

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

MICHAEL MITCHELL et al.,
Plaintiffs and Respondents,
v.
LILAC SOLUTIONS, INC., et al.,
Defendants and Appellants.

A173736
(Alameda County
Super. Ct. No. 24CV101375)

Under the California Arbitration Act (Code Civ. Proc., § 1280 et seq.), a party who is contractually entitled to compel arbitration of a dispute may “waive[]” that right. (§ 1281.2, subd. (a).) The trial court found such a waiver here, and we affirm.

Lilac Solutions, Inc. (Lilac), Gerald “Jerry” Sullivan, Matthew McCall, David Grauer, Matthew Legaspi, and Susannah Blumenstock (the Lilac Defendants) seek review of a trial court order denying their motion to compel arbitration in a case brought by Michael Mitchell, Khiry Crawford, Tyler Echevarria, and Anthony McCune (Plaintiffs) on claims of wrongful termination, discrimination, and sexual harassment.

The Lilac Defendants argue that: (1) in finding a waiver of their right to arbitrate, the trial court either failed to consider or misapplied the holding in *Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562 (*Quach*) and instead relied upon outdated case law that has been superseded by *Quach*, and (2) when, as part of its waiver analysis, the court evaluated why

they initiated discovery and took various other steps to advance the judicial proceedings, the trial court failed to take into account the “quandary” they faced in dealing with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (9 U.S.C §§ 401–402) (EFAA), which prevented them from seeking compelled arbitration immediately.

We see no reversible error. First, the court’s order denying compelled arbitration based on waiver of the right to arbitrate is consistent with *Quach*. Although the order makes no mention of *Quach* and cites precedent predating it, we must presume the trial court was aware of governing legal principles and correctly applied those principles absent some affirmative indication that it ruled contrary to law. There is no such indication here; the court relied on appropriate legal criteria in finding a waiver, and its pre-*Quach* citations do not conflict with that case.

Second, the Lilac Defendants’ conduct in seeking extensive discovery before filing a motion to compel arbitration supplies substantial evidence of waiver, impliedly by a clear and convincing evidence standard—the evidentiary standard *Quach* established for a waiver of arbitral rights—even though the trial court never mentioned the applicable standard of proof. Here, too, the Lilac Defendants fail to overcome the presumption of correctness court rulings are given on review.

Third, we reject the contention that, in finding waiver, the trial court erroneously failed to recognize and accommodate the cross-pressures the Lilac Defendants faced in dealing with the EFAA. They invite us to conclude that the trial court penalized them for failing to file an immediate motion to compel arbitration in the face of impossible odds created by the presence of what they see as a spurious sexual harassment cause of action pleaded solely to evade arbitration by using the EFAA as a shield. But that is an

overreading of the trial court’s order. Rather, given the nature and sequence of events in the first few months of the case, the trial court appears to have concluded that the Lilac Defendants unequivocally manifested an intent to litigate in a judicial forum—at least, until they were faced with an anti-SLAPP motion, which prompted a defense motion to compel arbitration.

We explain each of these points further below.

I. BACKGROUND

A. Pleadings, Discovery, and the Motion To Compel Arbitration

Plaintiffs were once employed by Lilac, a company that manufactures technology utilized in lithium extraction. Gerald “Jerry” Sullivan, Matthew McCall, David Grauer, Matthew Legaspi, and Susannah Blumenstock were managerial-level employees at Lilac with roles related to health and safety. Plaintiffs filed a complaint on December 6, 2024, alleging various claims of exposure to harmful chemicals, wrongful termination, gender and disability discrimination, and sexual harassment. The complaint demands a jury trial and alleges thirteen causes of action against the Lilac Defendants, including five for alleged violation of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.). The fifth cause of action is for sexual harassment.¹

Upon accepting employment at Lilac, each of the Plaintiffs signed an arbitration agreement requiring disputes arising out of their employment with Lilac be arbitrated. In responding to the complaint, the Lilac Defendants asserted their right to arbitrate under these agreements. They filed answers to the complaint alleging affirmative defenses based on a right to arbitrate. They filed a cross-complaint and an amended cross-complaint

¹ Each of the other twelve causes of action is supported by a highly detailed narrative recitation of factual background that, at least generally, seems to tie the pleaded claims to the factual subject matter alleged. The fifth cause of action, by contrast, is pleaded in a conclusory manner.

for violation of trade secrets in which they alleged that Plaintiffs were subject to an arbitration agreement. And on March 18, 2025, they filed a motion to compel arbitration.

But before seeking compelled arbitration, the Lilac Defendants took a number of affirmative steps in the pending judicial proceedings. They served Plaintiffs with 12 sets of written discovery; noticed depositions of each of the Plaintiffs; and noticed two depositions of third parties. They served 11 subpoenas on nonparties for production of business records. They also responded to 33 sets of Plaintiffs' discovery requests, and filed seven motions requesting action by the court on various procedural matters.² They filed their motion to compel arbitration shortly after plaintiffs filed an anti-SLAPP motion seeking to strike the amended cross-complaint. (See Code Civ. Proc., § 425.16.)

In their motion to compel arbitration, the Lilac Defendants argued that the arbitration agreement is enforceable and that the EFAA does not apply because Plaintiffs do not raise a plausible sexual harassment claim.³ In opposition to compelled arbitration, Plaintiffs argued that the Lilac Defendants waived their right to arbitrate by seeking to take discovery, by filing several motions, and generally by availing themselves to rights unique

² Specifically, the Lilac Defendants filed motions to seal portions of the complaint, to designate the case as complex, for their attorneys to be admitted *pro hac vice*, and for a protective order seeking to limit Plaintiffs' interrogatories.

³ As the Lilac Defendants saw things, the fifth cause of action was pleaded in a baseless attempt to block arbitration. (See *Yost v. Everyrealm, Inc.* (S.D.N.Y. 2023) 657 F.Supp.3d 563, 588 [recognizing the potential for "mischief" under the EFAA, insofar as it incentivizes "litigants bound by arbitration agreements to append bogus" harassment claims "to their viable claims, in the hope of end-running these agreements"].)

to a judicial proceeding. Plaintiffs also argued that the EFAA barred arbitration due to their sexual harassment claim.

B. The Trial Court’s Denial of the Motion To Compel Arbitration

The trial court denied the Lilac Defendants’ motion to compel arbitration on the ground that the Lilac Defendants had waived their right to compel arbitration. The trial court made this finding based on factors derived from *Fleming Distribution Co. v. Younan* (2020) 49 Cal.App.5th 73, 80 (*Fleming*) and *Kokubu v. Sudo* (2022) 76 Cal.App.5th 1074 (*Kokubu*). First, the trial court found that the Lilac Defendants’ filing of the cross-complaint and the amended cross-complaint without simultaneously seeking a “stay of the case” was “inconsistent with invoking the right to arbitrate.” Second, the trial court found that the Lilac Defendants had “substantially invoked the litigation machinery before seeking arbitration” through their pre-motion activities. Third, the trial court found that the Lilac Defendants had “taken advantage of judicial discovery procedures not available in arbitration.”

The Lilac Defendants timely filed a notice of appeal.⁴

⁴ Shortly before oral argument, and after the appellate briefing was closed, the Lilac Defendants filed an unopposed request to augment the record to include a stipulation and order entered in the trial court on May 13, 2026 pursuant to which (1) individual defendants Sullivan, McCall, Grauer, Legaspi, and Blumenstock were dismissed, leaving Lilac as the only remaining defendant in the proceedings below, and (2) five of the thirteen claims alleged in the complaint (causes of action five, seven and eight, and ten through thirteen) were dismissed. No request for dismissal of any parties to this appeal has been presented in these appellate proceedings. By order filed June 16, 2026, we denied the Lilac Defendants’ augmentation request, indicated we would treat it as a request for judicial notice, and deferred to the merits any ruling on the request as so construed. We now deny the judicial notice request on relevance grounds. The dismissals in the trial court

II. DISCUSSION

A. *Governing Law: Waiver of Contractual Right To Arbitrate*

“On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] . . . [t]he right to compel arbitration has been waived by the petitioner” (Code Civ. Proc., § 1281.2, subd. (a); *Quach, supra*, 16 Cal.5th at p. 572.)

The Lilac Defendants argue that the trial court applied an outdated legal standard for determining waiver under *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 (*St. Agnes*), and failed to appreciate that *St. Agnes* was partially overruled in *Quach*. (See *Quach, supra*, 16 Cal.5th at pp. 582 & fn. 4, 584–585.) Before *Quach*, California courts applied a six-factor waiver test enunciated as follows in *St. Agnes*, at page 1196: “‘In determining waiver, a court can consider “(1) whether the party’s actions are inconsistent with the right to arbitrate; (2) whether ‘the litigation machinery has been substantially invoked’ and the parties ‘were well into preparation of a lawsuit’ before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for stay of the proceedings; (5) ‘whether important intervening steps [e.g., taking advantage of judicial discovery procedures not

occurred long after the order at issue in this appeal, and thus can have no bearing on the correctness of that order at the time it was entered.

available in arbitration] had taken place’; and (6) whether the delay ‘affected, misled, or prejudiced’ the opposing party.” ’ ’ ’ *St. Agnes* further provides that for a plaintiff to prove waiver, they must show prejudice. (*Id.* at pp. 1203–1204.) As our high court later explained in *Quach*, the sixth *St. Agnes* factor—the prejudice requirement—was designed to ensure consistency with federal law. (*Quach*, at pp. 581–583.)

The six *St. Agnes* factors were relied upon in *Fleming*, and some of these factors were cited by the trial court in denying the Lilac Defendants’ motion to compel arbitration. But *Quach* did not overrule the *St. Agnes* waiver test in its entirety. Based on an intervening change in federal arbitration case law (*Morgan v. Sundance, Inc.* (2022) 596 U.S. 411; see *Quach, supra*, 16 Cal.5th at pp. 581–583), the *Quach* court abandoned the arbitration-specific prejudice factor in the *St. Agnes* test. Without the prejudice requirement, the *Quach* court explained, the *St. Agnes* waiver test placed arbitration contracts on equal footing with other types of contracts and thus was consistent with federal law after *Morgan*. (*Quach*, at p. 569.)

The *Quach* court emphasized that, going forward, waiver determinations should be solely focused on the waiving party’s conduct rather than any resulting harm to the party opposing arbitration. (*Quach, supra*, 16 Cal.5th at p. 585.) The court further explained that the *St. Agnes* factors should not be viewed as a “single multifactor test” for determining whether the right to compel arbitration has been lost through litigation, as some of the factors are relevant to other defenses such as forfeiture, estoppel, or laches, rather than waiver. (*Quach*, at p. 584.) Instead, courts should consider “only those factors that are relevant to the specific state law defense the party resisting arbitration has raised.” (*Ibid.*) In this case, the court applied the generally applicable law of waiver. (*Ibid.*)

Summing up its holding, the *Quach* court restated the *St. Agnes* waiver test, recasting it in the following terms: “To establish waiver under generally applicable contract law, the party opposing enforcement of a contractual agreement must prove by clear and convincing evidence that the waiving party knew of the contractual right and intentionally relinquished or abandoned it.” (*Quach, supra*, 16 Cal.5th at p. 584.) “The waiver inquiry is exclusively focused on the waiving party’s words or conduct; neither the effect of that conduct on the party seeking to avoid enforcement of the contractual right nor that party’s subjective evaluation of the waiving party’s intent is relevant. [Citations.] This distinguishes waiver from the related defense of estoppel, ‘which generally requires a showing that a party’s words or acts have induced detrimental reliance by the opposing party.’ [Citations.] To establish waiver, there is no requirement that the party opposing enforcement of the contractual right demonstrate prejudice or otherwise show harm resulting from the waiving party’s conduct.” (*Id.* at p. 585.)

B. Standard of Review

At the threshold, before turning to how that trial court conducted its waiver analysis, the parties dispute whether we should conduct a de novo or substantial evidence review. The Lilac Defendants argue that since the trial court applied the wrong legal standard, we should review its order denying compelled arbitration de novo, without giving any deference to the trial court’s ruling. Plaintiffs, on the other hand, argue that the standard of review is for substantial evidence, which is highly deferential. On this issue, we side with Plaintiffs. The primary case the Lilac Defendants rely upon for de novo review involved a trial court order denying compelled arbitration under the *St. Agnes* test prior to the issuance of the Supreme Court’s *Quach* opinion (see *Hofer v. Boladian* (2025) 111 Cal.App.5th 1, 9–10), which of

necessity means it was impossible for the trial court there to have been aware of the change in the law *Quach* brought about. Not so here.

Normally, a trial court determination that the right to compel arbitration has been waived is a question of fact subject to substantial evidence review on appeal. (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 426; *Davis v. Shiekh Shoes, LLC* (2022) 84 Cal.App.5th 956, 962.) Although we must bear in mind the clear and convincing burden of proof (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005–1012) and affirm only if we conclude it is “‘highly probable’” the Lilac Defendants waived their arbitral rights knowingly (*Quach, supra*, 16 Cal.5th at p. 586), nothing in *Quach* effects a change in the nature of substantial evidence review so long as, legally, the updated waiver test enunciated by the Supreme Court was correctly applied. Because we believe the trial court analyzed the waiver issue in a manner that is consistent with *Quach*, we see no reason to apply de novo review.

In general, waiver determinations consider the totality of the parties’ actions and specifically whether their combined actions “ ‘ ‘ ‘ indicate a conscious decision . . . to seek judicial judgment on the merits of the arbitrable claims, which would be inconsistent with a right to arbitrate.’ ” ’ ” (*Sierra Pacific Industries Wage & Hour Cases* (2025) 116 Cal.App.5th 1038, 1055.) Under this totality analysis, trial courts have “considerable flexibility to determine when waiver occurs” in the particular circumstances presented. (*Kokubu, supra*, 76 Cal.App.5th at p. 1083.) That was the case before *Quach*, and it continues to be the case after *Quach*. The Lilac Defendants now offer various reasons why they undertook litigation activities in court that they portray as either routine or mandatory, but conflicting inferences may be

drawn from the sum total of their conduct, and it is not our role on appeal to resolve those conflicts.

Under the deferential standard we apply in evaluating inferences drawn by the trial court, “ ‘all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment’ ” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60; see *Nissan Motor Acceptance Cases* (2021) 63 Cal.App.5th 793, 818 [“We must not review the evidence to determine whether substantial evidence supports the losing party’s version of the evidence. Instead, we must determine if there is any substantial evidence, contradicted or uncontradicted, to support the trial court’s findings”].) That standard dictates affirmance on this record.

C. The Trial Court’s Waiver Analysis

The Lilac Defendants argue that the trial court applied the wrong legal standard by relying on *Fleming* instead of *Quach*. We are not persuaded.

Preliminarily, we note that the Lilac Defendants’ suggestion that the trial court relied on a pre-*Quach* understanding of the six-factor *St. Agnes* test is not accurate. In fact, the court cited both *Fleming* and *Kokubu*, first relying on *Fleming* for a background recitation of the *St. Agnes* factors regarding waiver, and then relying on *Kokubu* in specifically analyzing and finding waiver on the facts presented. The trial court at one point did make a general statement that “under the factors discussed in *Fleming, supra*, 49 Cal.App.5th at 80, [the Lilac Defendants] . . . have waived the right to arbitrate[,]” but it did not specify which of these factors it meant. Notably, however, in the court’s analysis of waiver on the facts presented, there is no citation to any of the specific passages in either *Kokubu* or *Fleming* that apply the prejudice component of the multifactor *St. Agnes* test. (See *Kokubu, supra*, 76 Cal.App.5th at p. 1091; *Fleming, supra*, 49 Cal.App.5th at pp. 83–84.) Legally, that matters.

It is true that the trial court did not cite *Quach* in its April 2025 order denying compelled arbitration—*Quach* came down in July 2024—but that does not mean we must infer it was ignorant of the governing law or unaware of *Quach* at the time of its order. At the hearing on the motion to compel arbitration, the parties discussed *Quach* extensively. And in accord with our usual presumption of regular performance of judicial duty, we always presume a trial judge knows the law (see *People v. Coddington* (2000) 23 Cal.4th 529, 644) absent some affirmative indication in the record to the contrary, which is not present here. Nothing in the court’s order mentions prejudice, which is the crucial aspect of *St. Agnes* that *Quach* abandoned.

According to the Lilac Defendants, the trial court “overlooked the principles” established in *Quach*, as shown by its failure to say anything about the clear and convincing proof burden that now governs whether arbitral rights have been knowingly and intentionally relinquished. But the Lilac Defendants’ knowledge and understanding of the arbitration agreements is indisputable, since they raised their contractual right to arbitrate expressly in their responsive pleadings. It does not matter that the trial court never mentioned the term “clear and convincing” in its assessment of the evidence. In our substantial evidence review, we are charged with ensuring that the evidence supporting any implied findings is strong enough to meet the applicable burden of proof. (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at pp. 1005–1012.) And on this record, we believe the Plaintiffs met their burden by the requisite standard of clarity.

Legally, three aspects of the court’s reasoning are most salient, each taken from passages in *Kokubu* that remain good law following *Quach*. A close examination of these aspects of the court’s reasoning demonstrates that, in finding waiver, the court only considered things that bear upon whether

the Lilac Defendants knowingly waived their contractual arbitration rights. It did not undertake an analysis of prejudice to the Plaintiffs or apply any other *St. Agnes* factor in a manner that took the focus away from the driving consideration under *Quach*—the Lilac Defendants’ intent in litigating vigorously for more than three months before seeking to arbitrate.

First, and most important, the court considered “whether the party’s actions are inconsistent with the right to arbitrate.” (See *Kobuku, supra*, 76 Cal.App.5th at p. 1084.) In applying this factor, the trial court found that “Lilac’s filing a Cross-Complaint, then a (First) Amended Cross-Complaint, without simultaneously seeking a stay of the case pending completion of arbitration is inconsistent with invoking the right to arbitrate.” This factor is directly relevant to an analysis of waiver as it echoes generally applicable contract principles laid out in *Quach*. (*Quach, supra*, 16 Cal.5th at p. 584.) *Quach* requires that a finding of waiver be supported by an “intentional relinquishment” of a known right to compel arbitration. (*Ibid.*)

Applying this first factor, there is substantial evidence that the Lilac Defendants intentionally relinquished their right to arbitrate. Not only did they file a cross-complaint and an amended cross-complaint seeking affirmative relief, but they engaged in extensive discovery over a span of three months. During this period, they served extensive discovery, first party as well as third party, and several procedural motions. The extent and depth of their discovery efforts may be fairly construed to indicate a deliberate choice of a judicial forum. The Lilac Defendants try to explain away all of this litigation activity by contending that the rules of civil procedure made it compulsory for them to assert their own claims arising out of the same factual circumstances alleged by Plaintiffs. We recognize the difficult position the Lilac Defendants were in when faced with a decision whether to

file compulsory cross-pleadings before moving to compel arbitration, but the central problem they have here is not just with their responsive pleadings.

Rather, they have failed to persuade us why the trial court erred in finding, as a factual matter, that the pattern of their words and conduct in the three months following the filing of the complaint, *in its totality*, was inconsistent with their claimed entitlement to arbitrate. The Lilac Defendants answered, filed a series of cross-pleadings seeking affirmative relief, and launched a full-fledged discovery campaign covering every aspect of the case, all the while proceeding with notable dispatch over the course of three months—until the Plaintiffs filed an anti-SLAPP motion, which the Lilac Defendants quickly countered with a motion to compel arbitration, automatically freezing all discovery by the Plaintiffs. (See Code Civ. Proc. § 425.16, subd. (g).) On this record, we decline to second-guess the court’s finding that, in light of this series of moves and countermoves, what Lilac Defendants did was inconsistent with an intent to arbitrate.

Second, the trial court considered “ ‘ “whether “the litigation machinery has been *substantially* invoked” and the parties “*were well into* preparation of a lawsuit” before the party notified the opposing party of an intent to arbitrate.’ ” ’ ” (*Kokubu, supra*, 76 Cal.App.5th at p. 1084, italics added.) This factor focuses on the extent of the Lilac Defendants’ conduct during litigation. (See *Quach, supra*, 16 Cal.5th at p. 585.) It looks to whether the Lilac Defendants’ conduct in invoking “substantial litigation machinery” is inconsistent with the right to arbitrate, which is what *Quach* contemplates. (See *id.* at p. 584.) The same factual considerations taken into account with respect to the first waiver factor, discussed above, support a finding of waiver here as well.

The situation presented on the facts before us is broadly similar to *Quach*, where the defendant company waived its right to arbitrate because it filed an answer, initiated discovery, filed a case management statement requesting a jury trial, and posted jury fees. (See *Quach, supra*, 16 Cal.5th at p. 570.) In *Quach*, to be sure, the party claiming entitlement to arbitrate engaged in more extensive in-court litigation activity than simply taking discovery, but factually the comparison is a matter of degree. The difference between *Quach* and this case simply underscores that, in the circumstances presented, the trial court assessed the record in its entirety and drew a reasonable factual inference that the Lilac Defendants' conduct manifested an intent to litigate in court.

Third and finally, the trial court considered whether “Lilac has taken advantage of judicial discovery procedures not available in arbitration by propounding 12 sets of written discovery, 4 depositions notices on parties to this case, and 11 deposition subpoenas on nonparties.” (See *Kokubu, supra*, 76 Cal.App.5th at p. 1090.) It found that they did. The Lilac Defendants contend that as a result of recent amendments to Code of Civil Procedure section 1283.05, discovery methods in arbitration are now the same as discovery in an unlimited civil action. But that argument is beside the point here. Whether judicial and arbitration procedures are the same, or different, is not dispositive.

On this threefold analysis, the trial court found, in substance, that the Lilac Defendants elected to avail themselves of the judicial process and took clear and unmistakable steps to move the case forward in court, primarily by launching a wide-ranging discovery campaign. For us to affirm, it is enough that, factually, the record supports this determination. By making a comparison to what it viewed as more limited arbitral discovery, the trial

court did not frame the issue as one implicating prejudice to the Plaintiffs, but rather as a determination that the Lilac Defendants *chose* to make use of discovery tools available under judicial auspices. Whether the court was right or wrong about the uniqueness of the type and extent of discovery available in court has no bearing on whether the Lilac Defendants elected to proceed judicially—until they had a change of mind.

Nothing in the court’s order denying compelled arbitration indicates that it considered anything other than “factors that are relevant to the specific state law defense the party resisting arbitration has raised” (*Quach*, *supra*, 16 Cal.5th at p. 584)—which in this case was waiver. And overall, the focus of the trial court’s waiver analysis, as *Quach* explained it should be, was on the Lilac Defendants’ conduct insofar as it bore on their intent. Had the trial court shown concern for the detriment or disadvantage to the Plaintiffs of compelling arbitration versus remaining in court—considerations that might be relevant to defenses such as estoppel or laches, as distinct from waiver—the position taken by the Lilac Defendants would have greater force here. But that is not how we read the court’s order, and that is not what the order says. The three aspects of *Kokubu* that the trial court invoked are fully consistent with *Quach*’s reframing of the *St. Agnes* test to place the focus on voluntary relinquishment of known contractual rights.

The Lilac Defendants’ argument to the contrary relies heavily on *Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651, which reversed a waiver finding after the employer defendants in that case engaged in discovery and waited 14 months before moving to compel arbitration. As Plaintiffs point out, however, the determinative factor there—that the plaintiff failed to “demonstrate prejudice from the delay” (*id.* at p. 654)—has been superseded by *Quach*. Ironically, given the Lilac Defendants’ repeated

citations to *Khalatian*, they seem to be inviting us to do exactly what they charge the trial court with having done—rely on outdated case law for a holding that has been impliedly overruled by *Quach*.

D. The EFAA “Quandary” Faced by the Lilac Defendants

Based on the presence of a potential EFAA⁵ issue raised by a single claim in the complaint—the fifth cause of action alleging sexual harassment—the Lilac Defendants seek to downplay the significance of the multi-faceted discovery they pursued at the outset of the case. They point to case law holding that where one claim among several pleaded claims in a complaint falls within the scope of the EFAA, the single nonarbitrable claim renders all other pleaded claims nonarbitrable under the EFAA along with it. (See *Quilala v. Securitas Security Services USA, Inc.*, *supra*, 117 Cal.App.5th at pp. 88–90; *Casey v. Superior Court* (2025) 108 Cal.App.5th 575, 588; *Liu v. Miniso Depot CA, Inc.* (2024) 105 Cal.App.5th 791, 800; *Doe v. Second Street Corp.*, *supra*, 105 Cal.App.5th at pp. 573–577.)

Given these cases, the Lilac Defendants argue, their delay in moving to compel arbitration simply reflected their “efforts to grapple with the quandary created by [the] EFAA, recognizing they could not successfully compel arbitration until they were in a position to mount a credible challenge

⁵ Congress passed the EFAA as an amendment to the Federal Arbitration Act (FAA). (*Doe v. Second Street Corp.* (2024) 105 Cal.App.5th 552, 564; 9 U.S.C § 402.) The EFAA provides a narrow exception to the FAA’s section 2, which states that an agreement to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in [the EFAA].” (9 U.S.C § 2; *Quilala v. Securitas Security Services USA, Inc.* (2025) 117 Cal.App.5th 75, 83 (*Quilala*)). The EFAA applies when the plaintiff sufficiently pleads a sexual harassment or sexual assault claim, which then renders a predispute arbitration agreement unenforceable. (9 U.S.C § 402 (a).)

to the harassment claim’s merits.” Their claimed strategy was to “briefly defer a motion to compel so they could develop facts to challenge the viability of Plaintiffs’ sexual harassment claim (the idea being that, once [they] were in a position to show the harassment claim was baseless, the EFAA would no longer apply and arbitration would be back on the table).”⁶

While there is some surface logic to this proffered excuse, it does not square with the record of contemporaneous events. First of all, the scope of the Lilac Defendants’ discovery went well beyond what they claim was necessary to position the fifth cause of action for a dispositive motion. The chronology, alone, is suspicious. The complaint was filed on December 6, 2024, and the motion to compel arbitration was filed on March 18, 2025. While the Lilac Defendants claim that the Plaintiffs’ initial interrogatory and document requests responses in early January 2025 revealed no evidence supporting the fifth cause of action, by early March 2025 they had not filed a motion for summary adjudication aimed at the fifth cause of action or

⁶ In the trial court, the Lilac Defendants advanced a much more aggressive form of this argument. In the reply brief in support of their motion to compel arbitration and at the hearing on the motion, they contended that the trial court was obligated to decide as a threshold matter whether EFAA applies to the complaint and if so to what extent. As their counsel explained at the hearing, “we can’t get to a waiver analysis before deciding whether there is a valid and enforceable arbitration agreement to begin with.” In this view, it was analytically necessary to decide the EFAA issue before deciding anything else; that was so, the Lilac Defendants argued, because if the EFAA bars arbitration of the entire complaint they “could not have waived as a matter of law because there was nothing to waive.” The trial court declined to address this version of their EFAA argument because it was raised too late. The argument has not been renewed on appeal, so we, too, have no occasion to address it. We assume *arguendo*, however, that the EFAA applies due to the presence of the fifth cause of action in the complaint, and that, under the *Quilala* line of cases, the presence of that claim renders the entire case nonarbitrable.

indicated that such a motion was forthcoming in order to clear the way for arbitration. It was the filing of the anti-SLAPP motion on March 13, 2025 that appears to have spurred the filing of their motion to compel five days later. A perfectly reasonable reading of this sequence of events is that, in the face of the anti-SLAPP motion, forum shopping motivated the motion to compel arbitration as a litigation countermove.

The Lilac Defendants urge us to read things differently. They argue that “[i]mplicit in the trial court’s order is the assumption that Defendants, facing a mix of EFAA and non-EFAA claims, were required to move to compel arbitration right after the Complaint was filed, even if that motion was doomed to fail because the merits of Plaintiffs’ harassment claim were unknown and could not credibly be challenged without some initial fact discovery.” But nothing in the trial court’s order denying the motion to compel arbitration and nothing mentioned by the court at the hearing on that motion suggests that the court believed an immediate motion to compel arbitration was necessary. If the Lilac Defendants genuinely believed they needed time to work on developing a motion to surgically excise the sexual harassment allegations from the case before seeking compelled arbitration, they could have taken procedural steps to alleviate their dilemma.

For example, the Lilac Defendants could have filed a motion seeking leave to extend the time for responsive pleadings while simultaneously asking a stay of proceedings except for defense-initiated discovery that was laser-focused on the sexual harassment allegations.⁷ The trial court appears

⁷ The Lilac Defendants did, to be sure, take some steps to demonstrate that they were entitled to arbitrate. They point out, for instance, that they pleaded their right to arbitrate in the answer, the cross-complaint, and the amended cross-complaint. But that was not sufficient to avoid waiver. The “[m]ere announcement of the right to compel arbitration is not enough. To

to have recognized that such an option was available. In announcing its ruling at the hearing on the motion to compel arbitration, the court brought up the Lilac Defendants' failure to seek a stay "even before answers were filed." Because the court had also raised the stay issue in its tentative ruling, Lilac Defendants, in their argument at the hearing, tried to explain why they failed to pursue such a course. They pointed out that they sought a stay along with their motion to compel arbitration, and that they had no obligation to seek one sooner. The court, quite plainly, was unconvinced.

The Lilac Defendants contend that a stay was not available to them under Code of Civil Procedure section 1281.2, the provision in the California Arbitration Act conferring authority on courts to stay some aspects of ongoing litigation while other aspects of the litigation are sent to arbitration. But on its face, this provision presupposes that a motion to compel arbitration has been filed; it provides authority to grant such a motion as to claims that have been found to be arbitrable, while denying it and issuing a stay as to nonarbitrable claims. (Code Civ. Proc., § 1281.2, subd. (d); *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2015) 234 Cal.App.4th 459, 468.) That was not the procedural posture of this case in the period *before* the Lilac Defendants filed their motion to compel arbitration. They designated the case to be complex. And in the months preceding their decision to file the motion to compel, nothing stopped them from invoking the trial court's inherent authority to pause or sequence the proceedings in

properly invoke the right to arbitrate, a party must (1) timely raise the defense and take affirmative steps to implement the process, *and* (2) participate in conduct consistent with the intent to arbitrate the dispute." (*Fleming, supra*, 49 Cal.App.5th at p. 81, italics added; see also *Hofer v. Boladian, supra*, 111 Cal.App.5th at p. 16 ["merely mentioning a desire to arbitrate does not indicate an intent to arbitrate absent some *action*"].)

whatever manner it deemed to be most efficient. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967; see *Cohn v. Corinthian Colleges, Inc.* (2008) 169 Cal.App.4th 523, 531 [trial court was within its discretion to “expedite and specify limited discovery to be done before . . . motions for summary judgment”].)

The Lilac Defendants insist their delay in moving to compel arbitration was not only justified by tactical necessity, but compelled by their ethical responsibilities. “Penalizing [them] for their reasonable choice” to withhold a motion to compel arbitration until it had a plausible chance of success, they say, is “untenable both legally and in practice.” If, in resolving this appeal, we were to affirm a trial court waiver ruling premised on the idea that they should have pulled the trigger earlier on a motion to compel arbitration, that “would mean that waiver-conscious defendants in [their] position [in other cases] have no choice but to clutter already over-crowded trial court dockets with motions to compel the moment they are served with a complaint that contains a mix of EFAA and non-EFAA claims.” “This,” the Lilac Defendants tell us, “serves no one and would put defense counsel in the uneasy position of filing motions solely to avoid a waiver finding, *knowing* that the motions will fail on the merits. (*See, e.g., Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1176 [as officers of the court, attorneys serve as gatekeepers against frivolous litigation]).”

The Lilac Defendants also suggest that the rules of civil procedure dictated their course. The trial court took them to task for failing to seek dismissal of the fifth cause of action by demurrer, and Plaintiffs echo that criticism in their responding brief here on appeal. While federal procedural law might have given the Lilac Defendants more flexibility under the facial plausibility standard that governs motions to dismiss in federal court (see

Ashcroft v. Iqbal (2009) 556 U.S. 662, 678; *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544), they claim to have been in a straitjacket here. The Lilac Defendants explain their decision to bypass a demurrer by pointing out that, under California notice pleading standards, Plaintiffs had no obligation to plead the sexual harassment claim specifically. Faced with a conclusory claim that fell within the EFAA, the Lilac Defendants contend that a demurrer was futile, so they needed time for discovery in order to set up the fifth cause of action for eventual summary adjudication.

Here, too, there is superficial appeal to the Lilac Defendants' explanation of their hesitancy to seek compelled arbitration right away, but the logic quickly breaks down. Without delving into whether the fifth cause of action was or was not potentially vulnerable to a demurrer—an issue neither party addresses in specific terms, and we see no need to address—the problem with this entire line of argument, whether pitched at a policy level or at the level of day-to-day procedure, is that unlike the case the Lilac Defendants rely upon for support, *Piplack v. In-N-Out Burgers* (2023) 88 Cal.App.5th 1281, we cannot say on this record that they filed a motion to compel arbitration “as soon as it had any chance of success” (*id.* at p. 1289). The scope and timing of the Lilac Defendants' discovery appears to be wholly unconnected to the timing of their motion to compel arbitration on March 18, 2025. That fundamentally undermines any tactical necessity argument. All of the elaborate EFAA-based arguments presented here ring hollow in the face of what the Lilac Defendants actually did.

Other than some hand-waving about the difficulty of navigating the procedural cross-pressures they faced, the Lilac Defendants are left with nothing to refute the most natural reading of the record: That their motion to compel arbitration was filed in reaction to the Plaintiffs' anti-SLAPP motion

in an apparent effort to forum shop. To find a waiver on this record, there was no need to charge the Lilac Defendants with gamesmanship or improper motives; the trial court did not do so; nor do we. Litigants seek more advantageous forums all the time, and as a general matter there is often nothing nefarious about the practice. The problem for the Lilac Defendants here is not *why* they moved to compel when they did. It is their change of course after engaging in significant litigation activity in a judicial forum.

As we read its order, all the trial court did was draw the permissible inference that the Lilac Defendants made a choice to join issue as a pleading matter and begin litigating on the merits, before suddenly changing course and seeking another forum. Because we are satisfied that “[t]he record . . . demonstrates by clear and convincing evidence” the Lilac Defendants’ “intentional abandonment of the right to arbitrate” (*Quach, supra*, 16 Cal.5th at p. 586) in these circumstances, we must sustain that finding.

III. DISPOSITION

The trial court’s order is affirmed. Plaintiffs are entitled to their costs on appeal.

STREETER, J.

WE CONCUR:

BROWN, P. J.
SWEET, J.*

* Judge of the Marin Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Trial Court: Superior Court of California, County of Alameda

Trial Judge: Hon. Joscelyn Jones

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