

4. The party opposing arbitration must show that the other party, by its actions, intentionally waived its right to arbitration. *EZPawn*, 934 S.W.2d at 89; *Texas Residential Mortg., LP v. Portman*, 152 S.W.3d 861, 863 (Tex. App. - Dallas 2005, no pet.). A party waives arbitration if it substantially invokes the judicial process. *In re Bank One*, 216 S.W.3d 825, 827 (Tex. 2007); *In re Vesta Ins.*, 192 S.W.3d 759, 763 (Tex. 2006); *EZPawn*, 934 S.W.2d at 89; *Prudential Secs. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex.1995).

5. A party substantially invokes the judicial process by taking specific and deliberate actions, after suit is filed, that are inconsistent with the right to arbitrate. *Interconex, Inc.*, 224 S.W.3d at 534; *Sedillo v. Campbell*, 5 S.W.3d 824, 827 (Tex. App. - Houston [14th Dist.] 1999, orig. proceeding); *Williams Indus, v. Earth Dec. Sys.*, 110 S.W.3d 131, 135 (Tex. App. - Houston [1st Dist.] 2003, no pet.). Defendants never once, during approximately 15 months, attempted to seek arbitration in this matter.

6. After virtually all of the discovery was completed and the case was set for trial, Defendants have now changed their minds about litigating and now ask the trial court to compel arbitration. Defendants were allowed to conduct full discovery, file motions going to the merits, attend mediation, attend depositions and sought arbitration only on the eve of trial. The rule that one cannot wait until "the eve of trial" to request arbitration is not limited to the evening before trial; it is a rule of proportion. *Homes v. Cull*, lw080503611(Tex. 2008).

7. After approximately 15 months after the suit at issue was filed and shortly before the anticipated December 2008, trial setting, Defendants have now changed their minds and requested arbitration. Defendants gave no reason as to their change of direction. Without a doubt, Defendants change of mind unquestionably delays adjudication of the merits to the extent arbitration reduces delay, it also severely limits both pretrial discovery and post-trial review, and the costs associated with the litigation process. Having enjoyed the benefits of discovery for approximately 15 months, Defendants could not decide only then that arbitration was warranted.

8. The party opposing arbitration must show it suffered actual prejudice as a result of the other party's inconsistent action. *In re Bruce Terminix*, 988 S.W.2d 702, 704 (Tex. 1998); *Grand Homes 96, L.P. v. Loudermilk*, 208 S.W.3d 696, 704 (Tex. App. - Fort Worth 2006, pet. filed 1-26-07). A party may establish prejudice by showing that it incurred costs and fees because of the other party's actions or delay. *Interconex, Inc.*, 224 S.W.3d at 534; *Williams Indus.*, 110 S.W.3d at 135.

9. It is unquestionable that Defendants' conduct prejudiced Plaintiffs. As the Court noted in *Homes v. Cull*, "Prejudice" has many meanings. In the context of waiver under the FAA prejudice relates to inherent unfairness, which can consist of a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage, stating:

F]or purposes of a waiver of an arbitration agreement[,] prejudice refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.

Furthermore, the Court stated that "a party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party." *Homes v. Cull* at 38-39.

10. Defendants propounded and received discovery under one set of rules, and now seek to arbitrate the case under another. Defendants are attempting to delay disposition by switching to arbitration when trial was imminent and arbitration was not. Furthermore, Defendants attempted to have the case at issue dismissed and when that approach failed, conducted discovery and then attempted to limited Plaintiffs' rights to appellate review. The Texas Supreme Court held, in *Homes v. Cull* that "Such manipulation of litigation for one party's advantage and another's detriment is precisely the kind of inherent unfairness that constitutes prejudice under federal and state law." *Homes* at 40.

11. Furthermore, the amount of attorney time Plaintiffs have invested in responding to Plaintiffs' discovery requests and related motions to date is approximately 288 attorney hours and approximately 138 paralegal hours.

12. Defendant's impliedly waived the agreement to arbitrate and said agreement is therefore unenforceable.

13. Due to Defendant's implied waiver of the Arbitration Agreement, Plaintiffs move the Court to stay the arbitration proceedings.

B. EXPRESS WAIVER

14. A party may waive its right to arbitrate by expressly indicating that it wants to resolve the case in a judicial forum. *Interconex, Inc. v. Ugarov*, 224 S.W.3d 523, 533 (Tex. App. - Houston [1st Dist.] 2007, no pet.).

15. Both Plaintiffs and Defendants executed Construction Contract Addendum A. Section 12 of said Addendum entitled "*Demand for Arbitration or Termination*" states the following:

Owner may, on seven (7) days notice to Contractor, demand arbitration or terminate this contract before the completion date hereof, when Contractor defaults in performance of any provision herein, or fails to carry out the construction in accordance with the provisions of the Contract Documents. Owner shall be entitled to such damages and remedies as are provided by law.

16. By executing said Addendum, Defendants' acknowledged that Plaintiffs had the exclusive right to demand arbitration, and that Defendants' expressly waived their ability to demand arbitration at the time said Addendum was signed. Therefore, Defendants' demand for arbitration is unenforceable against Plaintiffs since Plaintiffs' are not demanding arbitration.

17. Due to Defendants' express waiver of the Arbitration Agreement, as well as having a mediation conducted as a form of Alternative Dispute Resolution, Plaintiffs respectfully request the Court to stay the arbitration proceedings and proceed with trial.

WHEREFORE, Plaintiffs object to Defendants' Demand for Arbitration, and respectfully request the Court to Overrule said Demand in all respects, to stay the arbitration proceedings and for such other and further relief as may be necessary to effectuate justice between the parties.