UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of September, two thousand twenty-six.

PRESENT:

REENA RAGGI,
MARIA ARAÚJO KAHN,
Circuit Judges,
RACHEL P. KOVNER,
District Judge.[*]

SLACKPASS, INC., D/B/A LAUNCHPASS

Plaintiff-Appellee,

v. No. 26-967-cv

FROSTED, INC., D/B/A WHOP, CAMERON ZOUB, STEVEN SCHWARTZ,

Defendants-Appellants.

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[*] Judge Rachel P. Kovner, United States District Court for the Eastern District of New York, sitting by designation.

FOR PLAINTIFF-APPELLEE:	FRIDRIKH V. SHRAYBER, Dentons Cohen & Grigsby P.C., Pittsburgh, PA.
FOR DEFENDANTS-APPELLANTS:	MATTHEW DUFFY (Kyle William Roche, Freedman Normand Friedland LLP, New York, NY; Richard Cipolla, *on the brief*), Freedman Normand Friedland LLP, Boston, MA.

Appeal from an order of the United States District Court for the Southern District of New York (Ramos, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the March 31, 2026 order of the district court is **AFFIRMED**.

This case arises from a dispute between companies that provide services to users of online chat community platforms who seek to charge fees for access to their online content, *i.e.*, online chat community monetization providers. Plaintiff-Appellee SlackPass, Inc., d/b/a LaunchPass ("Plaintiff"), created a program that allows users to manage all aspects of their paid communities, including managing access, tracking membership, and processing payments. Plaintiff offers its services

throughout the United States and globally to customers on popular[1] platforms such as Slack and Discord. All customers who use Plaintiff's product must pay user fees and accept Plaintiff's Terms of Use policy. The Terms of Use policy includes a "Dispute Resolution" section which contains a mandatory arbitration clause and a waiver of jury trial clause. Defendants-Appellants Frosted, Inc., d/b/a Whop, and its co-founders, Cameron Zoub and Steven Schwartz (collectively, "Defendants"), are Plaintiff's competitors in the online chat community monetization market. Plaintiff alleges that Defendants, posing as customers, signed up for various private chat communities to obtain access to Plaintiff's computer systems and unpublished information for the purpose of diverting Plaintiff's customers and disrupting its services.

After receiving service of the corrected complaint in August 2023, Defendants filed three separate motions for extensions of time to file a responsive pleading. The parties attended two pre-trial conferences and litigated Plaintiff's motion for a preliminary injunction. On March 14, 2024, Defendants moved to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). On

[1] Slack and Discord have approximately 18 million and 200 million members, respectively. App'x 62.

March 31, 2025, the district court denied in part and granted in part the motion to dismiss. On April 14, 2025, Defendants, who had retained new counsel, moved again for an extension of time to file an answer. Thereafter, the parties attended another status conference and filed a proposed scheduling order in April 2025. On May 13, 2025, Defendants filed an Answer which, *inter alia*, asserted that "certain claims are subject to a mandatory arbitration agreement."

It was not until July 8, 2025 that Defendants submitted a letter requesting a pre-motion conference where they indicated their intention to seek arbitration and strike Plaintiff's demand for a jury trial. Defendants moved to compel arbitration as to the claims they argued were covered by the arbitration clause. Relying on the waiver of jury trial provision, Defendants also moved to strike Plaintiff's demand for a jury trial as to the Computer Fraud and Abuse Act and defamation claims, which were expressly excluded from the arbitration clause.

The district court denied the motion to compel arbitration because it found that, through their litigation conduct, Defendants relinquished their right to arbitrate by acting inconsistently with that right. The district court also denied the motion to strike, reasoning that the jury trial waiver provision did not apply to the claims that were excluded from arbitration. This appeal followed. We assume the

parties' familiarity with the additional underlying facts and procedural history, to which we refer only as necessary to explain our decision.

We review *de novo* a district court's denial of a motion to compel arbitration. *Doyle v. UBS Fin. Servs., Inc.*, 144 F.4th 122, 126 (2d Cir. 2025). Whether a moving party waived its right to arbitrate turns on whether that party "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right[.]" *Id.* at 130. In making that determination, we may consider "all aspects of the moving party's conduct," including the length of the delay and the amount of litigation which has occurred. *Id.* We have made clear that a party must choose between litigation or arbitration and that arbitration is neither a "fallback position" nor a "second bite at the apple." *Id.* at 131.

We conclude that Defendants waived their right to arbitrate by choosing to litigate this case for nearly two years before moving to compel arbitration. Prior to seeking arbitration, Defendants filed multiple pleadings, attended several pre-trial conferences, moved to dismiss the complaint and, after losing the motion to dismiss, filed a joint discovery plan and scheduling order, which indicated that the case was "to be tried to a jury." App'x 357. Contrary to Defendants' contention, their motion to dismiss the complaint for failure to state a claim was a merits-based

challenge. *See Doyle*, 144 F. 4th at 132 n.10 ("[O]f course, a party's moving to dismiss a complaint on the basis of failure to state a claim would preclude any motion to compel arbitration."); *see also Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996) (resolution of a motion to dismiss for failure to state a claim is a decision on the merits). Because Defendants' conduct is unquestionably inconsistent with a desire to arbitrate their dispute with Plaintiff, the district court properly denied the motion to compel arbitration.

At oral argument, Defendants maintained that they did not know that they had a right to compel arbitration of Plaintiff's claims under the Terms of Use policy until the district court ruled on its motion to dismiss in March of 2025. In their briefing on appeal, the Defendants assert that they "could not fully appreciate how squarely the surviving claims fell within [Plaintiff's] own arbitration until after [Plaintiff] made Terms-governed access central to its theory" in its opposition to the motion to dismiss. Appellant Reply Br. 14–15. But Defendants point to no record evidence to support their assertion that they lacked knowledge of the arbitration right. Notably, attorneys submitted no sworn affidavits asserting or explaining such ignorance. In the absence of any record support, Defendants'

conclusory assertion of ignorance cannot overcome *Doyle's* instruction that an attempt to litigate on the merits acts as a knowing waiver of an arbitration right.

Finally, we lack jurisdiction to review the district court's order denying the motion to strike Plaintiff's jury demand because it is a non-final order and not immediately reviewable under the collateral order doctrine. *See Germain v. Connecticut Nat. Bank*, 930 F.2d 1038, 1039–40 (2d Cir. 1991). Defendants urge us to exercise pendent jurisdiction over the jury waiver issue. We may exercise such jurisdiction where an unreviewable ruling is "inextricably intertwined" with an appealable order or where review of such a ruling is "necessary to ensure meaningful review" of an appealable order. *Myers v. Hertz Corp.*, 624 F.3d 537, 552 (2d Cir. 2010). Defendants' reasoning for pendent jurisdiction is that the appeals arise from the same order and both motions relate to the same arbitration section of the Terms of Use policy. Appellant Br. 50–51. That alone, however, is insufficient to support pendent jurisdiction. The motion to strike the jury demand relates to a different and independent provision of the Terms of Use policy than the motion to compel arbitration. Determination of the motion to strike the jury demand involves a separate inquiry that does not impact the resolution of the motion to compel arbitration. *See Myers*, 624 F.3d at 553–54 (no pendent

jurisdiction where two issues are "similar, but independent" and resolution of the non-appealable portion of the order would require a "distinct" and "broader" inquiry than the one over which we have jurisdiction (internal quotation marks omitted)). Under these circumstances, we lack jurisdiction to address the district court's denial of the motion to strike.

We have considered the remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court