

Ninth Circuit Agrees Defendant Waived Right to Arbitrate, Affirms Order Denying Motion to Compel

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The U.S. Court of Appeals for the Ninth Circuit affirmed a California district court order denying the defendant's motion to compel arbitration, agreeing that the defendant waived its right to arbitrate by actively defending the lawsuit for a year and a half before moving to compel. The court explained that the "heavy burden" of establishing waiver can be overcome by demonstrating "(1) knowledge of an existing right to compel arbitration; (2) intentional acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." It was undisputed that the defendant knew it had a right to compel arbitration.

By moving to dismiss twice and then defending an appeal before seeking to enforce that right, the Ninth Circuit found the year-and-a-half delay underscored the defendant's "'strategic decision to take advantage of the judicial forum' in a manner inconsistent with its right to arbitrate." The court also agreed that the plaintiff had established prejudice in at least three respects. First, in litigating the action for more than a year, he was forced to incur costs "directly traceable" to acts that were inconsistent with the defendant's known right to arbitrate. Second, ordering arbitration at this stage would effectively force him to relitigate key issues that the court already decided in his favor. Third, granting the defendant's motion would give it an advantage from first choosing to litigate in federal court; namely, getting two bites at the apple. As such, the order denying the defendant's motion to compel was affirmed.

[Flores v. Adir Int'l, LLC](#), No. 18-55959 (9th Cir. Dec. 17, 2019).

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