NOT FOR PUBLICATION

FILED

SEP 3 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAMIEN UHL, and those similarly situated,

Plaintiff - Appellee,

MONIQUE PAYAN, and those similarly situated, KATHERINE MURPHY, and those similarly situated,

Plaintiffs,

v.

ROBLOX CORPORATION, a Delaware corporation,

Defendant - Appellant.

No. 25-5057

D.C. No.
3:23-cv-01940-TWR-BLM

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Todd W. Robinson, District Judge, Presiding

Argued and Submitted May 22, 2026
Pasadena, California

Before: LEE, BUMATAY, and SUNG, Circuit Judges.
Dissent by Judge BUMATAY.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Roblox Corporation appeals the district court's denial of its motion to compel arbitration. We have jurisdiction under 9 U.S.C. § 16(a)(1)(B) and 28 U.S.C. § 1291. "We review denial of a motion to compel arbitration *de novo*, and review findings of fact underlying the district court's decision for clear error." *Lim v. TForce Logistics LLC*, 8 F.4th 992, 999 (9th Cir. 2021) (internal citations omitted).

"[T]he test for waiver of the right to compel arbitration consists of two elements: (1) knowledge of an existing right to compel arbitration; and (2) intentional acts inconsistent with that existing right." *Hill v. Xerox Bus. Servs., LLC*, 59 F.4th 457, 468 (9th Cir. 2023). This is a "holistic" inquiry. *Id.* at 471 n.16. Because both requirements have been met, we affirm.

1. Knowledge of its right to compel arbitration. Knowledge does not require "a present ability to move to enforce an arbitration agreement." *Id.* at 469. Instead, it requires that a party had "knowledge of and knew how to assert its right to compel arbitration." *Id.* at 471.

Roblox has known of its right to compel arbitration since before the complaint was filed because it has always included an arbitration provision in its terms of service during the relevant period. According to Roblox, every version of its terms of service since at least 2017 has contained an arbitration clause. When plaintiff Damien Uhl's daughter created a Roblox account in 2017 with his permission, the Roblox Terms required the "parent or guardian's consent to agree to the Terms,"

which included an arbitration provision. And when someone purchases items on Roblox, he or she again must agree to these terms. Accordingly, Uhl's complaint alleged the information Roblox needed to know that it had the right to compel arbitration: It alleged that Uhl's children played Roblox since 2017 and that he spent money on Robux "on at least a monthly basis" since then. That is enough.

But Roblox did not move to compel arbitration—for months on end. It instead moved to dismiss the complaint on the merits in federal court. After having fully litigated the motion to dismiss—and failing to have the complaint dismissed with prejudice—Roblox now asserts that it did not move to compel arbitration because it needed Uhl's daughter's username to succeed in its motion to compel arbitration. Yet when a party has knowledge of its right to compel arbitration but does not have all the evidence required to win a motion to compel, the proper procedure is to move to compel, and then, if necessary, seek arbitration-related discovery. *See Knapke*, 38 F.4th at 833 (remanding for limited discovery on the motion to compel); *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016) (explaining that under the FAA, parties "may engage in limited discovery on the issue of contract formation" and can even "file a simultaneous motion for limited discovery and to compel arbitration").

Indeed, Roblox's position is critically undermined by its own August 16, 2024 email—sent after the district court rejected Roblox's motion to dismiss on July 10, 2024. In that email, Roblox told the plaintiffs that despite not having Uhl's

daughter's username, Roblox "decided to move to compel arbitration of plaintiffs' claims pursuant to the arbitration agreement in Roblox's Terms of Use." Roblox also stated that it would "need to conduct some targeted discovery directed to determine the version of Roblox's Terms to which Plaintiffs assented." But Roblox could have sent this same email when this lawsuit was originally filed on August 7, 2023 and before it filed its motion to dismiss. In other words, Roblox's August 16, 2024 email confirms that it knew it could move to compel arbitration even without the username—and thus it could have done so when the lawsuit was originally filed. Accordingly, in light of the "holistic" inquiry and the "totality of [Roblox's] actions," *Hill*, 59 F.4th at 468 at 471 n.16, the district court did not err in concluding that Roblox knew of its right to compel arbitration.

2. Intentional acts inconsistent with the right to arbitrate. Roblox acted inconsistently with its right to compel arbitration. "There is no concrete test to determine whether a party has engaged in acts that are inconsistent with its right to arbitrate." *Martin*, 829 F.3d at 1125. A party, however, "generally acts inconsistently with exercising the right to arbitrate when it (1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court." *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023) (internal citation and quotation omitted).

It is well established that "a conscious decision to seek judicial judgment on the merits of the arbitrable claims" is "inconsistent with a right to arbitrate." *Martin*, 829 F.3d at 1125 (citation modified). Thus, the paradigmatic act that is inconsistent with a right to arbitrate is "when defendants move for dismissal with prejudice on a key merits issue." *Newirth v. Aegis Senior Cmtys., LLC*, 931 F.3d 935, 942 (9th Cir. 2019), *abrogated on other grounds by Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022) (citation modified). That is exactly what Roblox did. Roblox asked the district court to "dismiss . . . with prejudice" all of Uhl's claims on the merits. And only when the court declined—holding only that Uhl needed to amend his complaint to allege his claims with greater particularity—did Roblox change course and move to compel arbitration.

Roblox argues that moving to dismiss is not necessarily inconsistent with a right to compel arbitration, citing, as an example, *Lake Communications, Inc. v. ICC Corp.*, where the defendant moved to dismiss for lack of personal jurisdiction. 738 F.2d 1473, 1476 (9th Cir. 1984), *overruled on other grounds by Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). But a motion to dismiss for lack of jurisdiction, unlike a motion to dismiss on the merits, does not choose a court over an arbitrator for a decision that resolves the dispute. Instead, it asks the court to decide an issue that an arbitrator cannot possibly resolve: whether the court has power over the parties—and therefore power to compel arbitration—

in the first place. *See Martin*, 829 F.3d at 1125–26 (distinguishing a motion to dismiss on the merits from other motions to dismiss and holding that a "party waives arbitration by seeking a decision on the merits before attempting to arbitrate") (citation omitted). We have repeatedly held that "[s]eeking a decision on the merits of a key issue in a case indicates an intentional and strategic decision to take advantage of the judicial forum." *Newirth*, 931 F.3d at 941; *see Armstrong*, 59 F.4th at 1015.

But there is more. Roblox did not merely move to dismiss on the merits. It also removed the case from state court, litigated a remand motion, and never—during the eleven months it was litigating—sought a stay pending a determination of whether the lawsuit should be in court at all. And it waited almost a year to move to compel. That "prolonged delay[]" is similar to or longer than delays in cases where this Court and others found waiver. *See, e.g., Gile v. Dolgen Cal., LLC*, 2022 WL 17248087, at *1 (9th Cir. 2022) (eleven months); *Kelly v. Pub. Util. Dist. No. 2 of Grant Cnty.*, 552 F. App'x 663, 664 (9th Cir. 2014) (eleven months); *Support Cmty., Inc. v. MPH Int'l, LLC*, 2025 WL 547380, at *1 (9th Cir. 2025) (ten months). Taken together, Roblox's actions are inconsistent with exercising a right to arbitrate.[1]

[1] *See, e.g., Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988) (party engaged in inconsistent actions where it litigated for two years, moved to dismiss, and approved a pre-trial conference order); *Martin*, 829 F.3d at 1126 (defendants engaged in inconsistent acts where they litigated for seventeen months, which included a motion to dismiss on a key merits issue); *Hill*, 59 F.4th at 471–

In sum, a party cannot ask the district court to dismiss a complaint on the merits, holding in reserve a claimed right to arbitrate that will be exercised only if it does not like the district court's decision. The district court did not err in finding that Roblox had waived its right to compel arbitration.

AFFIRMED.

72 (reliance on the judicial process can show inconsistent acts, even if the relevant acts are "seemingly commonplace and not an express disavowal of arbitral forums").

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No. 25-5057, *Uhl, et al. v. Roblox Corp.*
BUMATAY, Circuit Judge, dissenting:

As Justice Brandeis has said, it is more important to have the law "settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). This is so that parties understand their rights and know if they are going to waive their rights. After all, "waiver" requires an "intentional relinquishment or abandonment of a known right." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022). Unfortunately, this area of the law is not so settled to conclude that Roblox intentionally relinquished its right to arbitrate.

First, we've never held that parties must move to compel, and then, if necessary, seek discovery under the Federal Arbitration Act to avoid waiver of an arbitration right. While Roblox knew that Damien Uhl had signed *some* arbitration clause, it didn't know *which* arbitration clause he agreed to because he refused to provide Roblox his or his daughter's username. True, Roblox could have asked for discovery on this question as part of a motion to compel arbitration. But no case advises that the failure to seek discovery on arbitration issues constitutes a waiver of the right to arbitrate.

The cases cited by the majority are not enough to give Roblox notice of this newfound waiver rule. In *Knapke v. PeopleConnect, Inc.*, we permitted limited discovery on the enforceability of an arbitration clause after the defendant filed a motion to compel arbitration. 38 F.4th 824, 833 (9th Cir. 2022). So *Knapke*

approved of the procedure but it never tied the failure to seek discovery as part of a motion to compel arbitration to waiver. And *Martin v. Yasuda*, 829 F.3d 1118 (9th Cir. 2016), says nothing about discovery. Instead, there, the defendants knew exactly which arbitration agreement the parties were bound by and "devot[ed] 'considerable time and effort' to a joint stipulation structuring the litigation, fil[ed] a motion to dismiss on a key merits issue, enter[ed] into a protective order, answer[ed] discovery, and prepar[ed] for and conduct[ed] a deposition." *Id.* at 1126. Neither case involved what is at issue here—discovery to determine *which* arbitration clauses the plaintiff signed. Finding waiver based on the failure to seek discovery might be a good rule going forward, but it's wrong to apply it for the first time here.

Second, while Roblox probably could have filed its motion to compel arbitration from the get-go, we have never said that filing a non-jurisdictional motion to dismiss categorically constitutes waiver. Our caselaw has been much more conditional: "although filing a motion to dismiss that does not address the merits of the case is not sufficient to constitute an inconsistent act, seeking a decision on the merits of an issue *may* satisfy this element." *Id.* at 1125 (emphasis added). While Roblox's decision to wait to file its motion to compel arbitration should count in favor of waiver, given the novelty of the other bases of waiver, I don't think it was enough here.

Third, we have never said that filing a motion to remove a case to federal court supports waiver. And it doesn't make any sense to do so. Defendants may want to gain the protection of the Federal Arbitration Act in federal court. *See Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009) (quoting 9 U.S.C. § 4) ("When one party seeks arbitration pursuant to a written agreement and the other resists, the proponent of arbitration may petition for an order compelling arbitration in 'any United States district court which, save for [the arbitration] agreement, would'" otherwise have jurisdiction.). So neither the motion to remove nor the time it took to litigate the removal issue should count against Roblox.

Finally, while we have some precedent suggesting that a reservation of a right to arbitration in pleadings or motions is not enough to "defeat a claim of waiver," *see Martin*, 829 F.3d at 1125, no Ninth Circuit case applies that broad rule to similar facts. Here, Roblox noted that it could not file a motion to compel arbitration without Uhl's username in its motion to dismiss and expressly reserved its right to arbitrate. So Uhl and the district court were aware this issue was out there. We should not punish Roblox by woodenly applying a rule that is not supported by any precedential examples.

In the end, all the facts against Roblox sound like "forfeiture" rather than "waiver." *See United States v. Olano*, 507 U.S. 725, 733 (1993) ("forfeiture is the

failure to make the timely assertion of a right"). We confuse these two concepts by affirming "waiver" here.

I respectfully dissent.