

Court Denies Google's Bid to Compel Arbitration Four Years into Litigation

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A California federal judge recently denied Google's motion to arbitrate a class action lawsuit. The lawsuit alleged that Google violated privacy statutes by concealing the fact that Google-Assistant-enabled devices could accidentally record users' conversations without users' permission or knowledge.

In its ruling denying Google's request to send the case to arbitration, the federal court determined that the plaintiffs satisfied the two-prong test for waiver: (1) knowledge of an existing right to compel arbitration and (2) intentional acts inconsistent with the existing right to arbitrate.

With respect to the first prong, the court determined that Google knew about its existing right to compel arbitration because it drafted the arbitration provisions in the relevant agreements.

The court then summarized and examined Google's conduct over the course of the litigation:

- Google mentioned the possibility of compelling arbitration for the first time in its answer to the plaintiffs' complaint two and half years into the litigation, after already filing four motions to dismiss.
- Following its answer, Google did not move to compel arbitration and instead spent nine months litigating the case, including by arguing discovery matters and filing a motion for summary judgment.
- Google filed its motion to compel arbitration *after* the completion of fact and expert discovery and seven months after class certification.

As a part of its analysis, the court distinguished Google's case from a recent Ninth Circuit decision—*Armstrong v. Michaels Stores, Inc.*, 59 F. 4th 1011 (9th Cir. 2023)—that illustrated conduct that did *not* rise to the level of waiver of the right to compel arbitration. In *Armstrong*, the defendant repeatedly reserved its right to arbitration in every substantive filing, did not ask the court to weigh in on the merits of the case, did not engage in meaningful discovery, and did not litigate the case for a prolonged period of time before filing its motion to compel. Based on Google's litigation conduct

summarized above, the court concluded that the two cases were not the same and concluded Google waived its right to arbitrate.

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