SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALLAN CANDELORE, on his own behalf and on behalf of all others similarly situated,

Plaintiff,

vs.

TINDER, INC.; and DOES 1 through 50,

Defendants.

Case No.: BC583162

ORDER RE MOTIONS TO COMPEL ARBITRATION

Date: January 9, 2025
Time: 9:00 a.m.
Dept.: SSC 17

Defendant Tinder, Inc. filed a motion to compel arbitration of Plaintiff Allan Candelore's individual claims and a motion to compel arbitration of the class claims.

OBJECTIONS

Plaintiff and Defendant filed many objections to evidence. The court addresses only those objections to evidence the court considered in ruling on the two motions to compel arbitration.

I. Plaintiff's Objections to Defendant's Evidence Filed with Motions

Plaintiff argues Jun-Youn Kwak and Jennifer Flashman lack personal knowledge of the matters stated in their declarations. Plaintiff deposed Kwak and Flashman before filing his opposition to the motions to compel arbitration. Those depositions establish the basis for their personal knowledge.

For example, regarding the Android login screens applicable to Plaintiff, Kwak testified he and his team researched the historic login screens by checking the code base and prior builds. (Rubin Decl., Ex. F at pp. 29, 40-41, 48-49.) Google Play Console stores prior Android builds for Defendant, which Defendant is able to access. (Rubin Decl., Ex. F at p. 32.) Defendant kept records of the release date of the Android build showing the June 26, 2015 sign-in wrap screen (as well as the release dates of other Android builds), which Kwak or others under his supervision were able to confirm by checking the prior builds, source code, and emails about the release. (Rubin Decl., Ex. F and Supp. Brown Decl., Ex. 11, at pp. 51-52, 53-54, 56-57, 91-92, 108.) Kwak's team checked all the Android builds from 2015-2019 to see if the login screen had changed and collected screenshots of those login screens. (Rubin Decl., Ex. F at pp. 94-96, 112.) Defendant was able to obtain the Android login screens and blocking modals screens from the prior builds. (Rubin Decl., Ex. F at pp. 67, 68.) This testimony establishes that Kwak was personally involved in and oversaw this research and analysis and has personal knowledge about the Android login screens Plaintiff saw when he logged in on specific dates.

According to Flashman's deposition testimony, although she started working for Defendant in January 2018, she had to understand the historic data because it affected how Defendant made changes to its collection and handling of data. (Supp. Brown Decl., Ex. 12 at pp. 67-68.) Her job is to understand Defendant's users, which she does through the data they produce by using Defendant's app. (Supp. Brown Decl., Ex. 12 at p. 37.) Defendant tracks every event when a user uses the app. (Supp. Brown Decl., Ex. 12 at pp. 47-48.) The data indicates when a user created an

account, accepted a blocking modal, and logged in. (Supp. Brown Decl., Ex. 12 at pp. 67, 80.) Flashman performed her analysis for this case by having Defendant's engineering team pull Defendant's data, which she then summarized. (Supp. Brown Decl., Ex. 12 at pp. 29, 31-33, 34.) This testimony establishes that she has personal knowledge regarding the data analysis she performed and discussed in her declaration, as well as her conclusions based on that analysis.

To the extent the discussion below regarding the motions to compel arbitration relies on particular evidence to which Plaintiff objected, those objections are overruled.

II. Defendant's Objections to Plaintiff's Evidence

Nos. 1-6: The court did not rely on this evidence.

Nos. 7-9, 11, 12, 14, 17, 18, 19, 25, 26, 37, 45: Sustained.

No. 27: Sustained as to the first sentence. Otherwise, overruled.

Nos. 10, 13, 15, 16, 20, 21, 22, 23, 24, 28, 29, 30, 31, 32, 33, 34, 36, 42, 43, 44: Overruled.

No. 35: Sustained up to "Attached here to as Exhibit D . . . ." Otherwise, overruled.

No. 38: Sustained up to "on April 8, 2022 . . . ." Otherwise, overruled.

No. 39: Overruled up to "That was untrue." Sustained beginning with "That was untrue."

No. 40: Overruled up to "because as this Court later confirmed . . . ." Sustained beginning with "because as this Court later confirmed . . . ."

No. 41: Sustained except for "The Ninth Circuit reversed the second Kim settlement on December 5, 2023."

III. Plaintiff's Objections to Defendant's Evidence Filed with Reply

To the extent the discussion below regarding the motions to compel arbitration rely on Defendant's evidence to which Plaintiff objected, those objections are overruled.

MOTION TO COMPEL PLAINTIFF

I. Waiver

Plaintiff argues Defendant waived the right to compel arbitration of Plaintiff's individual claims. "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 v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562, 584.) The factors relevant to assessing a waiver argument are "(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 a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.)

The California Supreme Court recently eliminated the last requirement. (*Quach, supra,* 16 Cal.5th at p. 583-584.) The Court also clarified that "[c]ourts should not apply the *St. Agnes* factors as a single multifactor test for determining whether the right to compel arbitration has been lost through litigation. [Citations.] Instead, a court should be careful to consider only those factors that are relevant to the specific state-law defense the party resisting arbitration has raised." (*Id.* at p. 584.)

A. <u>Factual Background</u>

Plaintiff filed this case on May 28, 2015. On July 16, 2015, the court stayed this action pending the initial status conference. (Rubin Decl., ¶ 15.) On August 18, 2015, the parties filed a joint status conference statement in which Defendant stated: "The Tinder Terms of Use contain an arbitration provision and a class action waiver. Defendant reserves the right to move to compel arbitration and to enforce the class action waiver." It also stated Defendant intended to file a demurrer and then a motion for summary judgment. (*Id.* at ¶ 16; Aug. 18, 2015 Joint Initial Status Conference Class Action Statement at pp. 5, 6.) The parties agreed at the last hearing that this stay

ended on August 22, 2015. On September 21, 2015, Defendant filed a demurrer, which the court sustained without leave to amend on October 26, 2015. (Brown Decl., ¶ 3.) Plaintiff appealed on February 1, 2016. (Ruben Decl., ¶ 20.) The Court of Appeal reversed, and remittitur issued on May 10, 2018. (*Id.* at ¶ 25; Brown Decl., ¶ 3.)

Thus, no stay preventing the filing of a motion to compel arbitration or the case was otherwise active from May 28, 2015 to July 16, 2015, August 22, 2015 to October 26, 2015, and after May 10, 2018.

On August 29, 2018, the parties filed a joint case management conference statement in which they agreed to a schedule for a motion for class certification, the need for a protective order, and other case management issues. Defendant did not mention a motion to compel arbitration. (Aug. 29, 2018 Joint Statement.) On September 21, 2018, Defendant filed an answer asserting the affirmative defense of "Arbitration," alleging "[t]he claims asserted in the Complaint must be determined in arbitration in accordance with the arbitration agreement in the Tinder Terms of Use." (Answer at p. 5.) On October 2, 2018, the court entered the parties' proposed order setting a schedule for filing and hearing a motion for class certification. (Oct. 2, 2018 Order.) On October 30, 2018, Defendant filed an amended answer asserting the same arbitration defense. (Amended Answer at p. 8.) On November 27, 2019, the court signed a stipulated protective order filed by the parties. (Nov. 27, 2019 Order.) On May 7, 2019, the court entered the parties' proposed order altering the schedule for the motion for class certification. (May 7, 2019 Order.) During this time, Plaintiff propounded discovery, Defendant produced documents, and Plaintiff filed a motion to compel discovery. (June 21, 2019 Joint Status Conference Statement at p. 3.)

On June 21, 2019, the parties filed a joint status conference statement in which Defendant asserted the settlement in the federal case *Kim v. Tinder* encompassed the class claims in this case and therefore this case should proceed on an individual, not a class, basis. (June 21, 2019 Joint Status Conference Statement at pp. 5-6.) At the status conference, the court set a schedule for hearing a motion for a stay and continued the hearing date for the motion for class certification. (June 26, 2019 Minute Order.) On July 18, 2019, the court entered the parties' proposed order continuing the class certification hearing. (July 18, 2019 Order.) On July 24, 2019, the court

issued an order limiting discovery to Plaintiff's individual claims until the motion for a stay could be heard. (July 24, 2019 Order.) On August 19, 2019, the court entered the parties' proposed order continuing the motion for class certification. (Aug. 19, 2019 Order.) On September 13, 2019, Defendant filed a motion to stay this case pending the appeal of the approval of the *Kim* settlement. The motion to stay argued the *Kim* settlement barred the class claims in this case and left only Plaintiff's individual claims. (Sept. 13, 2019 Motion at p. 1.) On November 13, 2019, the court granted a partial stay – staying the class claims and allowing Plaintiff to pursue his individual claim. (Nov. 13, 2019 Order at p. 2.) On December 10, 2019, the court signed a stipulated order staying the entire case. (Dec. 10, 2019 Order.)

Thus, from May 10, 2018 to December 10, 2019, no stay prevented a motion to compel arbitration of Plaintiff's claims.

On August 20, 2021, Plaintiff filed a notice that the Ninth Circuit had issued an opinion reversing the approval of the *Kim* settlement. On September 27, 2021, the parties filed a joint status report in which Plaintiff asked for the stay to be lifted and Defendant argued the stay should remain because the *Kim* parties had reached a new settlement. (Aug. 20, 2021 Report at p. 10.) On October 3, 2021, the court lifted the stay and set a hearing date for the motion for class certification. (Oct. 5, 2021 Notice of Ruling.) On December 6, 2021, the court entered a stipulated order resolving discovery disputes. (Dec. 6, 2021 Order.) On January 12, 2022, the court entered a stipulated order altering the briefing schedule for the class certification motion. (Jan. 12, 2022 Order.)

On January 25, 2022, Plaintiff filed a class certification motion. Upon receiving it, defense counsel informed Plaintiff's counsel that Defendant intended to file a motion to compel arbitration. (Brown Decl., ¶ 12.) On February 4, 2022, the parties filed a joint status report addressing the second *Kim* settlement. Plaintiff contended this case should not be delayed by anything occurring in *Kim*. (Feb. 4, 2022 Joint Status Report at p. 3.) Defendant argued approval of the *Kim* settlement would bind the putative class in this case and therefore the Defendant should not have to oppose the class certification motion before the final approval in *Kim*. (*Id.* at pp. 4-5.) Also, Defendant stated that because the class certification motion asserted relief based on Plaintiff's

purchase of Tinder Gold, in addition to Tinder Plus, Defendant "intends to file a motion to compel Plaintiff to arbitrate any claim based on his purchase of Tinder Gold, subject to any intervening stay based on final approval of the *Kim* settlement." (*Id.* at p. 6.) At the February 14, 2022 status conference, the court did not make any orders. (Feb. 14, 2022 Minute Order.)

On March 9, 2022, Defendant filed a notice that the federal court had approved the *Kim* settlement. On March 10, 2022, Defendant filed its opposition to the motion for class certification. The opposition stated Defendant "intends to file a motion to compel Plaintiff to arbitrate any putative claim regarding Tinder Gold." (Opposition at p. 1. n.2.) The opposition argued Plaintiff was bound by the arbitration provision in the TOU. (See, e.g., *id.* at pp. 1-2.)

The parties participated in a pleading conference on March 28, 2022, at which the court declined to provide a hearing date for a motion to compel arbitration because such a motion would not be necessary if the court did not certify a class as to Tinder Gold. (Brown Decl., ¶ 14.)

On April 8, 2022, Defendant filed a motion to stay the class claims as barred by the *Kim* settlement. (April 8, 2022 Motion at p. 1.) Although Plaintiff had opted out of the *Kim* settlement, Defendant argued the stay should include his individual claims to avoid a decision on the merits of his individual claims and a one-way intervention problem. (*Id.* at p. 2.) The motion to stay did not mention a motion to compel arbitration. On June 27, 2022, the court granted the motion for a partial stay of "litigation other than: (1) any motion to amend the Complaint in this action; and (2) any petition to compel arbitration that Tinder may bring following amendment." (June 27, 2022 Order at p. 3.) The order stated the complaint "makes no allegations regarding Tinder Gold, but rather solely addresses Candelore's use of Tinder Plus. Candelore suggests his complaint could be amended so as to resolve this issue." (*Id.* at p. 10.) The court also stated resolution of issues concerning whether Plaintiff was subject to various arbitration agreements "would materially assist in determining what class, if any, Candelore might appropriately represent should the Ninth Circuit reverse the District Court's order in *Kim*." (*Id.* at pp. 10-11.) The court concluded Plaintiff "may pursue an amendment to the Complaint, and Tinder may pursue a petition to compel arbitration pending a ruling by the Ninth Circuit in *Kim*. (*Id.* at p. 11.) The court also denied the motion for class certification without prejudice.

Thus from October 3, 2021 to June 27, 2022, there was no stay.

On August 15, 2022, the parties filed a joint status report. Plaintiff stated he did not intend to file a motion to amend the complaint because the complaint already encompassed Tinder Gold. (Aug. 15, 2022 at p. 4.) Defendant argued Plaintiff could not litigate Tinder Gold without amending the complaint and that Defendant would not file a motion to compel arbitration until Plaintiff amended the complaint. (*Id.* at p. 7.) At the status conference, the court set a schedule for a motion to stay Plaintiff's individual claims pending the *Kim* appeal. On December 5, 2022, the court stayed the entire case. (Dec. 5, 2022 Order at p. 15.)

On December 11, 2023, the parties filed a joint report stating the Ninth Circuit had vacated the approval of the second *Kim* settlement. (Dec. 11, 2023 Joint Report at p. 1.) Plaintiff asked for the stay to be lifted, further briefing on the motion for class certification, and a hearing date. (*Id.* at p. 4.) Defendant stated that if this case was about more than "Plaintiff's initial purchase of Tinder Plus, . . . Defendant would request leave to move to compel Plaintiff to litigate claims based on any such purchases in arbitration, and that such motion be decided prior to any ruling on class certification." (*Id.* at p. 6.) The court set a date for the hearing on the motion for class certification. (Dec. 18, 2023 Minute Order.) At the last hearing, the parties agreed the court lifted the stay on December 18, 2023. Since that date, no stay has been in effect.

In addition to the activity described above, the parties participated in informal discovery and pleading conferences and many status conferences.

B. Analysis

1. Knowledge of Applicability of Arbitration Agreement

It is undisputed that Defendant's TOU contained an arbitration provision from before Plaintiff first started using the Tinder app in March 2015, but Defendant first implemented a sign-in-wrap process requiring users to consent to the TOU in July 2015. (Motion at p. 5.) Thus when Plaintiff first purchased Tinder Plus in March 2015, he did not need to consent to the TOU via a sign-in-wrap process. Defendant argues it did not know for years that Plaintiff's claims were subject to an arbitration agreement: "Plaintiff never put any subsequent and unpleaded purchases of Tinder Plus or Gold at issue until he filed his motion for class certification on January 25,

2022." (Motion at p. 14.) Plaintiff contends the complaint expressly alleges ongoing violations after Plaintiff's initial purchase of Tinder Plus. (Opposition at p. 16.)

The complaint alleges that after Plaintiff subscribed to Tinder Plus in March 2015, Defendant "continue[s] to charge Mr. Candelore, and Mr. Candelore continues to pay, $19.99 per month for Tinder Plus." (Complaint, ¶ 6.) The complaint alleges that Defendant's conduct is "ongoing," and Plaintiff seeks all money wrongfully obtained from him. (Complaint, ¶¶ 36, 37, 41, 42.) The prayer for relief seeks "statutory damages . . . for each and every offense committed by defendants against Plaintiff . . . for each time defendant[] charged Plaintiff . . . more for Tinder Plus." (Complaint at p. 13.) These allegations and the prayer for relief clearly put at issue more than Plaintiff's initial purchase of Tinder Plus. The complaint alleges Plaintiff made ongoing purchases, each month, of Tinder Plus and seeks recovery of all of the extra amounts Plaintiff paid monthly since he first purchased Tinder Plus. At a minimum, based solely on the complaint, Defendant knew Plaintiff was claiming ongoing violations regarding Tinder Plus charges and the right to damages for all of the monthly violations.

Also, Plaintiff presented evidence that during discovery disputes, Plaintiff asserted the alleged violations were ongoing and required Defendant to produce post-March 2015 documents. (Opposition at pp. 16-17.) For example, in Plaintiff's July 17, 2019 reply brief in support of a motion to compel the production of documents from Defendant, Plaintiff argued: "Tinder argues throughout its opposition that no discovery after March 2015 is relevant because that is when Plaintiff Candelore's claim ended. That is also wrong. Tinder charges its customers a monthly price for its Tinder Plus premium services, and there is no dispute that [Plaintiff] continued to pay a monthly price after March 2015. . . . [Plaintiff] has been discriminated against by Tinder *every month* since . . . ." (July 17, 2019 Reply at p. 7.)

Even assuming the complaint can be read to allege only ongoing violations regarding payments for Tinder Plus and not any claim based on Tinder Gold, Defendant knew or had reason to know that Plaintiff's Tinder Plus claims were subject to arbitration under Defendant's own theory. According to Defendant, "Plaintiff created a Tinder account on March 8, 2015 and purchased a subscription to Tinder Plus on March 21, 2015." (Motion at p. 6.) On July 24, 2015,

he "purchased a new subscription to Tinder Plus." (*Ibid.*) On August 24, 2015, he "logged into his account, thereby accepting the TOU." (*Ibid.*) Defendant argues "[t]he version of the TOU in place when Plaintiff logged in on August 24, 2015 included an arbitration agreement." (*Ibid.*) Not until September 27, 2017 did Plaintiff purchase a subscription to Tinder Gold. (*Ibid.*) According to Defendant's theory, the August 24, 2015 login requires Plaintiff to arbitrate his claims. That login occurred when Plaintiff was subscribed to and paying for Tinder Plus.

This history of Plaintiff's login and interactions with his Tinder Plus subscription was known or discoverable by Defendant. As early as August 18, 2015 (even before the August 24, 2015 login), Defendant suspected the arbitration agreement in the TOU applied to Plaintiff's claims because Defendant stated so in the August 18, 2015 joint status conference statement.

Further, the Flashman and Kwak declarations and their deposition testimony describe in detail how Defendant has access to data of all of Plaintiff's activity on the Android version of the Tinder app, and how Defendant researched the previous Android builds to uncover the Android login screen and TOU in effect on August 24, 2015. (See, e.g., Rubin Decl., Ex. F and Supp. Brown Decl., Ex. 11, at pp. 32, 51-52, 53-54, 56-57, 67-68, 91-92, 94-96, 108, 112; Supp. Brown Decl., Ex. 12 at pp. 29, 31-33, 34, 47-48, 67, 80, 96-97; Flashman Decl., ¶ 10.) By September 21, 2015, when Defendant filed its demurrer, it knew or could have known based on its own data that Plaintiff had logged in on August 24, 2015. Definitely by May 10, 2018, when remittitur issued and the parties started discussing the timing of a motion for class certification, Defendant knew or could have discovered from its own data that Plaintiff had logged in on August 24, 2015 and thereby (according to Defendant) had agreed to the TOU containing an arbitration provision.

As Defendant's motion to compel arbitration and the Flashman and Kwak declarations and deposition testimony make clear, whether a user is bound by an arbitration agreement may depend on when that user logged into the Tinder app or website, the type of Tinder login screen the user saw at that point in time, and the TOU in effect at that time. Defendant has not submitted evidence that the login experience, the login screen, or the TOU differed depending on whether a user subscribed to Tinder Plus or to Tinder Gold. At the hearing, defense counsel acknowledged that the login experience is the same for Tinder Plus and Tinder Gold users. Therefore, the

distinction between whether a user subscribed to Tinder Plus or to Tinder Gold is not relevant to determine whether a user agreed to the TOU and is bound to arbitrate.

Defense counsel argued at the hearing that Defendant was not required to do the research and data analysis to determine if Plaintiff had agreed to a TOU containing an arbitration provision. That may be, but a defendant that does not look into the existence of an arbitration agreement with a plaintiff runs the risk of discovering the agreement too late and facing the possibility of waiver. The Supreme Court in *St Agnes* explained "waiver" can "refer to the loss of a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish right." (*St. Agnes, supra,* 31 Cal.4th at p. 1195 n.4.) The Supreme Court in *Quach* said "[t]he waiving party's knowledge of the right may be 'actual or constructive.' [Citation]." (*Quach, supra,* 16 Cal.5th at p. 584.) Here, by not timely analyzing the data revealing Plaintiff's use of Tinder to determine if he had agreed to the arbitration provision, Defendant failed to perform an act it was required to perform to enforce its right to compel arbitration and at least had constructive knowledge that the TOU's arbitration provision applied to Plaintiff's claims.

Defendant also argues the court conditioned Defendant's ability to file a motion to compel arbitration on Plaintiff first amending the complaint. (Motion at p. 14.) That is not quite accurate. In the June 27, 2022 order, the court stated the complaint "makes no allegations regarding Tinder Gold, but rather solely addresses Candelore's use of Tinder Plus. Candelore suggests his complaint could be amended so as to resolve this issue." (June 27, 2022 Order at p. 3.) That order did not state Plaintiff needed to amend the complaint to allege ongoing purchases of Tinder Plus after Plaintiff's initial purchase or that Defendant could not bring a motion to compel arbitration of Defendant's claims regarding Tinder Plus.

Similarly, defense counsel argued at the hearing that the court did not allow Defendant to file a motion to compel arbitration before the hearing on the motion for class certification. That is not accurate. At a May 1, 2024 status conference, the court discussed with the parties the problem of the arbitration provisions in the various versions of the TOUs and the pending, already-briefed motion for class certification. The court proposed a couple ideas for resolving the arbitration issues before deciding the motion for class certification on the merits. One idea was for the court

to set a deadline for Defendant to file a motion to compel arbitration before the court decided the motion for class certification. The other idea was to certify a class limited to arbitration issues so that those issues could be decided on a class basis. The court requested briefing on those proposals. In its brief, Defendant continued to argue it could not file a motion to compel arbitration until Plaintiff amended the complaint to allege relief for Tinder Gold and subsequent purchases of Tinder Plus. (Defendant's May 16, 2024 Brief at pp. 1-2.) Because both sides disagreed with the court's proposals, the court abandoned the ideas and proceeded to decide the motion for class certification. In any event, as discussed below in detail, Defendant had already waived the right to arbitrate before May 2024.

The evidence does not support Defendant's argument that it had no idea Plaintiff's claims were covered by the arbitration provision in the TOU, or that it had no ability to file a motion to compel arbitration, until Plaintiff filed the motion for class certification referring to Tinder Gold on January 25, 2022. Also, even assuming the June 27, 2022 order required Plaintiff to amend the complaint before Defendant could file a motion to compel regarding Tinder Gold, the evidence does not support the argument that Defendant was prevented from filing a motion to compel arbitration regarding Plaintiff's claims about Tinder Plus.

Plaintiff presented clear and convincing evidence that Defendant had actual or constructive knowledge that Plaintiff's claims were covered by the arbitration provision under Defendant's theory of the enforceability of the TOU's arbitration provision.

2. <u>Actions Inconsistent with the Right to Arbitrate</u>

Plaintiff contends Defendant waived any right to arbitrate by attempting to gain a strategic advantage through litigation. (Opposition at p. 13.) "An attempt to gain a strategic advantage through litigation in court before seeking to compel arbitration is a paradigm of conduct that is inconsistent with the right to arbitrate." (*Sprunk v. Prisma LLC* (2017) 14 Cal.App.5th 785, 798.) Such conduct can include engaging in litigation and attempting to settle a case on a class-wide basis before moving to compel or waiting until after the plaintiff files a motion for class certification and then moving to compel when it appears the class is going to be certified. (*Id.* at pp. 789-799.)

The timeline and evidence detailed above suggests Defendant engaged in two strategies to delay the motion to compel arbitration in favor of using other means to end the case while the case remained in court. First, Defendant filed the demurrer rather than a motion to compel arbitration in order to obtain a complete dismissal (successfully in the short run).

Second, rather than filing a motion to compel arbitration after remittitur issued on May 10, 2018, Defendant proceeded with litigation, filing an answer, responding to discovery, agreeing to a protective order, briefing discovery motions, participating in informal discovery and pleading conferences, scheduling and rescheduling the class certification motion, and participating in many status conferences. In the June 21, 2019 joint status conference statement, Defendant revealed its second strategy – arguing the *Kim* settlement encompassed and precluded the class claims in this case. Thereafter, Defendant filed two motions to stay this case pending the *Kim* proceedings. Even though Plaintiff opted out of the *Kim* settlements and Defendant acknowledged the settlements would not preclude Plaintiff's individual claims, Defendant did not file a motion to compel arbitration of Plaintiff's individual claims. Defendant stated in the February 4, 2022 joint status report and its March 10, 2022 opposition to the motion for class certification that it was going to file a motion to compel arbitration of Plaintiff's individual claims, but it did not. Instead, Defendant sought stays in this case while the two *Kim* settlements played out.

The evidence clearly supports this being a strategic decision because each time the *Kim* settlement appeared close to final, Defendant sought to stay this case rather than file a motion to compel arbitration. And there is a reason for such a strategy. Eliminating class claims in this case would make settling Plaintiff's individual claims much cheaper. But there is also a cost. Attempting to dispose of class claims, and thereby delaying resolution of individual claims, is inconsistent with a right under an arbitration agreement to insist that any claims must be arbitrated on an individual basis. (*Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1045.) The evidence allows the clear inference that is what happened here.

The litigation conduct occurring after remittitur is clear and convincing evidence that Defendant acted in a manner inconsistent with its right to arbitrate. It chose not to exercise its

right to compel arbitration and to instead defend itself against Plaintiff's claims in court. (*Quach, supra,* 16 Cal.5th at p. 587.)

3. Notification of Intent to Arbitrate

The next factor is 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. Plaintiff contends Defendant invoked the machinery of litigation by litigating until it became clear it would not obtain its desired result through litigation. (Opposition at p. 15, n.2.) Defendant's conduct in the timeline detailed above shows Defendant using the litigation machine for years.

Defendant argues it has always asserted the "arbitration agreement as a defense, including in its Answer." (Motion at p. 15.) The defendant in *Sprunk* made the same argument, and the court responded "there is a difference between stating an intent and actually following through with asserting a right." (*Sprunk, supra,* 14 Cal.App.5th at p. 808.) And the court noted that asserting arbitration as an affirmative defense in pleadings " 'does not preclude a finding that subsequent conduct may cause a waiver of that right.' [Citations.]" (*Ibid.*) (See, e.g., *Quach, supra,* 16 Cal.5th at p. 586 ["Although [the defendant] asserted in its answer that [the plaintiff] should be compelled to arbitrate, its counsel did not otherwise raise the issue with [the plaintiff's] counsel or with the court"].)

Defendant also argues it never served discovery or filed a substantive motion except for the demurrer. (Motion at p. 15.) Participating in the discovery process by objecting to requests and not suggesting that discovery should be barred because of an arbitration clause is "wholly inconsistent" with arbitration, and it is "immaterial" that the other party initiated the discovery. (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558.) Rather "it is the manner in which [the party moving to compel arbitration] responded that matters." (*Ibid.*) (See, e.g., *Garcia v. Haralambos Beverage Co.* (2021) 59 Cal.App.5th 534, 543 [agreeing to a protective order, responding to discovery requests, meeting and conferring on discovery disputes, and participating in an informal discovery conference was inconsistent with arbitration].) Here, Defendant stipulated to a protective order, responded to discovery requests, participated in informal discovery

conferences, and litigated discovery motions. It did not object to discovery on the basis of its arbitration defense. (Ruben Decl., ¶¶ 26, 32, 34.) And it opposed the motion for class certification both times the motion was set for hearing.

Plaintiff presented clear and convincing evidence that Defendant used the litigation machinery in this case and actively participated in litigation for years before filing the motions to compel arbitration. This conduct was inconsistent with arbitration.

4. Delay

The third *St. Agnes* factor is whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay. Plaintiff argues Defendant delayed much longer than most cases finding waiver. (Opposition at pp. 13-14.) The timeline above shows long periods when the case was not stayed before Defendant filed this motion. To give just one example, from October 3, 2021 to June 27, 2022, there was no stay in this case. Indeed during that almost nine-month period, Defendant expressly stated it planned to file a motion to compel arbitration. But it did not. This one of period of unexcused delay is longer or as long as periods of delay in cases where courts have found waiver. (See, e.g., *Sprunk, supra,* 14 Cal.App.5th at pp. 807-808.)

5. Counterclaim

The fourth factor does not apply here because Defendant had not filed a counterclaim.

6. Important Intervening Steps

This factor considers whether "important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration]" have taken place. A class certification motion is a "significant litigation event" because it discusses the plaintiff's factual and legal theories and discloses the plaintiff's positions and evidence on disputed issues. (*Sprunk, supra,* 14 Cal.App.5th at p. 808.) Defendants twice opposed Plaintiff's class certification motions.

Having considered the evidence presented and the various factors, the court concludes that Plaintiff established waiver by clear and convincing evidence. Therefore, the motion to compel Plaintiff to arbitrate his claims is DENIED.

MOTION TO COMPEL CLASS

Plaintiff argues Defendant waived any right to compel the class to arbitrate when it waived the right to compel Plaintiff to arbitrate, citing *Sprunk v. Prisma LLC* (2017) 14 Cal.App.5th 785. (Opposition at p. 19.) Defendant argues it did not waive the right to compel the class to arbitrate because it could not file this motion until after class certification, citing *Sky Sports, Inc. v. Superior Court* (2011) 201 Cal.App.4th 1363. (Motion at pp. 14-15.)

In *Sky Sports*, the named plaintiff had not signed an arbitration agreement. (*Sky Sports, supra,* 201 Cal.App.4th at p. 1365.) When the plaintiff moved to certify a class, the defendant raised the arbitration agreements signed by putative class members to defeat class certification. (*Ibid.*) The trial court certified a class including employees with arbitration agreements, holding the defendant had waived its right to arbitration due to the unreasonable delay in bringing a petition to compel arbitration. (*Id.* at pp. 1366-1367.) The Court of Appeal reversed, explaining the defendant "could not bring a motion to compel [the named plaintiff] to arbitrate because he was not a party to the company's arbitration agreement." (*Id.* at p. 1368.) "Thus, any delay in bringing the motion to compel arbitration until the class was certified to include parties to the arbitration agreement cannot constitute a waiver by the [defendant]. Until the class was certified, the pleading requirements to move to compel arbitration under section 1281.2 were not satisfied." (*Id.* at p. 1369.)

The situation here is different. Defendant contends Plaintiff is a party to an arbitration agreement, and as discussed above, Defenant could have filed a motion to compel Plaintiff to arbitrate before the class was certified.

In *Sprunk*, the court addressed "whether a defendant in a putative class action can waive its right to compel arbitration against absent class members by deciding not to seek arbitration against the named plaintiff." (*Sprunk, supra*, 14 Cal.App.5th at p. 788.) There, the named plaintiff and class members signed contracts containing an arbitration clause. (*Id.* at p. 789.) The defendant filed a petition to compel arbitration of the plaintiff's individual claims, which the defendant withdrew after the plaintiff filed an opposition. (*Id.* at p. 790.) The defendant then filed a cross-complaint and served discovery. The plaintiff filed a motion for class certification. In opposition,

the defendant asserted the arbitration agreements signed by the class members and argued it could not have moved to compel arbitration of the class members' claims because they were not parties until the court certified the class. (*Id.* at p. 791.) The trial court granted class certification. The defendant then moved to compel arbitration of the class. The trial court denied arbitration, concluding the defendant "had waived its right to compel arbitration based upon its delay in seeking arbitration of [the named plaintiff's] individual claims. (*Id.* at p. 792.)

The Court of Appeal assumed "that a motion to compel arbitration against unnamed class members would have been premature until a class was certified." (*Id.* at p. 797.) But it continued its analysis, explaining the defendant could have moved to compel arbitration against the named plaintiff. (*Ibid.*) "By moving to compel arbitration against [the named plaintiff], [the defendant] could have effectively settled the question whether the claims in this action should be adjudicated in a court or through arbitration." (*Id.* at pp. 797-798.) There was "good reason to suspect that [the defendant] made a strategic decision to delay its motion to compel arbitration to give itself another opportunity to win the case by defeating a class." (*Id.* at p. 798.) There was "substantial evidence to support the conclusion that [the defendant's] delay in moving to compel arbitration until after a ruling on class certification was a strategic decision to attempt to win the case by defeating the class before seeking to arbitrate. Such a strategic use of the judicial forum is inconsistent with an arbitration right and supports a waiver finding." (*Id.* at p. 799.) The court distinguished *Sky Sports* because the named plaintiff in that case had not signed an arbitration agreement. (*Id.* at pp. 799-800.) Therefore, the court in *Sky Sports* "had no reason to consider whether a defendant who decides for strategic reasons not to pursue arbitration against a named plaintiff who *did* sign an arbitration agreement could waive its right to arbitrate against the class." (*Id.* at p. 800.)

This case is much more similar to *Sprunk* than to *Sky Sports*. If Defendant had moved to compel arbitration against Plaintiff earlier in this case, the questions about the evidentiary issues surrounding the login screens, validity of the login processes to compel arbitration, and the enforceability of the arbitration provision (all raised in the current motions) could have effectively been settled. Instead, as in *Sprunk*, there is good reason, supported by clear and convincing

evidence detailed above, to suspect Defendant made a strategic decision to delay a motion to compel arbitration to give itself the opportunity eliminate this case via demurrer, and then by way of the two settlement in the *Kim* case, and then by defeating the motion for class certification.

Defendant states it "has not used the litigation process with respect to the Class," arguing it demurred only to Plaintiff's individual claim and the decision on that demurrer was not binding on the class or any other plaintiff. (Reply at p. 10.) However, if the ruling sustaining the demurrer had been upheld on appeal, there is no reason to believe any other plaintiff would have stepped forward to litigate the class claims in place of Plaintiff. In that situation, the trial court's decision that Defendant's "age-based pricing practice did not constitute arbitrary or invidious discrimination" (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1142-1143), which did not depend on any factual allegations specific only to Defendant, would have effectively decided the class claims. (See, e.g., *Sprunk, supra,* 14 Cal.App.5th at p. 797 ["If [the plaintiff] had been forced to arbitrate, given the court's ruling it is unlikely that any other plaintiff would attempt to litigate in court"].) The evidence supports the conclusion that by filing the demurrer, Defendant was attempting to end this case entirely via litigation rather than in arbitration.

As in *Sprunk*, had Defendant forced Plaintiff into individual arbitration, it might have ended the judicial action (at least for the time period after sign-in wrap went into effect). While a different named plaintiff conceivably could have substituted in for Plaintiff, most of the class members would have been subject to the same or similar arbitration provision as Plaintiff, making it unlikely that any other plaintiff would have attempted to litigate the class action in court.

Having considered the factors discussed in connection with the motion to compel arbitration of Plaintiff's individual claims, and for the reasons stated above, the court concludes Defendant waived the right to compel arbitration of the class.

The motion is DENIED.

At the hearing, Defendant stated it planned to appeal a denial of its motions and requested a stay of this case pending such an appeal. Plaintiff stated he wants an opportunity to brief the appropriateness of a stay. If Defendant does appeal, the parties are to meet and confer on a short briefing schedule and a hearing date regarding a stay pending the appeal.

The court sets a status and trial setting conference for February 21, 2025 at 10 a.m. The parties are to file a joint report five court days before.

Dated: 1/17/2025

Laura Seigle

LAURA A. SEIGLE
JUDGE OF THE SUPERIOR COURT