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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THOMAS S. LEITH et al., Plaintiffs and Appellants, v. BERTHEL, FISHER & COMPANY FINANCIAL SERVICES, INC., et al., Defendants and Respondents.	C088365 (Super. Ct. No. SCV-0040085)

After initiating arbitration against defendants Berthel, Fisher & Company Financial Services, Inc. (Berthel Fisher), and their former investment advisor Shawn B. Davis (Davis)[1] (collectively, defendants), and facing a motion to dismiss, plaintiffs Thomas S. Leith and Lynda Reiner Leith (the Leiths) stipulated to dismiss their

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[1] The Leiths assert that Davis has been dismissed from this case, but there is nothing in the record to support this claim. Accordingly, we proceed on the assumption that Davis remains a defendant.

arbitration case so they could pursue their claims in court. Then, 19 months later, after an unsuccessful mediation, and with discovery pending and a trial date approaching, the Leiths reversed course and filed a petition to compel a return to arbitration. The court denied the petition, finding the Leiths had waived their right to arbitration.

On appeal, the Leiths argue the trial court erred in finding waiver because (1) even though they admittedly engaged in acts inconsistent with an intent to arbitrate, their actions did not prejudice defendants, and (2) in assessing waiver, the trial court improperly considered how an arbitrator likely would rule on an anticipated motion to dismiss the underlying claim.

We conclude that the Leiths expressly and impliedly waived their arbitration rights. We also conclude that any error by the trial court in considering how an arbitrator likely would rule on a motion to dismiss the arbitration was harmless. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2016, the Leiths initiated an arbitration proceeding before the Financial Industry Regulatory Authority (FINRA)[2] against Davis and the investment firm for which he worked, Berthel Fisher. In their statement of claim, the Leiths alleged that between 2005 and 2010, based on recommendations and advice from Davis, they purchased investments that were illiquid, risky, and unsuitable for them based on their financial situation, investment objectives, and risk criteria. The Leiths alleged that Davis failed to disclose the risky and illiquid nature of the investments and falsely assured them that purchasing the investments would allow them to earn higher returns while at the

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[2] FINRA is responsible for regulatory oversight of securities brokers and firms that do business with the public; professional training, testing, and licensing of persons registered by FINRA; and arbitration and mediation of disputes. (*Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 834, fn. 1.)

same time reducing their overall portfolio risk. The Leiths further alleged that after persuading them to purchase the investments, Davis concealed the poor performance of the investments by misrepresenting their actual value in annual "score card" reports. The Leiths allegedly discovered the "truth" about their investments in April 2016, and filed their arbitration claim five months later.

In January 2017, after filing an answer, defendants informed the Leiths of their intent to file a motion to dismiss the arbitration claims under rule 12206 of FINRA's Code of Arbitration Procedure for Customer Disputes (the FINRA rules).[3] Under that rule, a claim is ineligible for arbitration if "six years have elapsed from the occurrence or event giving rise to the claim." (FINRA rule 12206, subd. (a).) Treating the date of the initial investment as the relevant occurrence or event, defendants argued that the Leith's claims were ineligible for arbitration because they were filed more than six years after the dates of the initial investments.

Counsel for the Leiths was convinced that defendants' motion to dismiss had merit. Therefore, to avoid the cost and expense associated with a motion that counsel for the parties agreed "would probably be granted," the Leiths stipulated to voluntarily dismiss their arbitration case. "[C]onsistent with FINRA Rule 12206(b)," the parties stipulated that the dismissal would be "without prejudice," and therefore "not prohibit the Leiths from pursuing [their] claim[s] in a court of competent jurisdiction."[4] For their part, defendants stipulated that they would not raise the existence of an arbitration agreement or obligation to arbitrate as a defense to claims in court. The parties entered

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[3] The FINRA rules are available at <https://www.finra.org/rules-guidance/rulebooks/finra-rules> [as of Mar. 12, 2020], archived at <https://perma.cc/6TZV-Q7B4>.

[4] FINRA rule 12206, subdivision (b) provides, in relevant part: "Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court."

into the stipulation "solely for the mutually beneficial[] purpose of avoiding [the] cost and expense associated with [defendants] filing a motion to dismiss the arbitration pursuant to FINRA Rule 12206."

The Leiths signed the stipulated dismissal on January 31, 2017. Approximately eight months later, on September 27, 2017, the Leiths filed this lawsuit, making essentially the same claims against defendants as they did in the arbitration proceeding. Defendants filed an answer denying the allegations and asserting various affirmative defenses. The court set trial for December 10, 2018.

On December 19, 2017, the Leiths retained new counsel to represent them in the pending court action. The new firm attempted mediation with defendants on May 11, 2018, but the parties' informal efforts to resolve the dispute were unsuccessful.

In July 2018, with trial approaching, defendants served their first sets of written discovery and noticed the Leith's depositions. On July 31, 2018, the Leiths notified defendants of their desire to return to arbitration. Defendants rejected the proposal, asserting that the Leiths had waived their right to arbitration by abandoning the prior arbitration proceeding and pursuing their claims in court.

On August 29, 2018, the Leiths filed a petition to compel arbitration, along with a supporting memorandum, declaration, and a number of exhibits. The same day, they served their responses to defendants' discovery requests, objecting to every request based on the pendency of the petition to compel arbitration. In opposition to the petition, defendants filed a memorandum and evidence, as well as a motion to compel discovery. The Leiths filed a reply memorandum on October 9, 2018, along with additional evidence in support of their petition.

Before the hearing on the petition to compel arbitration, the trial court issued a tentative ruling, granting the petition. Although the court agreed that the Leiths acted inconsistently with an intent to invoke their right to arbitrate, the court tentatively found

that defendants had failed to establish prejudice, which the court termed a dispositive issue.

After hearing oral argument, the trial court reversed its tentative ruling and issued an order *denying* the petition. In its final order, the trial court "determine[d] that the position articulated in the tentative ruling on the issue of prejudice was not correct" and that "prejudice has been adequately demonstrated by the defendants."[5] In finding prejudice, the trial court relied on three factors, namely that (1) returning to arbitration would not vindicate the purpose of arbitration to serve as an expeditious, efficient, and cost-effective method of resolving the underlying dispute, (2) a renewed FINRA rule 12206 motion likely "would in the end result in return of the matter to the Superior Court," and (3) the claims at issue likely could not be consolidated with a related arbitration claim pending against defendant Davis and his new employer, WFG Investments, Inc. No statement of decision was requested or issued.

The Leiths timely appealed. (Code Civ. Proc., § 1294.)[6]

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5 The order provides in relevant part: "[T]he court is convinced that prejudice has been adequately demonstrated by the defendants. Once the first arbitration was dismissed, the defense has incurred the time and expense in preparing this matter for trial. The court is convinced that a return to arbitrate at this remote date will not vindicate the general purpose of arbitration to expeditiously resolve disputes. While the court expressly takes no position on whether a renewed motion under FINRA rule 12206 would likely be successful or not, the defense convincingly demonstrates a substantial likelihood that [FINRA] rule 12206 procedures would in the end result in return of the matter to the Superior Court, after a lengthy digression into arbitration. Moreover, its [*sic*] seems unlikely that granting the petition would, as plaintiffs forecast, easily result in consolidation with the already-pending FINRA arbitration, given the advanced procedural posture of the already-pending arbitration. These factors, taken together in this atypical arbitration petition, demonstrate the requisite prejudice. Accordingly, the court does not adopt that portion of its tentative ruling which granted the petition, and instead the court denies the petition."

6 Further undesignated statutory references are to the Code of Civil Procedure.

DISCUSSION

The Leiths challenge the trial court's order denying the motion to compel arbitration on two grounds. First, they argue the trial court erred in finding that the Leiths waived the right to arbitrate their claims. In particular, the Leiths argue that a party seeking to establish waiver must demonstrate prejudice, and that defendants failed to do so. Second, the Leiths argue that the trial court, in assessing prejudice, improperly considered the likelihood that a renewed FINRA rule 12206 motion would result in return of the matter to the court.[7] Finding no reversible error, we affirm the trial court's order.

A. *The Leiths waived their right to compel arbitration*

The California Arbitration Act governs private arbitration.[8] (§ 1280 et seq.) Through this detailed statutory scheme, the Legislature has expressed a " 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) To effectuate that policy, the California Arbitration Act authorizes a party to an arbitration agreement to seek a court order compelling the parties to arbitrate a dispute covered by the agreement. (§ 1281.2.) A proceeding to compel arbitration is in essence a suit to compel specific

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[7] In their reply brief, the Leiths also raise the argument that the trial court improperly relied on the fact that the claims likely could not be consolidated with the other arbitration claim. Because this contention was raised for the first time in the reply, we need not, and do not, consider it. (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830.)

[8] Although not briefed by the parties, there is a threshold choice of law question. The arbitration agreement in this case provides that it is governed by Iowa law. The parties' briefs only discuss California law. Because the parties have assumed that California law applies and have not invoked Iowa law, or argued that the agreement's choice of law provision should be enforced, we treat the choice of law issue as forfeited and apply California law in reaching our decision. (*Fuentes v. TMCSF, Inc.* (2018) 26 Cal.App.5th 541, 547.)

performance of the arbitration agreement. (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 479.)

In this case, there is no dispute that a valid agreement to arbitrate exists and that the Leith's claims fall within the scope of that agreement.[9] The only issue is whether the Leiths expressly or impliedly waived their right to compel arbitration.

As with other contractual rights, a right to compel arbitration is subject to "waiver." (§ 1281.2, subd. (a).) Although courts frequently define "waiver" as the voluntary relinquishment of a known right, waiver also may stem from conduct " 'which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.' "[10] (*Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 598.)

No single test delineates the conduct that will constitute a waiver of arbitration. (*St. Agnes, supra*, 31 Cal.4th at p. 1195.) Nevertheless, our Supreme Court has identified several factors that are properly considered in assessing waiver claims. (*Id*. at p. 1196.) Such factors include (1) whether the party has taken actions inconsistent with the right to arbitrate; (2) whether the litigation machinery was substantially invoked and whether the

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9 Technically, this case involves multiple arbitration agreements containing the same or similar language. For simplicity, we shall refer to the agreements collectively as though there is a single arbitration agreement.

10 Courts also have used the term "waiver" loosely to describe the related, but distinct, concepts of forfeiture and estoppel. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195, fn. 4 (*St. Agnes*); *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1149-1151 (*Chase*); *Old Republic Ins. Co. v. FSR Brokerage, Inc*. (2000) 80 Cal.App.4th 666, 678-679; *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1189-1190.) Because courts have used the term "waiver" to refer to different concepts, the term "waiver" is sometimes used merely as a shorthand statement for the conclusion that a contractual right to arbitration has been lost. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315 (*Platt Pacific*).)

parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party requested arbitration close to the date of trial or unreasonably delayed seeking arbitration; (4) whether a defendant seeking arbitration filed a counterclaim without demanding arbitration; (5) whether important intervening steps took place before the party demanded arbitration (e.g., the party took advantage of discovery procedures not available in arbitration); (6) whether the party demanding arbitration engaged in bad faith or willful misconduct; and (7) whether the party delayed the demand for arbitration in a way that affected, misled, or prejudiced the opposing party. (*Ibid.*)

The trial court here found the Leiths engaged in acts inconsistent with an intent to arbitrate by dismissing their arbitration proceeding and litigating their claims in court for nearly a year before eventually seeking a return to arbitration. The trial court also found that granting the Leith's petition to compel arbitration would prejudice the defendants by, among other things, depriving them of the advantages of arbitration as an expeditious and cost-effective method of resolving the underlying dispute.

On appeal, the Leiths do not dispute they engaged in conduct inconsistent with an intent to invoke arbitration, but argue there was no waiver because defendants were not prejudiced by their actions. Without a showing of prejudice, the Leiths argue, there can be no waiver. We disagree.

1. Express waiver

We requested supplemental briefing from the parties on whether a showing of prejudice is required if the Leiths expressly waived their contractual right to arbitration by voluntarily dismissing their pending arbitration claim. We conclude that while prejudice generally is required to support a finding of implied waiver, a showing of prejudice is unnecessary when there has been an express waiver. We explain below.

As a general rule, the right to arbitrate, like other contract rights, is subject to waiver, which may be either express, based on the words of the waiving party, or

implied, based on conduct indicating an intent to relinquish the right. (*Thorup v. Dean Witter Reynolds, Inc.* (1986) 180 Cal.App.3d 228, 234; *Lynch v. California Coastal Com.* (2017) 3 Cal.5th 470, 475.) Whether a right to arbitrate has been waived in any particular case will depend upon the facts and circumstances of that case. (*Thorup, supra*, 180 Cal.App.3d at p. 234.) However, because waiver depends on intent, courts are reluctant to find waiver without a clear showing that the party intended to give up such right, especially when there is a strong public policy favoring the exercise of that right. (*Ibid.*; *Sprunk v. Prisma LLC* (2017) 14 Cal.App.5th 785, 795; see also *Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview* (1990) 218 Cal.App.3d 502, 513 (*Brookview*); *Dole Bakersfield, Inc. v. Workers' Comp. Appeals Bd.* (1998) 64 Cal.App.4th 1273, 1277.) Thus, it is a general rule that before a court will find an implied waiver, the party seeking waiver must show it was misled and prejudiced by the other party's conduct. (*Dole Bakersfield, supra*, at p. 1277 [a waiver will not be " ' "presumed or implied contrary to the intention of a party whose rights would be injuriously affected, unless by his conduct the opposite party has been misled to his prejudice into the honest belief that such waiver was intended" ' "]; *Applera Corp. v. MP Biomedicals, LLC* (2009) 173 Cal.App.4th 769, 791 (*Applera*); see also *Thorup*, at p. 234 [waiver of right to arbitration will not be lightly inferred].) In this sense, an implied waiver is akin to a species of estoppel, which requires a showing of prejudice. (*Chase, supra*, 42 Cal.App.4th at p. 1160, fn. 14; *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 841.)

This rationale does not apply in the context of an express waiver. Unlike an implied waiver, an express waiver leaves little room for ambiguity about whether the party's actions were intentional. Accordingly, we agree with those courts concluding that a showing of prejudice is unnecessary when there has been an express waiver. (*Applera, supra*, 173 Cal.App.4th at p. 791 ["Absent an express waiver of the contractual provision, the application of the waiver and judicial estoppel doctrines require a showing of

prejudice"]; *Gustafson v. State Farm Mut. Auto. Ins. Co*. (1973) 31 Cal.App.3d 361, 365 [finding a valid release of arbitrable claim waives right to compel arbitration, with no discussion of prejudice]; see also *Gilmore v. Shearson/American Express, Inc.* (2d Cir. 1987) 811 F.2d 108, 112 (*Gilmore*); *Nexteer Auto. Corp. v. Mando Am. Corp.* (2016) 314 Mich.App. 391, 397 [886 N.W.2d 906, 910]; *In re Citigroup Global Mkts., Inc.* (Tex.Ct.App. 2006) 202 S.W.3d 477, 481-482.)[11]

We conclude from the evidence in the record here that the Leiths expressly waived their right to arbitration when they voluntarily abandoned their pending FINRA arbitration claim.

To effect an express waiver of arbitration rights, parties need not use explicit waiver language, as long as the words used by the parties plainly indicate an intent to relinquish the right to arbitrate. (*Brookview, supra,* 218 Cal.App.3d at p. 513 [waiver requires "a clear showing of intent to give up such right"]; *Nunez v. Nevell Group, Inc.* (2019) 35 Cal.App.5th 838, 845 [written election not to proceed with filing petition to compel arbitration was an explicit waiver]; *Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1390 [refusing to pay arbitrator fees waived right to arbitrate].) For instance, courts have found express waivers where a party withdrew a motion to compel arbitration or successfully resisted a motion to compel arbitration. (*Gilmore, supra,* 811 F.2d at pp. 110, 112; *Smith v. Petrou* (S.D.N.Y. 1989) 705 F.Supp. 183, 185.) Courts also have found express waivers of FINRA arbitration rights where the parties have superseded and displaced an obligation to arbitrate with a more specific agreement. (See *Goldman,*

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11 Our conclusion is consistent with the Supreme Court's opinion in *St. Agnes,* identifying prejudice as a "critical" factor in waiver determinations because the issue in that case was whether participating in litigation impliedly waived the party's right to arbitration. (See, e.g., *St. Agnes, supra,* 31 Cal.4th at p. 1203.)

Sachs & Co. v. Golden Empire Schs. Fin. Auth. (2d Cir. 2014) 764 F.3d 210, 214-215 and *Goldman, Sachs & Co. v. City of Reno* (9th Cir. 2014) 747 F.3d 733, 741.)

A key document before us in this case is the parties' stipulation for dismissal of the Leith's FINRA arbitration claim. We independently determine the meaning of that agreement as a question of law. (*Estate of Dodge* (1971) 6 Cal.3d 311, 318.) Based on the language of that agreement, we conclude that the Leiths expressly waived their contractual right to arbitration when, in knowing disregard of their right to arbitrate, they voluntarily and intentionally stipulated to dismiss their arbitration case in favor of proceeding in a judicial forum.

We reject the Leith's argument that the stipulated dismissal did not effect a waiver because the arbitration was dismissed "without prejudice." Although the Leiths would have us ascribe to this phrase its usual meaning in litigation (under which a party may refile a complaint at their discretion), it is clear to us that the intent of dismissing the arbitration without prejudice was simply to permit the Leiths to pursue "the claim in a court of competent jurisdiction"—"consistent with FINRA Rule 12206(b)"—without the specter of a res judicata bar. In other words, the dismissal was "without prejudice" to the filing of a new action on the same allegations, but the parties intended the new action would be filed in a different forum. (See *Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 879 [a voluntary dismissal without prejudice means there has been no decision of the controversy on the merits]; *Chambreau v. Coughlan* (1968) 263 Cal.App.2d 712, 718 [same]; see also *Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 407 [doctrine of res judicata applies to arbitration proceedings].)

Nothing in the record suggests an intent to preserve for the Leiths a right to return to arbitration should they have second thoughts about their decision to dismiss. (See *Spirs Trading Co. v. Occidental Yarns, Inc.* (N.Y.App.Div. 1979) 73 A.D.2d 542, 543 [423 N.Y.S.2d 13, 15].) The stipulation explicitly states what the parties sought to avoid

with the agreement, i.e., the cost and expense associated with defendants' FINRA rule 12206 motion to dismiss—an objective that could only be met if the Leiths abandoned the arbitration proceeding and went to court. Further, defendants had to agree not to raise the arbitration agreement as a defense in court. This concession makes sense only if the Leiths intended to pursue their claims in court, rather than arbitration.

We conclude that the Leiths expressly waived their right to arbitration by initiating and then voluntarily dismissing their FINRA arbitration claim.

2. Prejudice and implied waiver

Even if the Leiths had not expressly waived their right to arbitrate, we conclude there is substantial evidence to support the trial court's finding of prejudice and implied waiver of the right to arbitrate.

There is no bright line rule establishing the nature and degree of prejudice necessary to support a finding of implied waiver. The Supreme Court has provided only broad guidance, stating that prejudice typically is found where the petitioning party has unreasonably delayed seeking arbitration or substantially impaired an opponent's ability to use the benefits and efficiencies of arbitration. (*St. Agnes, supra*, 31 Cal.4th at p. 1204.)

Prejudice also is found where the petitioning party has gained some advantage by resorting to the court system or where the delay in demanding arbitration has substantially impaired the other side's ability to participate in arbitration, e.g., where a party unduly delayed and waited until the eve of trial to demand arbitration. (*St. Agnes, supra*, 31 Cal.4th at p. 1204; see also *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 784 [prejudice caused by faded memories and lost evidence]; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1228-1229 [prejudice caused by obtaining information about opponent's legal strategies by means of the defendant's answer to the complaint]; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558 [prejudice caused by substantial expense of litigation, use of discovery to disclose trial

tactics, and loss of efficiencies otherwise available through arbitration]; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 212-213 (*Continental*) [prejudice caused by defendants using discovery process to gain information about plaintiff's case which defendants could not have gained in arbitration].)

Prejudice usually is not found merely because there was a short (reasonable) delay in the demand for arbitration, or the party opposing arbitration shows only that it incurred costs and expenses in responding to preliminary pleadings and motions.[12] (*St. Agnes, supra,* 31 Cal.4th at p. 1203; *Continental, supra,* 59 Cal.App.4th at p. 212; see also *Kalai v. Gray* (2003) 109 Cal.App.4th 768, 776.) However, courts may consider the length of any delay and the expense incurred as factors bearing on whether the opposing party has been prejudiced. (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 995 (*Sobremonte*); *Lewis v. Fletcher Jones Motor Cars, Inc*. (2012) 205 Cal.App.4th 436, 452; *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 377-378 [and cases cited therein]; see also *Oregel v. PacPizza, LLC* (2015) 237 Cal.App.4th 342, 360-361 [construing *Iskanian* as endorsing the line of cases that allow consideration of time and expense in determining prejudice where the delay was unreasonable or unjustified]; *Bower v. Inter-Con Security Systems, Inc*. (2014) 232 Cal.App.4th 1035, 1048 [same].)

A few courts have concluded that an unreasonable delay in seeking arbitration, in and of itself, may amount to prejudice if the delay is so lengthy that the opposing party is deprived of the benefits of arbitration. (See *Burton v. Cruise* (2010) 190 Cal.App.4th

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[12] The question presented usually is whether a defendant's participation in litigation caused prejudice to the plaintiff. Unsurprisingly, courts are reluctant to find prejudice under such circumstances since the defendant did not initiate the litigation and may have been ignorant of the arbitration provision. The question here, in contrast, is whether a defendant has been prejudiced by essentially *compelled* participation in litigation initiated by plaintiffs *in knowing disregard* of their arbitration rights.

939, 947 (*Burton*); *Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1216; *Sobremonte, supra*, 61 Cal.App.4th at pp. 995-996; see also *Platt Pacific, supra*, 6 Cal.4th at p. 315 [party may waive arbitration by failing to timely demand it]; *Allstate Ins. Co. v. Gonzalez* (1995) 38 Cal.App.4th 783, 793 [unreasonable delay in demanding arbitration amounts to a waiver]; *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1099 [same]; but see *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1275.)

In *Burton, supra*, 190 Cal.App.4th 939, the Fourth Appellate District, Division Three, ruled that an unreasonable delay in demanding arbitration may constitute a waiver of the right to arbitrate. (*Id.* at pp. 945, 947.) The court criticized cases holding that waiver does not occur by mere participation in litigation for failing "to recognize that a petitioning party's conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of the advantages of arbitration as an 'expedient, efficient and cost-effective method to resolve disputes.' " (*Id.* at p. 948.) The *Burton* court held that by delaying the arbitration request, the plaintiff circumvented "the expected benefits to be achieved from a speedy and relatively inexpensive arbitral forum" and deprived the opposing party of the benefit of his bargain, which is the "epitome of prejudice." (*Id.* at p. 949.)

In reaching its decision, the *Burton* court relied on the California Supreme Court's decision in *Wagner Construction Co. v. Pacific Mechanical Corp*. (2007) 41 Cal.4th 19 (*Wagner*). In *Wagner*, the Supreme Court reversed an order denying a petition to compel arbitration on the ground the statute of limitations had run on the underlying claims, concluding this was an issue for the arbitrator to decide. (*Id.* at pp. 23, 29.) The court noted in dictum that an action to compel arbitration is, in essence, a suit in equity to compel specific performance of a contract. (*Id.* at p. 29.) Therefore, it is subject to

waiver if a party fails to demand arbitration within a reasonable time. (*Id*. at p. 30.)[13] A party that does not demand arbitration within a reasonable time is considered to have waived the right to arbitration. (*Ibid*.)

In this case, the Leiths contend defendants have not been prejudiced, despite the lengthy delay in seeking a return to arbitration, because there was little litigation activity between the parties. The Leiths cite the absence of dispositive motions, depositions, expert witness designations, or any meaningful (substantive) discovery responses. Although we agree that there has not been much litigation activity, we conclude that substantial evidence supports the trial court's conclusion that defendants were prejudiced.

Whether defendants suffered prejudice is a question of fact, which we review for substantial evidence. (*St. Agnes, supra*, 31 Cal.4th at p. 1196; *Fry v. Board of Education* (1941) 17 Cal.2d 753, 761.) In applying the substantial evidence standard, we do not exercise our independent judgment on the effect or weight of the evidence; we simply determine whether the findings are supported by substantial evidence in light of the record. (*Grunwald-Marx, Inc. v. Los Angeles Joint Board, Amalgamated Clothing Workers* (1961) 192 Cal.App.2d 268, 283; *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100.) We view the evidence most favorably to the prevailing party, giving that party the benefit of every reasonable inference and resolving all conflicts in its favor. (*Oregel*, at p. 1100.)

Under the circumstances of this case, we find substantial evidence supports the trial court's finding that defendants were prejudiced. Without deciding whether

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13 What constitutes a reasonable time is a question of fact. (*Wagner, supra*, 41 Cal.4th at p. 30.) In *Wagner*, because the trial court did not undertake the necessary factual inquiry, the Supreme Court declined to reach the issue of whether the plaintiff waived its right to compel arbitration. (*Id*. at p. 31.) Nevertheless, the Supreme Court's discussion of what is required to waive a right to compel arbitration carries persuasive weight. (*Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 297.)

unreasonable delay alone would be enough to establish prejudice, we conclude that prejudice can be inferred in this case based on the combination of defendant's change of position due to the voluntary abandonment of the prior arbitration claim (including *defendant's* waiver of the right to demand arbitration), the unreasonable delay in demanding a return to arbitration (after abandonment of the prior arbitration), the time and expense incurred by defendants in mediating the case and then preparing the matter for trial, and the timing of the petition—after a failed mediation, in the midst of discovery, and close to the scheduled trial date.

Since at least September 2016, the Leiths have been aware both of the existence of the arbitration provision and its applicability to the underlying dispute. During that time, they filed and dismissed an arbitration claim,[14] waited eight months, filed this lawsuit, and then waited another 11 months before renewing their request for arbitration after defendants answered the complaint, participated in mediation, propounded discovery, and filed a motion to compel. By the time the Leiths petitioned to return to arbitration, trial was only about four months away.

We agree with defendants, and the trial court, that to allow the Leiths to compel arbitration under these circumstances would substantially undermine and impair the public policy of arbitration as a speedy and relatively inexpensive means of dispute resolution. (*Burton, supra*, 190 Cal.App.4th at p. 948; *St. Agnes*, *supra*, 31 Cal.4th at p. 1204.) Thus, we hold that there is substantial evidence in the record to support a finding of prejudice.

B. *Consideration of the FINRA rule 12206 motion*

As part of the trial court's rationale in finding that defendants would be prejudiced by a return to arbitration, the court considered the likelihood that a renewed FINRA rule

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[14] Before the stipulated dismissal, defendants also answered the Leith's arbitration claim and researched a possible FINRA rule 12206 motion to dismiss.

12206 motion would be granted, resulting in the matter being returned to the court after an additional delay. The Leiths contend that the trial court erred in considering how the arbitration panel might rule on such a motion.

We find it unnecessary to decide this question because, even if the trial court erred in considering the likelihood that a renewed FINRA rule 12206 motion might be granted, there is substantial evidence in the record to support the court's finding of prejudice. It is not reasonably probable that a result more favorable to the Leiths would have been reached in the absence of consideration of a renewed FINRA rule 12206 motion. Thus, any error was harmless. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-801.)

DISPOSITION

We affirm the order denying the petition to compel arbitration. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

KRAUSE, J.

We concur:

DUARTE, Acting P. J.

RENNER, J.