

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NAYYER ALI,

Plaintiff and Respondent,

v.

DIGNITY HEALTH, et al.,

Defendants and
Appellants.

B339782

(Los Angeles County
Super. Ct. No.
23STCV03405)

APPEAL from an order of the Superior Court of the County of Los Angeles, Maurice Leiter, Judge. Affirmed.

Manatt, Phelps, & Phillips, Barry S. Landsberg, Doreen Wener Shenfeld, Joanna S. McCallum, and Craig S. Rutenberg, for Defendants and Appellants.

Call & Jensen, Mark Eisenhut and L. Lisa Sandoval, for Plaintiff and Respondent.

I. INTRODUCTION

The trial court denied defendants'¹ motion to compel arbitration, finding their litigation activity and unreasonable delay waived their right to arbitrate. On appeal, defendants contend the waiver finding must be reversed because the court applied the wrong legal standard and it was not supported by clear and convincing evidence. We affirm.

II. BACKGROUND

A. *Complaint*

On February 16, 2023, plaintiff Nayyer Ali filed a complaint² against defendants asserting three causes of action for (1) tortious interference with prospective economic relations (interference claim); (2) retaliation in violation of the whistleblower protections of Health and Safety Code section 1278.5 (section 1278.5 claim); and (3) unfair business practices (unfair practices claim).

Plaintiff alleged he was an experienced critical care physician and a longstanding member of SMMC's medical staff. For many years, plaintiff taught SMMC residents pursuant to an

¹ Defendants are Dignity Health, doing business as St. Mary's Medical Center (SMMC), Carolyn Caldwell, Charles Anderson, and Christopher Pook.

² The complaint was also filed on behalf Dr. Mauricio Heilbron, but he is not a party to this appeal.

automatically renewing contract with the hospital's residency program. He also served as a teaching attending physician for SMMC's intensive care unit (ICU) from 1996 until November 2022. Residents gave him uniformly positive reviews and he twice received outstanding teaching awards.

Plaintiff served on SMMC's Peer Review Committee from 2013 to 2018, and chaired both the Peer Review Committee and the Department of Medicine at the time the complaint was filed. He was also a current member of the Medical Executive Committee for SMMC's medical staff.

Although plaintiff was a medical staff member of and had privileges to practice at SMMC, he maintained a private critical care consultation practice. He only had patients at SMMC if other private physicians referred their patients to him. Doctors with patients at SMMC trusted plaintiff who consequently had a "quite busy" practice and provided more ICU care at SMMC than any other physician in the last six months of 2022.

As a member of SMMC's medical staff and Medical Executive Committee, plaintiff was "a vocal critic of efforts by the SMMC administration to interfere with medical staff independence." Defendants retaliated against plaintiff for his advocacy for patients and the medical staff by terminating his automatically renewing teaching contract with SMMC's residency program and by removing him from the schedule for teaching attending physicians in the ICU.

In his interference claim, plaintiff alleged that defendants retaliated against him with the intent to disrupt plaintiff's economic relationship with the residency program and the referring physicians who would ordinarily refer patients to plaintiff.

In his section 1278.5 claim, plaintiff alleged that defendants discriminated and retaliated against him by terminating his automatically renewing teaching contract, limiting referrals that he received, and maliciously threatening and pursuing unfounded disciplinary actions against him.

And, in his unfair practices claim, plaintiff alleged that defendants' retaliatory conduct constituted an unfair business practice.

The complaint included a demand for jury trial.

B. *Defendants' Litigation Activity*

1. Anti-SLAPP Motion

On March 30, 2023, prior to answering the complaint, defendants filed a special motion to strike multiple allegations from the complaint pursuant to Code of Civil Procedure³ section 425.16 (anti-SLAPP motion)⁴. The majority of the allegations that defendants sought to strike related to Dr. Heilbron's claims. As to plaintiff, the motion sought to strike allegations from six paragraphs detailing defendants' efforts to circumvent the

³ All further references are to the Code of Civil Procedure, unless otherwise indicated.

⁴ "A special motion to strike under section 425.16—the so-called anti-SLAPP statute—allows a defendant to seek early dismissal of a lawsuit that qualifies as a SLAPP. 'SLAPP is an acronym for "strategic lawsuit against public participation.'" (Nygard, Inc. v. Uusi-Kerttula (2008) 159 Cal.App.4th 1027, 1035.)

customary peer review process in place at SMMC by disciplining plaintiff directly.⁵

In opposition to the motion, plaintiff submitted his own declaration dated April 17, 2023, describing defendants' retaliation and harassment. He also described facts showing that defendants' reasons for terminating him were pretextual.

2. Meet and Confer Regarding Demurrer

On April 4, 2023, defendants' counsel e-mailed plaintiff's counsel and asked to schedule a meet and confer regarding defendants' anticipated demurrer, listing one of the topics for discussion as the parties' "dispute resolution and arbitration agreement that precludes [plaintiff] from suing over . . . non-renewal [of the teaching contract]." Defendants' counsel then listed seven additional issues defendants intended to raise in a demurrer. Counsel advised that "[d]efendants intend to file a motion to strike under [section] 436 to strike [p]laintiffs' claims for damages related to peer review in their claims under section 1278.5", but counsel did not advise plaintiff that defendants intended to seek arbitration of plaintiff's claims or request that plaintiff arbitrate any claims.

⁵ Defendants did not argue, however, that plaintiff could not prevail on the merits of his claims in the trial court because they were subject to a binding arbitration agreement.

3. Case Management Conference Statement

On May 4, 2023, defendants filed a joint case management statement in which they requested a five-day non-jury trial on all of plaintiff's claims. In response to question No. 10. c. (5), asking for the alternative dispute resolution processes in which defendants had agreed to participate, defendants responded, "Private arbitration not yet scheduled." And, in response to question No. 15, asking for the motions defendants intended to file, they responded, "To the extent any claims survive demurrer, defendants will seek to dispose of them by motion for summary judgment." Defendants did not disclose in their statement that they also intended to file a motion to compel arbitration.

4. Ruling on Anti-SLAPP Motion

On June 15, 2023, following a hearing, the trial court issued a minute order granting, in part, and denying, in part, the anti-SLAPP motion directed at plaintiff's claims. On June 20, 2023, defendants filed a notice of appeal from the trial court's order.

5. Demurrer to Complaint

On June 20, 2023, the same day they filed their notice of appeal of the anti-SLAPP ruling, defendants filed a demurrer to plaintiff's interference claim. As to plaintiff's allegation of interference with his teaching contract, they argued plaintiff could not state an interference claim because (1) his teaching contract had a mandatory dispute resolution provision and

plaintiff had failed to allege he had exhausted that contractual requirement; (2) defendant SMMC could not interfere with its own prospective economic relationship; and (3) defendants Caldwell and Anderson, as officers of the SMMC, could not be held liable for interfering with their principal's prospective economic relationship.

As to plaintiff's allegations of interference with his prospective economic relationship with his referral doctors, defendants argued (1) plaintiff could only raise that claim by way of a petition for writ of administrative mandamus; (2) plaintiff's alleged prospective economic relationship with his referral doctors was too speculative; and (3) plaintiff's claim against defendant Pooks, as the chairman of the hospital community board, failed to allege any facts showing that he participated in the alleged interference. Defendants noticed the demurrer for hearing on October 19, 2023.

6. Attorney Fees Motion

On August 14, 2023, defendants filed a motion for an award of attorney fees for prevailing, in part, on their anti-SLAPP motion. They argued that because the trial court granted their motion, in part, they were entitled to \$41,619.23 in fees under section 425.16, subdivision (c)(1) as the prevailing parties on the motion.⁶ Defendants noticed the motion for hearing on November 3, 2023.

⁶ The declarations and billing statements submitted in support of the motion showed that defendants had incurred \$277,461.53 in fees defending the action during the six-month

7. First Amended Complaint

On October 5, 2023, in response to defendants' demurrer, plaintiff filed a first amended complaint. Plaintiff again asserted section 1278.5 retaliation and unfair practices claims, but omitted his interference claim. In support of the section 1278.5 claim, plaintiff alleged that defendants' retaliation against him "included the termination of his automatically renewing teaching contract, blacklisting him from teaching in the ICU, and manipulating the call panels to limit referrals to [plaintiff] for critical care consultations." In his unfair practices claim, he repeated that "[d]efendants' conduct in excluding physicians from participation in the emergency call panels, their refusal to collaborate with the [m]edical [s]taff in the publication of such panels, and their retaliation against [plaintiff was] both unfair and unlawful."

8. Ruling on Fee Motion

On November 3, 2023, following a hearing, the trial court granted defendants' fee motion. The court declined to reduce the amount of fees requested, finding that "[a]nti-SLAPP motions are complex. They take significant skill and time, and require investigation, research, and analysis. Defendants have made a

period since the filing of the complaint. But defendants explained that, because a portion of that amount was incurred for services unrelated to the anti-SLAPP motion, such as the demurrer and an opposition to a request for a temporary restraining order, defendants were requesting only 15 percent of that total amount.

reasoned, good faith attempt to apportion fees between successful and unsuccessful aspects of the motion.”

9. Demurrer to First Amended Complaint and Motion to Strike Jury Demand

On November 7, 2023, defendants filed a demurrer to the first amended complaint directed only at plaintiff’s claims, accompanied by a motion to strike. In the demurrer, defendants argued that the “absence of a focused complaint from [plaintiff] about suspected substandard patient care [was] a dispositive defect [in plaintiff’s] section 1278.5 claim.” Defendants also argued that (1) to the extent plaintiff’s section 1287.5 claim was premised on “termination or non-renewal of his teaching contract (which actually expired by its own terms . . .)”, it was “barred because [plaintiff] failed to exhaust the contract’s mandatory dispute resolution procedure, and in any event the non-renewal of his *expired* contract was not actionable termination as a matter of law”; (2) plaintiff’s claim based on SMMC’s purported exclusion of other non-party doctors from the internal medicine call panel alleged “only acts towards those other doctors, not against [plaintiff], and therefore [was] not actionable under section 1278.5”; and (3) plaintiff’s claim that SMMC “stopped scheduling him for other teaching work [did] not allege acts that affected his medical staff privileges or contractual rights, as the statute requires. Thus, he fail[ed] to state a section 1278.5 claim and his derivative claim under the unfair competition law . . . fails as well.”

In the motion to strike, defendants sought an order striking plaintiff’s jury demand, arguing that plaintiff did not have a right

to a jury trial on either his section 1278.5 claim or his unfair practices claim.

On January 10, 2024, plaintiff filed an opposition to the demurrer, asserting, among other arguments, that the arbitration provision in his teaching agreement did not bar his section 1278.5 claim because (1) the provision did not apply to the individual defendants; (2) defendants had failed to show that the agreement they submitted with their demurrer was the agreement to which plaintiff referred in the complaint; and (3) the arbitration provision in the agreement submitted by defendants expressly provided that a court may determine plaintiff's claim for improper termination of his teaching contract.

On January 16, 2024, defendants replied, reiterating their prior arguments, including that the arbitration agreement barred plaintiff's section 1287.5 claim.

10. Appeal of Anti-SLAPP Ruling

On February 2, 2024, defendants filed an opening brief in their appeal from the trial court's order denying, in part, the anti-SLAPP motion. As to plaintiff's claims, they argued that the trial court erred by not striking the entirety of his retaliation claim arising from peer review allegations. They also argued that the court should order on remand that they were entitled to recover all of their attorney fees incurred in bringing the motion, as opposed to the partial amount awarded by the trial court.⁷

⁷ On December 31, 2024, this court affirmed, in part, and reversed, in part, the trial court's anti-SLAPP ruling. (*Ali et al. v. Dignity Health et al.* (Dec. 31, 2024, B331058) [nonpub. opn.])

11. Ruling on Demurrer and Motion to Strike

On February 21, 2024, following a hearing, the trial court issued an order on the demurrer to the first amended complaint, as well as the motion to strike. The court sustained the demurrer with leave to amend as to plaintiff's claims against defendant Pook only, and overruled the demurrer as to plaintiff's remaining claims. The court also granted the motion to strike plaintiff's jury demand.

On March 22, 2024, plaintiff filed a second amended complaint which included amended allegations as to his claims against defendant Pook.

C. *Motion to Compel Arbitration and Stay Proceedings*

On March 19, 2024, defendants demanded that plaintiff "agree to submit to JAMS arbitration his claims arising from and relating to [the teaching contract] dated June 23, 2020[,] . . . pursuant to paragraph 7.3 of that agreement."

On March 28, 2024, defendants filed their motion to compel arbitration with supporting declarations from defendant Caldwell and their attorney. The Caldwell declaration attached a copy of plaintiff's teaching contract containing the arbitration clause and the attorney declaration attached e-mails and correspondence reflecting defendants' demand to arbitrate. Among other arguments, defendants maintained that they had not waived their right to arbitrate.

Plaintiff opposed the motion, arguing that defendants had acted inconsistently with an intent to timely pursue their arbitration rights and therefore waived them.

Defendants filed a reply.

D. *Ruling on Motion*

Following a hearing on the motion to compel, the trial court took the matter under submission and then issued an order denying the motion. The court began its analysis by noting that defendants had carried their initial burden of showing the existence of an agreement to arbitrate and that the burden therefore shifted to plaintiff to establish any defenses.

The trial court then addressed plaintiff's assertion of waiver and concluded: "Plaintiff . . . asserts [d]efendants have waived the right to arbitrate. The [c]ourt agrees. Defendants have participated extensively in litigating this case in court. Defendants have filed two demurrers, an anti-SLAPP motion, and a motion for attorney[] fees. Defendants also have appealed the ruling on the anti-SLAPP. [¶] Defendants assert that this does not show waiver because these motions did not address [p]laintiff's [teaching contract] claims. This is incorrect. [Plaintiff] has alleged in each iteration of the complaint that [d]efendants retaliated against him by refusing to renew his [teaching contract]. Defendants expressly addressed the [teaching contract] and the arbitration provision in their first demurrer, filed on June 20, 2023, arguing that [p]laintiff could not allege retaliation because [p]laintiff had failed to seek arbitration before filing suit. Defendants did not seek to compel arbitration at that time. Instead, [d]efendants waited for the [c]ourt's rulings on its challenges to [p]laintiff's pleadings via demurrer and anti-SLAPP before filing this motion. [¶] Defendants have acted inconsistently with the intent to compel

arbitration by using the court system to challenge [p]laintiff[’s] claims and by unreasonably delaying the filing of this motion. Defendants’ motion to compel arbitration is DENIED.”

Defendants filed a timely notice of appeal from the order denying their motion.

III. DISCUSSION

A. *Legal Principles*

While this appeal was pending, our Supreme Court issued its opinion in *Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562 (*Quach*) overruling the arbitration-specific definition of waiver embraced in *St. Agnes Medical Center v. PacificCare of California* (2003) 31 Cal.4th 1187 (*St. Agnes*) in favor of the “generally applicable” definition of waiver. (*Quach, supra*, 16 Cal.5th at p. 578.) The court in *Quach* noted that the United States Supreme Court’s decision in *Morgan v. Sundance, Inc.* (2022) 596 U.S. 411 (*Morgan*) “render[ed] the *St. Agnes* framework inapplicable in cases governed by the [Federal Arbitration Act’s] procedural rules.” (*Quach, supra*, 16 Cal.5th at p. 575.) *Quach* then “held that a waiver occurs under the [California Arbitration Act⁸] if, by clear and convincing evidence, it is shown that a party has ‘intentionally relinquished or abandoned’ its known right to compel arbitration. (*Quach*,

⁸ The analysis of whether a party has waived its right to arbitrate is the same under both federal and state law. (*Quach, supra*, 16 Cal.5th at 572, fn. 2.)

[*supra*, 16 Cal.5th] at pp. 569, 584.)” (*Hofer v. Boladian* (2025) 111 Cal.App.5th 1, 4 (*Hofer*).)

In *Hofer, supra*, 111 Cal.App.5th 1, a different panel of this court summarized the new test in California for determining waiver after *Quach, supra*, 16 Cal.5th 562 (the *Quach* test): “‘To establish waiver under generally applicable contract law,’ *Quach* held, ‘the party opposing enforcement of a contractual agreement must prove by clear and convincing evidence that the waiving party [(1)] knew of the contractual right and [(2)] intentionally relinquished or abandoned it.’ (*Id.* at p. 584.) Knowledge of the right to arbitrate ‘may be “actual or constructive.”’ (*Ibid.*) Intentional relinquishment or abandonment of the right to arbitrate may be (1) express, by ‘evidence of words expressing an intent to relinquish the right,’ or (2) implied, by ‘conduct’—including ‘litigat[ing] the case’ in a judicial forum—‘that is so inconsistent with an intent to enforce the contractual right [to arbitrate] as to lead a reasonable fact finder to conclude that the party had abandoned it.’ (*Id.* at pp. 569, 584; see generally *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31 [looking to conduct is appropriate in assessing waiver].)” (*Hofer, supra*, 111 Cal.App.5th at pp. 10–11.)

The court in *Hofer, supra*, 111 Cal.App.5th 1 also explained the primary differences between the new test and the former arbitration-specific definition of waiver in *St. Agnes, supra*, 31 Cal.4th 1187, including the elimination of the prejudice element. “*Quach*’s test for evaluating whether a party has waived its right to compel arbitration differs from *St. Agnes*’s test in three significant ways. . . . First, . . . [u]nder *Quach*, prejudice is no longer ‘determinative’ or, for that matter, even ‘relevant.’ (*Quach, supra*, 16 Cal.5th] at pp. 573–575, 585.) By focusing

solely on whether the words and conduct of the party seeking to compel arbitration evince a relinquishment or abandonment of the right to arbitrate, *Quach* eliminated the prejudice requirement and made proving waiver easier. Second, . . . [b]y directing courts to apply the generally applicable standard that ‘consider[s] only those factors that are relevant to’ waiver, *Quach* narrowed the test for waiver and, in that respect, made proving waiver harder. (*Ibid.*) Third, . . . *Quach* raised that standard of proof by requiring the party to prove waiver by clear and convincing evidence—that is, by evidence making it “highly probable” the party seeking to arbitrate knew of the contractual right and intentionally relinquished or abandoned it. (*Id.* at p. 584.) In this regard, *Quach* made proving waiver harder.” (*Hofer, supra*, 111 Cal.App.5th at p. 12.)

In determining whether a party has waived its right to arbitrate, a trial court need not find that the party unconditionally abandoned its right to arbitrate because, by definition, a court making such a determination will have pending before it a motion or petition to compel arbitration filed by that party. As the United States Supreme Court has acknowledged when describing the typical procedural posture of such motions or petitions: “[D]efendants do not always seek [arbitration] right away. Sometimes, they engage in months, or even years, of litigation—filing motions to dismiss, answering complaints, and discussing settlement—before deciding they would fare better in arbitration. When that happens, the court faces the question: Has the defendant’s request to switch to arbitration come too late?” (*Morgan, supra*, 596 U.S. at p. 413.)

B. *Standard of Review*

The trial court did not have the benefit of the decision in *Quach, supra*, 16 Cal.5th 562 at the time of its ruling. In such cases, we review “de novo the undisputed record of the trial court proceedings and ask[] whether [plaintiff] has established by clear and convincing evidence that [defendants] knew of [their] contractual right to compel arbitration and intentionally relinquished or abandoned that right. [Citation.]” (*Id.* at p. 585, fn. omitted.)

Thus, we reject defendants’ contention that “the trial court’s ruling cannot be sustained because it is based on the erroneous, pre-*Quach* legal standard, and it should be reversed for that reason alone.” (See also *Hofer, supra*, 111 Cal.App.5th at pp. 9–10.)

C. *Application of Quach*

Applying *Quach, supra*, 16 Cal.5th 562, we conclude plaintiff demonstrated by clear and convincing evidence that defendants waived their right to arbitrate.

Defendants do not dispute they were aware of the arbitration provision in the teaching contract at the time plaintiff filed his complaint. They also presumably interpreted the complaint as containing discrete, separately actionable claims based solely on the teaching contract that were embedded within one or more of plaintiff’s tort or statutory causes of action, as they now contend. Thus, at the beginning of the litigation, they were presented with the decision of whether to litigate the entire dispute in court or to timely demand resolution of the discrete

claims based on the teaching contract in the arbitral forum. (See *Charles J. Rounds Co. v. Joint Council of Teamsters* (1971) 4 Cal.3d 888, 899 [where, as here, a plaintiff “raises issues not susceptible to arbitration or not covered by the arbitration agreement, [the] defendant may not merely assert failure to arbitrate an issue as an affirmative defense; a stay rather than dismissal of the suit is then proper. Defendant must therefore demand arbitration if it seeks such a stay”]; see § 1281.4.)

Yet defendants delayed over a year before demanding that plaintiff arbitrate his claims or moving to compel arbitration, without explaining why they waited so long to assert their rights.⁹ If they intended from the outset to arbitrate only claims arising from the teaching contract, they should have explained why they did not earlier move to compel arbitration of those claims and request a stay of the non-arbitrable claims. “[A] party that wishes to pursue arbitration must take “active and decided steps to secure that right” because an arbitration agreement “is not . . . self-executing.” (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1795.) ‘Mere announcement of the right to compel arbitration is not enough. To properly invoke the right to arbitrate, a party must (1) timely raise the defense and take affirmative steps to implement the process, and

⁹ We note that the arbitration provision upon which defendants rely requires the party seeking to invoke its arbitration rights to meet and confer with the other party within 10-days of receiving notice of a dispute covered under the agreement. If the parties do not resolve the controversy through that process, the provision requires them to submit it to arbitration under the JAMS commercial rules, thereby contemplating a prompt demand to arbitrate.

(2) participate in conduct consistent with the intent to arbitrate the dispute. Both of these actions must be taken to secure for the participants the benefits of arbitration. (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 997–998; see *Brock v. Kaiser Foundation Hospitals, supra*, 10 Cal.App.4th at p. 1795 [a party wishing to compel arbitration files a petition to compel arbitration and request a stay in the superior court].)” (*Fleming Distribution Co. v. Younan* (2020) 49 Cal.App.5th 73, 80–81 (*Fleming*).)

Defendants’ unexplained delay in seeking to compel arbitration under the circumstances therefore supported an inference that they intentionally relinquished or abandoned their right to arbitrate. (See *Semprini v. Wedbush Securities, Inc.* (2024) 101 Cal.App.5th 518, 527 (*Semprini*); *Davis v. Shiekh Shoes, LLC* (2022) 84 Cal.App.5th 956, 968 [“extended silence and much delayed demand for arbitration’ [17 months] cuts strongly in favor of a finding of waiver”].)

Further, during the first six months that the action was pending, defendants incurred over \$270,000 in attorney fees actively litigating the action in court, an expenditure at the outset of a controversy that is inconsistent with an intent to arbitrate discrete parts of it. (See *Fleming, supra*, 49 Cal.App.5th at p. 80 [“[A]t some point continued litigation of the dispute justifies a finding of waiver”].)

Moreover, the totality of several of the litigation activities in which defendants engaged during the year-long delay (*Hofer, supra*, 111 Cal.App.5th at p. 14), supports a finding that defendants intentionally relinquished or abandoned the right to arbitrate, at least until they decided they would fare better in arbitration. First, instead of responding to the complaint with a

motion to compel arbitration and requesting a stay of non-arbitrable claims, defendant filed an anti-SLAPP motion which sought, among other things, to require plaintiff to make a prima facie showing that he had a reasonable probability of prevailing on the merits of his causes of action. Such conduct evinced an intent to utilize the trial court's formal procedures—not the informal processes of the arbitral forum—to resolve the dispute.

Defendants then filed and prosecuted an appeal from that portion of the anti-SLAPP order denying their motion. And, they sought and obtained in the judicial forum an award of attorney fees for partially prevailing on their anti-SLAPP motion, further evincing an intent to aggressively defend the matter, including the contract-based claims, in court. (*Fleming, supra*, 47 Cal.App.5th at p. 80 [Whether “the litigation machinery has been substantially invoked” a factor to be considered in determining claim of waiver].)

Next, while their anti-SLAPP motion was pending determination, defendants filed a case management statement requesting a bench trial on all of plaintiff's claims, including those allegedly covered by the arbitration provision. They also informed the trial court of their intent to adjudicate those claims by demurrer and summary judgment, without disclosing an intent to move to compel arbitration of some of those claims. Their representations and omissions to the court in preparation for trial were thus also inconsistent with an intent to arbitrate.

Finally, defendants moved to strike plaintiff's demand for a jury trial on the only two claims asserted in the first amended complaint, without distinguishing between arbitrable and non-arbitrable claims. Had defendants intended to try to the court only the non-arbitrable claims embedded in those two causes of

action, their motion would have been limited to striking the jury demand as to those discrete claims, not the entirety of each cause of action. Thus, like the representations and omissions in their case management statement, that omission was inconsistent with their right to arbitrate.

Defendants assert four reasons why the record of their litigation activity and delay did not constitute sufficient evidence of their intent to relinquish their arbitration rights: (1) their efforts to obtain dismissal of arbitrable claims based on failure to arbitrate were consistent with asserting the right to arbitrate; (2) their litigation of non-arbitrable claims does not demonstrate intentional abandonment of the right to arbitrate discrete arbitrable claims; (3) there is no clear and convincing evidence of waiver; and (4) the timing of their demand to arbitrate does not evidence an intent to abandon the right.

As to defendants' first contention—that their demurrers based on the arbitration provision were not inconsistent with an intent to arbitrate—we will assume without deciding that defendants' demurrers based on the arbitration clause, when viewed in isolation, did not support a finding of waiver. But we do not view defendants' demurrers in isolation. As we have discussed, defendants, rather than promptly filing a motion to arbitrate, elected to test the legal and factual sufficiency of plaintiff's claims by seeking to strike portions of plaintiff's complaint in an anti-SLAPP motion, to request attorney fees for partially prevailing on that motion, to challenge on appeal the adverse portion of the trial court's decision on that motion, and then to pursue a dismissal of all of plaintiff's claims by way of demurrer.

Defendants' second contention, that their litigation of non-arbitrable claims does not demonstrate an intentional abandonment of the right to arbitrate the arbitrable claims, urges us to examine each instance of litigation activity or delay independently and determine whether that conduct was directed to an arbitrable or nonarbitrable claim. We reject defendants' contention for two reasons.

First, we decline to follow defendants' proposed piecemeal approach to the waiver analysis because, as explained, under *Quach, supra*, 16 Cal.5th 562 and its progeny, we must apply a clear and convincing evidence standard and evaluate the litigation conduct and any corresponding delay in totality. (See *Hofer, supra*, 111 Cal.App.5th at p. 14 ["we reject the . . . plaintiffs' assumption that we should take a divide-and-conquer approach by examining whether each aspect of their litigation conduct *by itself* demonstrates a waiver; the inquiry into whether it is 'highly probable' the party has, by their conduct, intentionally relinquished or abandoned the right to arbitrate takes into account the totality of that conduct"].)

Second, we do not view defendants' litigation conduct as limited to only those claims that they now maintain are not arbitrable. Indeed, as we discuss above, defendants did not at the outset of the controversy seek to arbitrate only those claims they now contend are arbitrable and stay the nonarbitrable claims; they sought a bench trial of all of plaintiff's claims, including those allegedly covered by the arbitration provision, sought dismissal by demurrer of all of plaintiff's claims, advised the trial court that they intended to file a motion for summary judgment of any claims that survived demurrer, and moved to

strike plaintiff's demand for a jury trial without distinguishing between arbitrable and nonarbitrable claims.

We have already rejected defendants' third argument, that clear and convincing evidence does not support a finding of waiver by explaining above our contrary conclusion.

Finally, defendants question whether delay is even a factor after *Quach, supra*, 16 Cal.5th 562, asserting "[t]he role of 'delay' in the arbitration waiver analysis is unclear after *Quach*" and delay relates to the separate doctrine of forfeiture, not waiver under the *Quach* test. They also maintain that delay, without litigation activity, is insufficient to demonstrate waiver and that their delay in commencing arbitration proceedings was not unreasonable. Again, we disagree.

The decision in *Quach, supra*, 16 Cal.5th 562 did not suggest or imply that delay was no longer a factor to be considered in the waiver analysis. *Quach* held that the totality of a moving party's litigation activity should be considered, focusing primarily on the party's words and conduct, to determine intent to relinquish or abandon. Further, *Quach* noted that accepting the defendant's contention that it did not waive its right to arbitrate "would surely create undue delay and gamesmanship going forward[.]" (*id.* at p. 586) which supports the conclusion that undue delay remains an important factor in determining whether a party has waived its right to arbitrate. Further, even if a party's conduct in delaying the initiation of arbitration, by itself, may no longer be sufficient without more to show waiver, a prolonged unexplained delay, as occurred here, remains a relevant consideration. The longer a party waits to commence arbitration without any explanation for the delay, the stronger the inference of intent to forego the benefits of arbitration,

including expedience and cost savings, in favor of litigating in court. We also reject the assertion that defendants did not couple their delay with litigation activity, which we detail above.

When viewed in totality, defendants' words and conduct show they made a strategic decision to first utilize the judicial process in an attempt to eliminate all of plaintiff's claims and recover attorney fees. But when, after a year of litigation, they could not successfully defeat all of plaintiff's claims in court prior to trial, they "decid[ed] they would fare better in arbitration." (*Morgan, supra*, 596 U.S. at p. 413.) That strategic decision carried with it the risk that a court could construe their conduct as waiver of the right to arbitrate. But defendants nevertheless consciously and deliberately pursued the year-long course of litigation conduct described above, which suggests they weighed the risk of a waiver finding against the benefit of prevailing on the merits in court and decided to adopt the more aggressive approach to resolving the dispute. (See *Semprini, supra*, 101 Cal.App.5th at p. 527 ["It is well established that a four- to six-month delay in enforcing the right to arbitrate may result in a finding of waiver if the party acted inconsistently with the intent to arbitrate during that window"]; see *Quach, supra*, 16 Cal.5th at p. 586 ["Rather than moving to compel arbitration at the outset of the case, [the defendant] answered the complaint and propounded discovery requests, suggesting it did not intend to seek arbitration"].)

Given the undisputed record, we conclude that, when viewed in totality, it contains substantial evidence from which a reasonable trier of fact could have found it highly probable that defendants knew of their right to arbitrate at least some of the claims pleaded and intentionally relinquished that right. (See

Quach, supra, 16 Cal.5th at p. 585, fn. 6.) “[D]efendant[s] request to switch to arbitration [has] come too late[.]” (*Morgan, supra*, 596 U.S. at p. 413.)

IV. DISPOSITION

The order denying the motion to compel arbitration is affirmed. Plaintiff is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM (D.), J.

We concur:

BAKER, Acting P. J.

MOOR, J.