an answer to a lawsuit. Contrary to the Students' argument, the affirmative defenses are not requests for affirmative relief but are instead defensive in nature. *See G.T. Leach Builders*, 458 S.W.3d at 513 (holding a compulsory counterclaim that was defensive in nature does not amount to waiver). Much like compulsory counterclaims, defendants are required to expressly plead their affirmative defenses in their answer or risk waiving them. *See RSL Funding*, 499 S.W.3d at 430–31 (stating the assertion of claims or defenses as prescribed by procedural rules to avoid their forfeiture did not waive right to arbitration). SMH and Eades never sought summary judgment or dismissal based on their affirmative defenses; instead, they merely included the affirmative defenses as required by the Texas Rules of Civil Procedure once the Students initiated the lawsuit against them. *See id.* at 430 ("[A]sserting defensive claims—even if such claims seek

affirmative relief—does not waive arbitration."); *G.T. Leach Builders*, 458 S.W.3d at 512 (stating a waiver factor we consider is whether the movant sought disposition of the counterclaims on the merits).

Likewise, the request for recovery of court costs and other relief for which SMH and Eades may be entitled does not substantially invoke the judicial process. *See Hogg v. Lynch, Chappell & Alsup, P.C.*, 480 S.W.3d 767, 784 (Tex. App.—El Paso 2015, no pet.) (noting the filing of defensive pleadings does not amount to arbitration waiver).

The arbitration agreement states the parties waive their right to a jury trial. Many of the trial court's questions in the hearing revolved around the jury demand in SMH's answer. It appears from the record that the trial court thought the jury trial request—which contravened the arbitration agreement—was an act inconsistent with the intent to arbitrate the claims. We note that whether a movant seeking arbitration asserted a jury demand is not one of the factors to be considered. *See FW Servs. Inc. v. McDonald*, No. 04-19-00331-CV, 2020 WL 444400, at *4 (Tex. App.—San Antonio Jan. 29, 2020, no pet.) (mem. op.) ("[W]e question whether a jury demand in a defendant's answer, alone, substantially invokes the judicial process."); *see also generally G.T. Leach Builders*, 458 S.W.3d at 512 (listing arbitration waiver factors). Nevertheless, this court and at least one other court of appeals have held a movant did not waive its right to arbitration even though it demanded a jury and paid the jury fee. *See Pennzoil Co. v. Arnold Oil Co., Inc.*, 30 S.W.3d 494, 497, 500 (Tex. App.—San Antonio 2000, orig. proceeding); *Chambers v. O'Quinn*, 305 S.W.3d 141, 151–52 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

Here, the Students also demanded a jury in their original petition; however—if it were determined that no valid and enforceable arbitration agreement exists or that the claims were not arbitrable—the Students could have withdrawn their jury demand at any point, leaving the case to

be tried to the bench unless SMH also asserted a jury demand.[6] Though the jury demand in SMH's answer could be considered an act inconsistent with its right to arbitrate, "[m]erely taking part in litigation . . . is not enough." *G.T. Leach Builders*, 458 S.W.3d at 512 (internal quotation marks omitted).

The alleged requests for affirmative relief in SMH's and Eades's answers are defensive in nature and do not constitute a substantial invocation of the judicial process. In reaching this conclusion we are particularly mindful that it remained an open question whether the Students would be bound by the arbitration agreement as third-party beneficiaries at the time SMH and Eades filed their answers. Until our decision in *Garcia* answered this open question, SMH and Eades acted prudently by filing defensive pleadings. *RSL Funding*, 499 S.W.3d at 431 (emphasizing defensive actions, spurred by procedural rules providing that claims would be forfeited if action were not taken, did not waive arbitration). The actions the Students direct our attention to do not support a finding that SMH and Eades waived their rights to arbitration.

3. Discovery

The Students assert that the signing of a Rule 11 agreement and moving for several protective orders are acts inconsistent with SMH's right to arbitrate. The Students also assert SMH and Eades "conducted substantial affirmative merits discovery" before moving to compel arbitration. A review of the record does not support the Students' position.

The record shows SMH filed two motions for protective orders seeking protection from two sets of discovery propounded by the Students. In the motion regarding the first set of discovery, SMH sought protection "from written discovery propounded by the Plaintiffs that requires the invasion of personal and privacy rights held by non-parties to this litigation" and

[6] Further, the record does not reflect, and the Students do not assert, that SMH paid the jury fee.

because the discovery requests were "unduly burdensome and overly broad." In the motion regarding the second set, SMH sought protection from "written discovery propounded by the Plaintiffs that is unduly burdensome and unnecessarily expensive because the information requested is not relevant to any issues in this case and is not reasonably calculated to lead to the discovery of admissible evidence." SMH also signed a Rule 11 agreement allowing SMH additional time to respond to the Students' first set of discovery—which included 112 requests for production, 14 interrogatories, 38 requests for admissions, and several requests for disclosure. Both of these motions and the Rule 11 agreement were responsive to the Students' discovery and did not amount to waiver. *See G.T. Leach Builders*, 458 S.W.3d at 514 ("Responding to discovery and simply being named in the lawsuit while discovery is ongoing do not amount to waiver."); *see also FW Servs.*, 2020 WL 444400, at *3 n.2 (noting a Rule 11 agreement did not support waiver when it "related to the discovery responses").

SMH also filed a Motion for Entry of Confidentiality and Protective Order stating discovery exchanged by the parties will likely involve "sensitive, personal, and confidential information" about its students and faculty "that should be protected from disclosure outside this litigation." The Students also sought to keep their identities confidential. The trial court issued an extensive order granting the confidentiality requests. We believe SMH's confidentiality motion was also responsive to the Students' discovery requests and it was necessary for SMH to pursue this motion so it could protect the confidentiality of its students and staff. These actions do not support a finding that SMH substantially invoked the judicial process.

The only discovery propounded by SMH were requests for disclosure. *FW Servs.*, 2020 WL 444400, at *3 (alterations omitted) ("The Texas Supreme Court has also 'declined to find waiver of the right to arbitrate in cases where the movant made a request for disclosure.'" (quoting *G.T. Leach Builders*, 458 S.W.3d at 514)). Because the Students filed suit using

pseudonyms, these requests were necessary, in part, to obtain the identities of the Students so that SMH could retrieve the relevant school enrollment contracts containing the arbitration agreements. The record shows Eades propounded its first and only set of requests for production and interrogatories[7] on February 25, 2022, just one month before SMH filed its motion to compel arbitration. However, the Students did not provide any evidence regarding the amount of time and expense the parties have committed to responding to the discovery or in the litigation, whether the discovery conducted would be unavailable or useful in arbitration, or whether activity in court would be duplicative of the arbitration proceedings. *See G.T. Leach Builders*, 458 S.W.3d at 512; *see also San Antonio Eye Ctr.*, 2022 WL 3908843, at *6 (declining to find waiver after 40,000 pages of discovery had been produced between the parties, but the non-movant failed to provide context of the discovery exchanged); *see also Perry Homes*, 258 S.W.3d at 593 ("How much litigation conduct will be 'substantial' depends very much on the context; three or four depositions may be all the discovery needed in one case, but purely preliminary in another."). Moreover, we have previously held that issuing a set of requests for production and interrogatories does not amount to waiver. *See San Antonio Eye Ctr.*, 2022 WL 3908843, at *6; *see also In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998) (orig. proceeding) (holding the filing of an answer and propounding one set of interrogatories and one set of requests for production did not amount to waiver of the right to arbitrate).

After considering the totality of the circumstances, we hold SMH and Eades did not substantially invoke the litigation process and, thus, did not impliedly waive their rights to arbitration. Accordingly, the trial court erred when it denied the motion to compel arbitration.

[7] The discovery included approximately forty-five requests for production and fifteen interrogatories per plaintiff.

PLEA IN ABATEMENT

"The Federal Arbitration Act requires courts to stay litigation of issues that are subject to arbitration." *Cardinal Senior Care, LLC v. Bradwell*, No. 04-21-00557-CV, 2022 WL 17660268, at *5 (Tex. App.—San Antonio Dec. 14, 2022, no pet.) (mem. op.) (citing *In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d 185, 195 (Tex. 2007) (orig. proceeding)). "[W]hen an issue is pending in both arbitration and litigation, the Federal Arbitration Act generally requires the arbitration to go forward first." *Merrill Lynch Tr.*, 235 S.W.3d at 195. Having already concluded the trial court should have granted the motion to compel arbitration, we likewise hold the trial court erred when it denied the plea in abatement.

CONCLUSION

We reverse the trial court's order denying Eades and SMH's motion to compel arbitration and motion to abate proceedings pending arbitration. We remand the cause to the trial court for it to render an order (1) compelling arbitration of the Students' claims and (2) staying the underlying litigation pending resolution of the arbitration.

Irene Rios, Justice