SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 10-12-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 10-12-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV381965 Motion: Judgment on Pleadings	Ling Wang vs Lori Greymont et al	On August 23, 2023, cross-complainants filed a FAXC. Accordingly, despite argument of Greymont, the motion is MOOT and the matter is taken OFF CALENDAR. The Court will hear Demurrrer to the FAXC on 11/9/23.
LINE 2	21CV391414 Motion: Order for Attorney's Fees after Anti SLAPP	Satish Ramachandran vs City of Los Altos et al	Good cause appearing and notice appearing proper, Defendants' unopposed motion for attorney's fees in the amount of $93,213.50 is GRANTED. "[F]ailure to oppose a motion may be deemed a consent to the granting of the motion." California Rule of Court 8.54(c). Plaintiff shall pay the fees to Defendants' counsel within 20 days of the final order. Defendants shall submit the final order.
LINE 3	22CV408330 Motion: Compel	Armando Cortes et al vs General Motors LLC	The parties have filed a notice of settlement, such that the motion to compel is MOOT and is OFF CALENDAR. The ADR review set for 11/16/23 is VACATED. Parties shall appear for a dismissal review hearing on April 4, 2024 at 10 a.m.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 10-12-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 4	22CV408330 Motion: Compel	Armando Cortes et al vs General Motors LLC	The parties have filed a notice of settlement, such that the motion to compel is MOOT and is OFF CALENDAR. The ADR review set for 11/16/23 is VACATED. Parties shall appear for a dismissal review hearing on April 4, 2024 at 10 a.m.
LINE 5	22CV408330 Motion: Compel	Armando Cortes et al vs General Motors LLC	The parties have filed a notice of settlement, such that the motion to compel is MOOT and is OFF CALENDAR. The ADR review set for 11/16/23 is VACATED. Parties shall appear for a dismissal review hearing on April 4, 2024 at 10 a.m.
LINE 6	16CV290327 Motion: Vacate Renewal Judgment	David Yomtov vs Michelle Gazave	Notice is not proper as no amended notice has been filed. If Defendant appears, the matter may be continued to allow proper notice. If Defendant fails to appear, the matter will be taken off calendar.
LINE 7	18CV321891 Hearing: Motion Termination Sanctions	Christopher Treble vs Perry Hariri et al	This Court ordered a shortened time to hear the motion and ordered any opposition to be filed no later than October 5, 2023. The Cout however failed to set a date for the filing of Plaintiff's motion and Plaintiff did not file until October 4, 2023 which did not allow sufficient time for Defendant Urban Dynamics to respond. The hearing is therefore continued to November 9, 2023, at 9 a.m. and Defendant is ordered to respond no later than October 26, 2023. Any reply must be filed no later than November 2, 2023. Plaintiff is ordered to provide notice to Defendant.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 10-12-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 8	2014-1-CV-271935 Hearing: Petition Compel Arbitration	K. Pesic vs Zouves Fertility Center, et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 9	21CV382735 Motion: Vacate 3-6-23 Judgment	Nguyet Nguyen vs John Tran	Defendant's motion to vacate the judgment is DENIED. Defendant was served and was present at several court appearances. He claims he didn't understand the process because he did not have an attorney. This is not sufficient to defeat the judgment. Self-represented parties are held to the same standard as attorneys. See *Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1413 ("when a litigant accepts the risks of proceeding without counsel, he or she is stuck with the outcome, and has no greater opportunity to cast off an unfavorable judgment than he or she would if represented by counsel").
LINE 10			
LINE 11			
LINE 12			

- oo0oo -

Calendar Line 8
Case Name: *K. Pesic v. Zouves Fertility Center, et al.*
Case No.: 2014-CV-271935

Defendants Christo Zouves, M.D., and Zouves Fertility Center (collectively, the "Zouves Defendants") move to compel arbitration after the Sixth Appellate District ordered a new trial. Plaintiff Katherine Pesic objects, claiming that because she is a nonsignatory to the contract that contains the arbitration agreement, the Zouves Defendants are unable to compel arbitration.

I. INTRODUCTION

A. Factual Background[1]

This action arises out of the alleged use of decedent Ivan Pesic's ("Pesic") genetic material by Joyce Chin ("Chin") to conceive two children through the fertility procedures performed by the Zouves Defendants.

In February 2011, Pesic and Chin signed the Informed Consent and Agreement for Longterm Cryopreservation and Storage of Semen (the "Agreement") with the Zouves Defendants governing the storage and use of Pesic's sperm. The Agreement provided an initial one-year storage period for the frozen sperm and stipulated that "[a]t the end of the designated storage period, this Agreement with the [Zouves Fertility Center] for continued cryopreservation of the semen must be renewed, otherwise **the failure to renew the contract will result in the semen being thawed and discarded.**" (Decl. of J. Julia Hansen-Arenas, Exh. A, p. 40 [emphasis in original])

Pesic died in Japan on October 13, 2012 and left all of his property to his wife of 33 years, Plaintiff Katherine Pesic. Chin filed a claim for child support against Pesic's estate for the three children she had with Pesic.

B. Procedural Background

Plaintiff sued the Zouves Defendants for damages arising from the conception and birth of Pesic and Chin's twin children. The suit proceeded to trial on four claims: (1) conversion, (2) breach of fiduciary duty, (3) negligence, and (4) aiding and concealing stolen property in violation of Penal Code section 496. Prior to reaching the jury Plaintiff dismissed her negligence claim.

In October 2019, the jury returned a verdict in favor of Plaintiff solely on the conversion claim. In January 2020, the trial court granted the Zouves Defendants' motion for

---

[1] The Court draws the operative facts from the Sixth Appellate District ruling. (*Pesic v. Zouves Fertility Center et al.* (November 28, 2022, H407915, H048180) [2022 Cal.App. Unpub. LEXIS 7163] [nonpub. opn.]; Evid. Code § 452, subd. (d); see also *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914 ["'A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments.'"])

judgment notwithstanding the verdict. In November 2022, the Sixth District reversed the judgment notwithstanding the verdict, holding the Agreement expired and the conversion claim had merit. The Sixth District also ordered a new trial as to damages from the conversion claim only.

In anticipation of damages to be determined at trial, the Zouves Defendants now seek to enforce the arbitration clause and indemnity clause of the Agreement against Plaintiff.

II. LEGAL STANDARD

"Under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate. [Citations.] The threshold question requires a response because if such an agreement exists, then the court is statutorily required to order the matter to arbitration." (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 19 (*Fleming*), internal quotation marks omitted.)

Under California law, "[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) Thus, a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate … exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2.) This initial issue also reflects the very plain principle that you cannot compel individuals or entities to arbitrate a dispute when they did not agree to do so." (*Fleming*, *supra*, 88 Cal.App.5th at p. 19.)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal*, *supra*, 14 Cal.4th at p. 413.) "In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

III. ANALYSIS

The Zouves Defendants maintain that Plaintiff's claim for conversion is a dispute covered by the arbitration agreement, even though she did not sign it, because it purportedly includes claims arising out of the use of Pesic's cryogenically preserved semen.

A. Existence of an Agreement to Arbitrate

The Zouves Defendants provided the executed Agreement, attached as Exhibit A to the declaration of their counsel, J. Julia Hansen-Arenas. The arbitration agreement states, in pertinent part:

> 9. Any and all disputes relating to this Agreement or its breach shall be settled by arbitration in Foster City, California, in accordance with the then-current rules of the American Arbitration Association, and judgment upon the award entered by the arbitrators may be entered in any Court having jurisdiction hereof. Costs of arbitration, including reasonable attorneys' fees incurred in arbitration, as determined by the arbitrator, together with any reasonable attorneys' fees incurred by the prevailing party in Court enforcement of the arbitration award after it is rendered by the arbitrator, must be paid to the prevailing party by the Party designated by the Arbitrator or Court.

(Decl. of J. Julia Hansen-Arenas, Exh. A, pp. 41-42.)

B. Enforceability

Plaintiff does not dispute the existence of the Agreement. Plaintiff, however, does dispute its enforceability because Plaintiff is a nonsignatory and the arbitration clause does not comply with Code of Civil Procedure section 1295.

1. Enforceability on Nonsignatory

"'[P]arties can only be compelled to arbitrate when they have agreed to do so.'" (*Williams v. Atria Las Posas* (2018) 24 Cal.App.5th 1048, 1053 (*Williams*) [quoting *Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 840].) "However, both California and federal courts have recognized limited exceptions to this rule, allowing nonsignatories to an agreement containing an arbitration clause to compel arbitration of, or be compelled to arbitrate, a dispute arising within the scope of that agreement." (*DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1353; see also *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513 [describing "six theories by which a nonsignatory may [compel or] be bound to arbitrate: '(a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary'].)

The Zouves Defendants provide no evidence to show Plaintiff signed the Agreement or otherwise agreed to the terms as a signatory, agent, or third party beneficiary. (See *DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1353 [holding a nonsignatory to an arbitration agreement may compel or be bound to arbitration under the agreement on several theories, including assumption of the agreement or status as an agent or third party beneficiary].) While the Zouves Defendants cite to *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508 in their Reply for the proposition that a "patient's right to privacy in their medical treatment choices outweighed the spouse's right to a jury trial of his claims arising from his spouse's medical treatment," the arbitration agreement in *Mormile* explicitly intended to "'bind all parties whose claims may arise out of or relate to treatment or services provided by the physician *including any spouse or heirs of the patient.*'" (*Id*. at p. 1510 [emphasis added].) Thus, the *Mormile* court stated, "There is no question the agreement was intended to define and bind those individuals with a potential cause of action if negligent treatment of [the patient] resulted in her injury or death." (*Id*. at p. 1515.)

Here, the agreement does not intend to bind Plaintiff in any representative capacity (*i.e.*, Pesic's spouse or heir). The Agreement solely provides that the "Female Partner," Joyce Chin, and the "Male Partner," Ivan Pesic, collectively referred as the "Partners," enter into the

Informed Consent and Agreement for Cryopreservation and Storage of Semen. (Decl. of J. Julia Hansen-Arenas, Exh. A, p. 39.)

The Zouves Defendants also fail to show by a preponderance of evidence that Plaintiff brings a claim derivative of her husband's cause of action. (See *Williams, supra,* 24 Cal.App.5th at p. 1053.) In *Williams*, a residential care facility argued that a widow's claim for loss of consortium arose from the facility's care of her husband and therefore falls within the arbitration agreement. (*Ibid.*) However, the *Williams* court ultimately held the claim did not come within the scope of the arbitration clause because the widow filed suit as a party injured by the facility, not as a representative or heir of her husband. (*Ibid*. [citing *Bush v. Horizon West* (2012) 205 Cal.App.4th 924, 931 (*Bush*)].) Similarly, in *Bush,* a daughter's claim of negligent infliction of emotional distress did not fall within the arbitration agreement because the court determined the daughter "is not acting as a representative or heir of Bush; she is acting for herself, pursuing her own claim based on the emotional distress she allegedly sustained as a consequence of witnessing the injury to her mother caused by defendants' alleged misconduct." (*Bush, supra,* 205 Cal.App.4th at p. 931.)

Here, Plaintiff's conversion claim arises from an assertion of *her* –not Pesic's– property rights over Pesic's cryopreserved genetic material. (Fourth Amended Complaint[2], ¶ 47; see also *Pesic, supra,* 2022 Cal. App. Unpub. LEXIS 7163 at *16.) The Sixth Appellate District held that because the 2011 Agreement no longer authorized the Zouves Defendants' use of Pesic's semen after the storage period because the agreement expired and Chin failed to produce a death certificate, the Zouves Defendants committed conversion by substantially interfering with *Plaintiff's* property. (*Pesic, supra,* 2022 Cal.App. Unpub. LEXIS 7163 at *43.)

2. Code of Civil Procedure Section 1295

Code of Civil Procedure section 1295, subdivision (a) provides:

> Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: 'It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.'

Code of Civil Procedure section 1295, subdivision (b) states:

> Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type: 'NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO

[2] The Court takes *sua sponte* judicial notice of its own records. (Evid. Code § 452, subd. (d).)

HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.'

Code of Civil Procedure section 1295, subdivision (g)(2) defines "professional negligence" as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."

Plaintiff maintains that because Code of Civil Procedure section 1295 applies to any claim arising out of medical care, intentional torts such as conversion are within the scope of legislative intent. In *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, the Supreme Court held that when a plaintiff seeks punitive damages directly related to the professional services of a health care provider, a claim that "emanates from the manner in which defendants performed" and in "a matter that is an ordinary and usual part of medical services," is sufficient for purposes of Code of Civil Procedure section 425.13. In *Titolo v. Cano* (2007) 157 Cal.App.4th 310, the appellate court applied the *Central Pathology* Court's analysis and scope of "medical services" to Code of Civil Procedure section 1295 to hold that a plaintiff could bring a breach of fiduciary duty, among other claims, when a physician improperly communicated medical records to an insurer.

In a more recent case, the Supreme Court further explained that "section 1295, construed in light of its purpose, intends to give patients and health care providers the option of entering into an agreement that will resolve all medical malpractice claims, including wrongful death claims, by arbitration." (*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 851.) While the *Ruiz* Court discussed at length whether wrongful death claims were subject to Code of Civil Procedure section 1295, the Court was unequivocal in holding that because the arbitration agreement between the decedent and physician explicitly bound "any spouse or heirs of the patient," the wrongful death claims of the decedent's wife and adult children were subject to arbitration. (*Id.* at p. 841.)

Here, Plaintiff fails to invoke Code of Civil Procedure section 1295 requirements because she neglects to provide factual support for her assertion that the conversion claim arises from the scope of "medical services." In *Bush, supra,* 205 Cal.App.4th 924, the appellate court distinguished *Ruiz*, holding, "Nothing in section 1295 or the arbitration agreement here compels the conclusion that the Supreme Court's decision in *Ruiz* applies to a case like this, where neither medical malpractice nor wrongful death is at issue. Accordingly, we reject defendants' arguments that [plaintiff] was not a third party to the arbitration agreement under *Ruiz*." (*Bush, supra,* 205 Cal.App.4th at p.931; see also *Avila, supra,* 20 Cal.App.4th at pp. 841-843 [noting elder abuse claims under the act are not "within the ambit of section 1295, and therefore *Ruiz's* holding does not apply"].)

Notwithstanding the above, the burden is on the Zouves Defendants to show by a preponderance of evidence that the conversion claim falls within the ambit of the arbitration clause. The Zouves Defendants have not done so here.

C. Waiver

Even if the Zouves Defendants met their initial burden on the threshold issue of enforceability –which they did not– the evidence shows that the Zouves Defendants waived their right to arbitration due to an unreasonable delay in demanding arbitration.

Here, the Zouves Defendants maintain the indemnity claim and arbitration demand are timely because the indemnity cross-complaint is an independent action. The Zouves Defendants contend that the claim has not accrued because the damages phase of the trial is pending.

Plaintiffs cite to *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19 for the proposition that the timeliness of an arbitration demand "has nothing to do with the statute of limitations on the underlying claims." (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 29.) Rather, the four-year statute of limitations requirement to bring a petition to compel arbitration reflected that a petition "states a separate cause of action subject to its own limitation period." (*Ibid*.) Accordingly, the Supreme Court stated the trial court "erroneously concluded the statutes of limitations on Wagner's contractual and statutory claims barred the petition to compel," while the Court of Appeal erroneously "concluded that Wagner's failure to demand arbitration before the statutes of limitations had run on the underlying claims in itself justified a finding of waiver." (*Id.* at p. 30.) The *Wagner* Court reiterated that "a wide range of factors are relevant" in determining whether the right to arbitrate is waived. (*Ibid.* [citing *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 (*St. Agnes*)].)

The following factors are relevant in deciding whether a party's conduct constitutes a waiver of arbitration:

> (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 [(possibly)] (6) whether the delay affected, misled, or prejudiced the opposing party.

(*St. Agnes, supra,* 31 Cal.4th at pp. 1195-96 [internal quotations omitted].)

Plaintiff insists that the Zouves Defendants waived their right to arbitration with unreasonable delay, invocation of litigation machinery, and prejudice to Plaintiff. Plaintiff points out that the Zouves Defendants' Answer failed to allege the right to arbitrate as an affirmative defense, the Zouves Defendants' Case Management Statements repeatedly sought a jury trial and neglected to check the box on arbitration, and the Zouves Defendants actively participated in the discovery process. (Plaintiff's Appendix of Supporting Evidence, Exhs. G-KK.) While portions of discovery may not be wholly relevant to the individual arbitration the Zouves Defendants now seek to compel, these actions, as a whole, are not consistent with the right to arbitrate. (See *Kokubu v. Sudo* (2022) 76 Cal.App.5th 1074, 1085-

1091 [finding waiver because movant took advantage of judicial discovery procedures not available in arbitration, unreasonably delayed demand for arbitration and prejudiced nonmoving party because delay led to substantial legal fees]; *Sprunk v. Prisma LLC* (2017) 14 Cal.App.5th 785, 809 [holding four-year delay resulted in "class-related discovery and preparing and arguing an extensive class certification motion that never would have been necessary if individual arbitration had been ordered earlier in the case."]; *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 998 [trial court erroneously failed to find waiver where "the only affirmative act the [petitioner] took to invoke arbitration was to allege its right to arbitrate as an affirmative defense in an answer" and "[t]he remainder of [its] conduct was inconsistent with an intent to arbitrate"].)

The sixth *St. Agnes* factor, "critical in waiver determinations," is whether or not litigation has resulted in prejudice to the party opposing arbitration. (*St. Agnes, supra,* 31 Cal.4th at p. 1203.) "[M]erely participating in litigation, by itself, does not result in a waiver, [and] courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*Id.* at p. 1203.) Rather, "[p]rejudice typically is found only where the petitioning party's conduct has substantially undermined th[e] important public policy" favoring arbitration "as a speedy and relatively inexpensive means of dispute resolution," or where the petitioner's conduct has "substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*Id.* at p. 1204.) "[C]ourts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration; where a party unduly delayed and waited until the eve of trial to seek arbitration; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence." (*Ibid.*, citations omitted.)

Here, the Zouves Defendants' conduct has prejudiced the Plaintiff because they waited 10 years before demanding arbitration, and in that time, took advantage of procedures not available in arbitration. These proceedings have been neither speedy nor inexpensive, and forcing Plaintiff to arbitration now would impose the restrictions of that process without allowing her to enjoy its benefits. (See *Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1103 [by delaying his arbitration demand, petitioner caused both parties "to run up substantial legal expense," depriving the parties of the efficiencies that would otherwise have been available through arbitration].)

IV. CONCLUSION

The petition to compel arbitration is DENIED. Plaintiff shall submit the final order.

- oo0oo -