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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NORMAN KAREL, Plaintiff and Appellant, v. DANIEL DICARLO et al., Defendants and Respondents.	D068443 (Super. Ct. No. 37-2015-00011180-CU-PT-NC)

APPEAL from an order of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Affirmed.

Parcells Law Firm and Dayton B. Parcells III for Plaintiff and Appellant.

Kovalsky & Associates and Robert M. Kovalsky for Defendants and Respondents.

Norman Karel appeals from an order denying his petition to compel Daniel Dicarlo and AFM Fine Restaurants Corporation, Inc., a California corporation (AFM), to arbitrate his claims under a written "Agreement Among Shareholders" (Agreement). The trial court denied Karel's petition on the basis that he waived his right to arbitrate his

disputes with Dicarlo and AFM (together Respondents) under the terms of the Agreement. Because substantial evidence supports the trial court's finding of waiver, we will affirm the order.

I.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *The Arbitration Agreement*

In January 2013, pursuant to the terms of the Agreement, Dicarlo, Karel and Joseph Alfano became shareholders of AFM, which purchased the Tuscany restaurant (Tuscany) in Carlsbad. In exchange for $300,000 and equity other than cash, Dicarlo received 82,000 shares of AFM stock; in exchange for $50,000, Karel received 5,000 shares of AFM stock; and in exchange for equity other than cash, Alfano received 10,000 shares of AFM stock.

At issue in this appeal is whether Karel waived the enforceability of article XII of the Agreement, entitled "Alternative Dispute Resolution." Section 12.1 is entitled "Negotiation" and sets forth a required procedure by which the parties must attempt to informally resolve any dispute before instituting legal action, including a written notice of the party's position with a disclosure of supporting documentation.[2] Section 12.2 is

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1 We recite the facts in a light most favorable to the trial court's order denying arbitration. (*Jones v. Adams Financial Services* (1999) 71 Cal.App.4th 831, 833.)

2 Section 12.1 provides in full: "NEGOTIATION. The Parties hereby agree that they shall, *before filing suit, proceeding with any formal legal action or instituting any formal legal action, attempt* to informally resolve any and all disputes, claims, or controversies arising out of or relating to this Agreement via negotiation procedures

entitled "Arbitration" and, in the event the negotiation process in section 12.1 is unsuccessful, sets forth a detailed mandatory process for binding arbitration under the expedited procedures of the JAMS Comprehensive Arbitration Rules and Procedures.[3]

('Negotiation'). Claims covered by this dispute resolution agreement include, but are not limited to the following: (a) alleged violations of federal, state, or local constitutions, statutes, regulations, or ordinances, including, but not limited to, Federal and California securities laws and the California Corporation's code; (b) allegations of a breach of a contractual obligation; (c) breach of fiduciary duty and duty of good faith and fair dealing; (d) intentional interference with existing and prospective contracts; and (e) alleged violations of public policy. To facilitate Negotiation, the party with a claim is required to send written notice of the alleged dispute to the other party (the 'Dispute Notice'). Within thirty (30) days after delivery of the Dispute Notice, the receiving party shall submit to the other a written response ('Response'). The notice and response shall include with reasonable particularity a statement of each party's position, a summary of arguments supporting that position, and any supporting documentation. Within fifteen (15) days after delivery of the Response, the parties shall meet at a mutually acceptable time and place and negotiate a resolution in good faith."

[3] Section 12.2 provides in full: "ARBITRATION. With the exception of any Excluded Matters as defined below, the Parties agree that any dispute or claim in law or equity arising between them which is/are not settled through Negotiation for whatever reason shall be decided by neutral, *binding* arbitration. The formal arbitration shall be conducted in accordance with the expedited procedures set forth in the JAMS Comprehensive Arbitration Rules and Procedures as those Rules exist as of the date of the undersigned's signature, including Rules 16.1 and 16.2 of those Rules. The arbitrator shall be selected pursuant to the procedure set forth below and shall render an award in accordance with California Law, without reference to conflict of law principles. Arbitration shall take place in San Diego, California. Judgment upon the award of the arbitrator(s) may be entered in any court having jurisdiction. If the arbitrator(s) determine a party to be the prevailing party under circumstances where the prevailing party won on some but not all of the claims and counterclaims, the arbitrator(s) may award the prevailing party an appropriate reasonable percentage of the costs and attorney fees reasonably incurred by the prevailing party in connection with that proceeding. This provision is separate and several and shall survive the consummation of the transactions contemplated by this Agreement. If arbitration is necessary, the parties shall each submit, one to the other, sent by U.S. Mail, a list of five (5) persons that each party proposes to serve as the arbitrator. If within ten (10) days following receipt of the above lists by each of the parties, they are unable to agree on an arbitrator, the parties, or either of them, may

Section 12.3 deals with claims excluded from the otherwise mandatory alternative dispute resolution procedures.[4] Finally, section 12.4 expressly discloses that final and binding arbitration is the exclusive means for resolving claims under the Agreement, that the right to a civil court action is waived and that consultation with counsel prior to signing the Agreement is advised and encouraged.[5]

B. *Karel's Superior Court Civil Action Against Respondents; July 2014 - March 2015*

During 2013, the shareholders got along well. By May of 2014, however, Dicarlo had removed Alfaro from the day-to-day management of the restaurant, after which Karel became "belligerent and threatening" and stopped supporting the restaurant. In early July

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petition the Superior Court of the State of California to select an arbitrator pursuant to the provisions of the California Code of Civil Procedure."

[4] Neither Karel nor Respondents contend the claims at issue here are excluded from section 12.3, which provides in full: "EXCLUDED MATTER. As used herein, 'Excluded Matter' means any: (1) claims related to workers' compensation or unemployment insurance; (2) administrative claims filed with government agencies such as the Equal Employment Opportunity Commission, Labor Commissioner, Department of Fair Employment and Housing, or the National Labor Relations Board; (3) claims expressly excluded by statutory law; (4) claims for injunctive relief; and (5) claims falling within the small claims jurisdiction."

[5] Section 12.4 provides in full: "RIGHT TO SEEK LEGAL COUNSEL AND WAIVER OF JURY. The Shareholders agree that final and binding arbitration is the exclusive means for resolving the claims outlined in this Agreement. However, this Agreement does not in any way alter the at-will status of any Shareholder's employment, if any. This Agreement is a waiver of all rights a Shareholder may have to a civil court action on any dispute outlined by this Agreement. Accordingly, only an arbitrator, not a judge or jury, will decide the dispute, although the arbitrator has the authority to award any type of relief that could otherwise be awarded by a judge or jury. Each Shareholder is advised and encouraged to first review this provision with an attorney at law of his or her choosing before executing this Agreement."

2014, Karel sued Respondents for breach of oral contract, breach of fiduciary duty, elder abuse, fraud, breach of written contract and an accounting in San Diego Superior Court case No. 37-2014-00021925-CU-FR-NC (*Karel* Action).[6]

After receipt of service of process of the *Karel* Action and the retention of defense counsel,[7] but prior to answering the complaint, in late July 2014 Respondents notified Karel in writing of their belief that the filing of the *Karel* Action was in violation of article XII, quoting at length from the various sections describing and requiring the alternative dispute resolution procedures set forth *ante*. For purposes of section 12.1's

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6 Respondents ask that we take judicial notice of "records filed and taken into consideration by the trial court" in this action from the court's files in the *Karel* Action, and in their appendix Respondents provide copies of 23 documents from the *Karel* Action. We grant in part and deny in part Respondents' motion for judicial notice.

As a general rule, we do not take judicial notice of documents that were not presented to the trial court in the first instance, principally because an appeal reviews the correctness of an appealable order as of the time the trial court ruled based on the record that was before the court for its consideration. (*Vons Companies v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; *In re Zeth S.* (2003) 31 Cal.4th 396, 405.) Thus, we deny the motion for judicial notice of all documents that were not considered by the trial court. (*Ibid.*) We accordingly disregard all statements in the Respondents' brief for which any of these documents is cited as the sole record reference. (See Cal. Rules of Court, rule 8.204(a)(1)(C).)

Here, in ruling on Karel's petition to compel arbitration, the trial court referred to — and, by inference, took judicial notice of — only two documents from the *Karel* Action that are not part of the record on appeal: (1) Respondents' motion for attorney fees; and (2) Karel's opposition to Respondents' motion for summary judgment. We grant Respondents' motion for judicial notice as to Respondents' motion for summary judgment in the *Karel* Action. (Evid. Code, § 459, subd. (a).) We deny Respondent's motion for judicial notice as to the attorney fee motion in the *Karel* Action, because Respondents have not provided us with a copy of the motion. (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 743.)

7 Unless context indicates otherwise, in this part I. of the opinion, further references to actions by the parties are to actions by counsel for the parties.

requirement to negotiate, Respondents offered to consider the complaint in the *Karel* Action as the requisite "written notice of the alleged dispute" on the condition that Karel voluntarily dismiss the *Karel* Action and engage in meaningful settlement negotiations. Respondents advised Karel that if they were required to respond to the complaint, they would file a motion for summary judgment based on *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087 (*Johnson*), which (according to Respondents' letter) affirmed a summary judgment in favor of the defendants against a plaintiff who had filed suit without initiating arbitration as required by the parties' written agreement.

Karel refused to dismiss the *Karel* Action, and after appearing in the action Respondents promptly requested the earliest possible hearing date for their summary judgment motion (which the court could not accommodate until Jan. 23, 2015).

Karel also refused to engage in the negotiations required under section 12.1 of the Agreement. Instead, about 10 days later (in early August 2014), Karel personally served a notice that Dicarlo appear for his deposition and produce 31 categories of documents, including personal income tax returns and personal financial information unrelated to AFM or Tuscany. Respondents objected on the basis Karel was proceeding in violation of article XII of the Agreement. Karel replied with a letter, explaining that Respondents' objections were improper; that the Agreement "was the subject of fraud and non[]disclosure"; "*that* [*Karel*] *waived arbitration*" *under the Agreement*; that the deposition would go forward as noticed; and that if Dicarlo not appear at the deposition, then Respondents would file a motion to compel Dicarlo's compliance with the discovery demands. (Italics added.)

Two days later, Respondents spoke with Karel and offered to produce informally financial and corporate documents, suggesting that that the parties " 'put down our swords' " and discuss settlement. In early September 2014, Respondents delivered to Karel a written settlement offer, including a proposed settlement agreement, by which Karel would receive a full return of his investment ($50,000) and a discount (30 percent) at Tuscany for future food and beverage in exchange for a surrender of his AFM stock. After another three days, Karel wrote to Respondents and rejected the offer, stating he was ready to go to trial; in addition, he explained that he needed the outstanding discovery so that he could determine share value and settlement value and to prepare an opposition to Respondents' (anticipated) summary judgment motion.

In late September 2014, Karel again wrote to Respondents, repeating his rejection of the settlement offer and again demanding that Dicarlo appear for his deposition and provide the requested 31 categories of documents. Four days later, Respondents replied by providing copies of AFM's most recent tax returns, by reaffirming their contention that Dicarlo's actions in prosecuting the *Karel* Action were in violation of article XII of the Agreement, and by describing the risk Karel would take if he followed through with his threat of filing a motion to compel discovery. In this latter regard, Respondents acknowledged that "the mere erroneous filing of a civil complaint is not a waiver of contractual arbitration," but explained that that if Karel insisted on discovery and going forward with the threatened discovery motion, Respondents would assert in any proceedings after the summary judgment hearing that Karel had waived the right to arbitrate under the Agreement.

The next day, Respondents received notice that Karel had commenced third-party discovery by subpoenaing bank records.

At some point in time prior to mid-October 2014, Respondents filed their motion for summary judgment to be heard on January 23, 2015. Consistent with their earlier admonition to Karel, Respondents relied principally on *Johnson*, *supra*, 84 Cal.App.4th 1087, arguing that they were entitled to judgment as a matter of law, because the claims in the complaint were subject to the alternative dispute resolution procedures required under article XII of the Agreement.

In mid-October 2014, in response to Karel's earlier request, Respondents provided Karel with a detailed history of financial transactions, prepared by AFM's certified public accountant, showing that Dicarlo (personally) had repaid fully with interest all noncompensation advances from AFM to Dicarlo.

In late December 2014, Karel served Respondents with his previously threatened motion to compel Dicarlo's deposition and production of documents. The hearing on the motion was noticed for mid-January 2015, one week prior to the hearing on Respondents' motion for summary judgment. In support of his motion to compel, Karel summarized Respondents' objection to the requested discovery as follows: Under article XII of the Agreement, Karel agreed to a mandatory alternative dispute resolution procedure, including an express waiver of the right to file a lawsuit like the *Karel* Action. Karel described his response to Respondents' objection in part as follows: The alternative dispute resolution procedure contained in article XII of the Agreement did not apply to the claims in the *Karel* Action, because "[*Karel*] *has waived his right to compel*

arbitration." (Italics added.) As evidence of this latter statement, Karel submitted a declaration in which his attorney testified that, in late August 2014 in response to Respondents' objection to the discovery, "[*Karel*] *waived arbitration*." (Italics added.) On January 20, 2015, the court granted Karel's motion to compel discovery.[8]

Respondents' summary judgment documents are not in the record on appeal, but we have taken judicial notice of Karel's opposition (see fn. 6), and the trial court's minute order granting the motion is in the record. In his opposition, Karel presented a number of procedural and substantive arguments.

On January 23, 2015, the court ruled as a matter of law that, because article XII of the Agreement contains an enforceable arbitration clause requiring the parties to submit each of the causes of action in the *Karel* Action to binding arbitration, Karel was barred from pursuing the *Karel* Action. Respondents tell us that judgment was entered and no appeal was taken, and Karel does not suggest otherwise.

On March 26, 2015, Karel filed — and the trial court denied — an ex parte application to reinstate his complaint.

C. *Karel's Postjudgment Attempts to Arbitrate; January 2015 - May 2015*

After the grant of summary judgment in the *Karel* Action, in late January 2015 Karel sent Respondents a "Notice of Dispute" in an apparent attempt to initiate the settlement negotiation phase of the alternative dispute resolution procedure in

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8 On that same day, Karel (not counsel) showed Dicarlo (not counsel) a $340,000 check and told Dicarlo that he (Karel) had more and would spend whatever was necessary to defeat him (Dicarlo).

section 12.1 of the Agreement. In late February 2015, Respondents replied by writing that the notice was insufficient under the terms of section 12.1.

Two days later, on February 27, 2015, Karel filed a demand for arbitration with JAMS.

In mid-March 2015, Respondents submitted to JAMS a preliminary response to Karel's demand, arguing that the demand was premature since Karel had not provided a proper notice of dispute or participated in the related settlement negotiations required under section 12.1 of the Agreement. Notably, Respondents offered to participate in proceedings at JAMS so long as the appointed neutral first attempted a mediation (which Respondents would deem compliance with section 12.1 of the Agreement) before proceeding to a binding arbitration.

In late March 2015 — one day after the trial court denied Karel's ex parte application to reinstate his complaint in the *Karel* Action (see pt. I.B., *ante*) — Karel replied to Respondents' preliminary response to JAMS by informing Respondents and JAMS that he (Karel) "will not agree to mediate."

Less than a week later, on April 3, 2015, Karel filed the underlying verified petition to compel arbitration. In his petition, Karel set forth many of the above-described facts, attaching his complaint in the *Karel* Action. He alleged specifically that "Dicarlo has admitted he owes $50,000 to [Karel]" and sought punitive damages, interest and attorney fees, in addition to $50,000 in compensatory damages.

In answer to the petition, Respondents filed a response, a memorandum of points and authorities and two declarations. Respondents denied liability and asserted

principally that, because of Karel's efforts to avoid complying with the alternative dispute resolution procedures under article XII of the Agreement — in particular, by prosecuting the *Karel* Action — Karel waived any right he may have had to arbitrate the claims alleged in the petition.

In reply, Karel presented procedural objections to what Respondents had filed. Notably, Karel did not respond (or otherwise object) to Respondents' argument and evidence that he had waived his right to arbitrate.

Finally, Respondents replied to Karel's procedural objections, and Karel submitted two more declarations, neither of which related to any argument raised by Respondents in opposition to Karel's petition.

On April 29, 2015, the court issued a tentative decision denying Karel's petition. Following oral argument on May 1, 2015, the court confirmed its tentative ruling and filed a detailed order denying Karel's petition, finding that Karel had expressly and impliedly waived his right to arbitrate the disputes alleged in his petition. More specifically, with regard to waiver, the court found: Karel had taken steps inconsistent with an intent to invoke arbitration; Karel had unreasonably delayed in seeking arbitration; and Respondents had been prejudiced by Karel's delay.

Karel timely appealed from the order denying his petition to compel arbitration. (Code Civ. Proc., § 1294, subd. (a).)

Following briefing in this appeal, AFM filed bankruptcy. During the pendency of AFM's bankruptcy case, we stayed the appeal. We lifted the stay after receiving a copy of a bankruptcy court order dismissing AFM's bankruptcy case.

II.

DISCUSSION

Contending that the evidence does not support the finding of waiver, Karel argues on appeal that the trial court erred in denying his petition to compel arbitration. We disagree.

A. *Law*

Where, as here, a party to an arbitration agreement alleges a controversy and the existence of a written agreement to arbitrate the controversy and another party to the agreement refuses to arbitrate such controversy, if the trial court determines that such an agreement exists, the court "*shall order*" the parties to arbitrate the controversy unless the court determines that the petition waived the right to compel arbitration. (Code Civ. Proc., § 1281.2, subd. (a), italics added.)[9] Thus, despite the "strong policy favoring arbitration agreements" that "requires close judicial scrutiny of waiver claims" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*)), "a party to an arbitration agreement may by its conduct 'waive' its right to compel arbitration" (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425).

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9 "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner[.]" (Code Civ. Proc., § 1281.2, subd. (a).)

Unlike traditional waiver, waiver of the right to arbitrate "refers not to a voluntary relinquishment of a known right, but to the loss of a right based on a failure to perform an obligation." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 314; see *St. Agnes, supra,* 31 Cal.4th at p. 1195, fn. 4 [" ' "waiver" has also been used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost' "].) Accordingly, waiver of the right to arbitrate may be found "regardless of the party's intent to relinquish the right." (*St. Agnes*, at p. 1195, fn. 4.)

While "no single test delineates the nature of the conduct of a party that will constitute such a waiver," our Supreme Court has found a waiver of the right to demand arbitration in a variety of contexts, "ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure," including specifically the consideration of the " 'bad faith' or 'wilful misconduct' of a party." (*Davis v. Blue Cross of Northern California*, *supra*, 25 Cal.3d at pp. 425-426; accord, *St. Agnes*, *supra*, 31 Cal.4th at p. 1196; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 983 (*Engalla*); *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 782 (*Christensen*); *Johnson*, *supra*, 84 Cal.App.4th at pp. 1099-1100; *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1249-1250 (*Martinez*); *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211-212.)

Within these contexts, the *St. Agnes* court identified the following six factors — no one of which is controlling (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 944-945

[four, not all six, factors applicable]) — to be "relevant and properly considered in assessing waiver claims":

> " ' "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party." ' "

(*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.)

Waiver does not occur by " ' "mere participation in litigation" ' "; there must also be prejudice to infer a waiver. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1203.) In this regard, prejudice is not established merely by showing that the responding party has incurred costs or legal expenses associated with litigation. (*Ibid*.) Rather, "[p]rejudice typically is found where the petitioning party's conduct has substantially undermined [the] important public policy [in favor of arbitration] or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*Id.* at p. 1204.)

Generally, "the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196; accord, *Engalla*, *supra*, 15 Cal.4th at p. 983; *Christensen*, *supra*, 33 Cal.3d at p. 781; *Davis v. Blue Cross of Northern California*, *supra*, 25 Cal.3d at p. 426.) On appeal, the appellant has the burden to show that there is

no substantial evidence to support the trial court's finding of waiver. (*Zolezzi v. PacifiCare of California* (2003) 105 Cal.App.4th 573, 589.)

B. *Analysis*

1. *The Waiver Finding Will Be Reviewed for Substantial Evidence*

In his reply brief, Karel contends that, because the essential facts are undisputed, the issue is one of law that is reviewed de novo. (See *St. Agnes, supra*, 31 Cal.4th at p. 1206 ["When the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling."].) While we normally do not consider an argument raised for the first time in a reply brief (*Thompson v. Toll Dublin, LLC* (2008) 165 Cal.App.4th 1360, 1373, fn. 5 [affirmance of order denying motion to compel arbitration]) — and here Karel does not mention the standard of review in his opening brief — we will do so here, because of the importance of applying the correct standard of review. Since determination of the standard of review is a legal ruling we must make in the first instance in order to consider the issues raised in an appeal, Respondents are not prejudiced by the inability to reply to Karel's tardy assertion.

Karel's premise (that essential facts are undisputed) for his conclusion (that the issue is one of law) is inaccurate, because some of the underlying essential facts were most definitely in dispute.[10] Moreover, we may not apply a de novo standard of review

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10 For example, Respondents rely on at least three pleadings that Karel filed in the *Karel* Action (only two of which are properly before us) in which Karel unequivocally took the position that *he* affirmatively waived the arbitration provision in the Agreement.

to the finding of waiver, since more than one reasonable inference may be drawn even from the admittedly undisputed facts.[11] (*St. Agnes, supra*, 31 Cal.4th at p. 1206; *Davis v. Continental Airlines, Inc.*, *supra*, 59 Cal.App.4th at p. 211.)

Accordingly, we will review the record on appeal to determine whether it contains substantial evidence in support of the trial court's finding that Karel waived the right to arbitrate his dispute with Respondents under section 12.2 of the Agreement. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443 (*Lewis*) [waiver of contractual arbitration provision]; see generally *Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 60 [where order denying motion to compel arbitration based on a factual finding, substantial evidence standard of review applied]; *Engalla*, *supra*, 15 Cal.4th at p. 984.)

"We infer all necessary findings supported by substantial evidence . . . and 'construe any reasonable inference in the manner most favorable to the [order finding

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At the hearing on his petition in this action, Karel took the position that *each* of these written statements was "a typographical error." In response, Dicarlo argued that, given the history of the litigation and the context of these statements in the pleadings, there were no typographical errors. By finding that Karel *expressly* waived the arbitration provision, the trial court in the *Karel* Action necessarily decided this factual dispute against Karel.

11 For example, there is no dispute that, in the *Karel* Action, Karel insisted on taking Dicarlo's deposition and obtaining copies of Dicarlo's documents. One inference is that Karel wanted to be fully informed during the negotiation process required under section 12.1 (from which the trial court could infer an intent to comply with article XII), whereas another inference is that Karel wanted to obtain a litigation advantage by finding out Dicarlo's position on various issues (from which the trial court could infer an intent to waive article XII).

waiver], resolving all ambiguities to support an affirmance.' " (*Lewis, supra,* 205 Cal.App.4th at p. 443, citations omitted.) The test is not whether there is substantial evidence that would support a finding contrary to that on appeal; we determine only whether the record contains substantial evidence in support of the finding actually made.[12] (*Pope v. Babcock* (2014) 229 Cal.App.4th 1238, 1245.) Testimony of a single witness, including that of a party, may be sufficient (Evid. Code, § 411; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614), whereas even uncontradicted evidence in favor of an appellant may not establish the fact for which the evidence was submitted (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890 (*Foreman*)). We may reverse the trial court's finding of waiver *only* "in cases where the record before the trial court establishes a lack of waiver *as a matter of law*." (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 185, italics added (*Doers*); *Christensen, supra,* 33 Cal.3d at pp. 781-782; *Lewis,* at p. 443.)

2. *Substantial Evidence Supports the Trial Court's Finding of Waiver*

The trial court here ruled that Karel both expressly and impliedly waived his right to arbitrate the claims raised in the *Karel* Action. Substantial evidence supports each of these rulings.

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12 The rhetoric in Karel's reply brief regarding "Respondents' references to their self-serving, hearsay, multiple hearsay, and otherwise inadmissible statements and documents" is not helpful. Having failed to object in the trial court, Karel forfeited any challenge on appeal to the admissibility of this evidence. (Evid. Code, § 353, subd. (a); *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 749.)

a. *Express Waiver*

In the *Karel* Action, Karel moved for an order compelling Dicarlo to appear for his deposition and to produce 31 categories of documents. Respondents had objected to Karel's requested discovery on the related bases that, under article XII of the Agreement, (1) Karel had waived his right to file a lawsuit like the *Karel* Action, and (2) all of the claims in the *Karel* Action were subject to the alternative dispute resolution procedures. In response to these objections — i.e., in support of his motion to compel — Karel argued to the trial court that the arbitration provision was unenforceable because he (Karel) previously had waived his right to compel arbitration of the claims in the *Karel* Action. As evidence, Karel submitted a declaration in which his attorney testified that when Respondents first objected to the requested discovery on the basis of the arbitration provision more than three months earlier, Karel responded in writing by expressly waiving arbitration.

In their response to Karel's petition to compel arbitration — i.e., in support of their argument that Karel had waived his right to arbitrate under the Agreement — Respondents submitted evidence of all of the above-described facts related to Karel's motion to compel discovery in the *Karel* Action.

Accordingly, based on the position Karel took in the *Karel* Action, substantial evidence supports the trial court's finding that Karel *expressly* waived the right to compel arbitration of the claims at issue.

b. *Implied Waiver*

As summarized in *Davis v. Continental Airlines, Inc.*, *supra*, 59 Cal.App.4th 205, a waiver may be found "where the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct." (*Id.* at pp. 211-212; see also, *St. Agnes*, *supra*, 31 Cal.4th at p. 1196; *Engalla*, *supra*, 15 Cal.4th at p. 983; *Christensen*, *supra*, 33 Cal.3d at p. 782; *Davis v. Blue Cross of Northern California*, *supra*, 25 Cal.3d at pp. 425-426; *Johnson*, *supra*, 84 Cal.App.4th at pp. 1099-1100; *Martinez, supra*, 83 Cal.App.4th at pp. 1249-1250.) These three standards are in the disjunctive; i.e., upon a sufficient showing, *any one* will support a finding of waiver. Finally, mere prosecution of the earlier litigation is not sufficient to find a waiver; there must also be evidence that the delay caused the responding party "some prejudice." (*Davis v. Continental Airlines, Inc.*, *supra*, at p. 212; see also *St. Agnes*, at p. 1203; *Johnson*, at p. 1100; *Christensen*, at p. 782; *Martinez*, at p. 1250.)

As we explain, substantial evidence supports each of the four findings necessary to establish that Karel *impliedly* waived the right to compel arbitration of the claims at issue.

i. *Steps Inconsistent with an Intent to Arbitrate*

We first consider whether the record contains substantial evidence that Karel took "steps inconsistent with an intent to invoke arbitration." (*Davis v. Continental Airlines, Inc.*, *supra*, 59 Cal.App.4th at p. 211.)

Before answering the complaint in the *Karel* Action, Respondents advised Karel that the filing of the *Karel* Action was in violation of the alternative dispute resolution

requirements under article XII of the Agreement and that if required to answer the complaint Respondents would file a motion for summary judgment based on Karel's failure to exhaust his arbitration remedies under *Johnson*, *supra*, 84 Cal.App.4th 1087. Karel refused either to engage in meaningful settlement negotiations (as required under § 12.1 of the Agreement) or to dismiss the *Karel* Action. Instead, Karel responded with discovery demands — i.e., noticing Dicarlo's deposition and his production of 31 categories of documents.

In response to Respondents' objections to the discovery request (based on Karel proceeding in violation of art. XII of the Agreement), Karel replied with a letter stating in part that he waived arbitration under the Agreement.

After Respondents informally produced documents and Karel rejected a settlement offer, Karel insisted that Dicarlo comply with the outstanding discovery demands.

Respondents produced additional documents, again describing to Karel the risk he was taking if he insisted on proceeding with further discovery and affirmatively stating that if he did so proceed they would argue in any subsequent proceedings that he had waived his right to arbitrate. Karel responded by subpoenaing third-party bank records.

Approximately six weeks after being served with Respondents' motion for summary judgment in the *Karel* Action and one month before the hearing on Respondents' motion, Karel filed a motion to compel Dicarlo's deposition and production of documents. In support of the motion, Karel submitted argument and evidence that he had waived arbitration under the Agreement. On January 20, 2015, Karel received a

favorable ruling on his motion, and Dicarlo was ordered to answer questions at a deposition and to produce documents.

In late March 2015 —after Karel's demand for arbitration through JAMS — Karel filed an ex parte application to reinstate his complaint in the *Karel* Action, which had been decided adversely to him on summary judgment.

Following the denial of Karel's ex parte application, Karel advised Respondents (and JAMS) that he would not agree to mediation prior to arbitration — a procedure Respondents had offered to accept in lieu of the required negotiations under section 12.1, which Karel had ignored.

On appeal, Karel relies on and correctly cites and quotes from *Doers, supra,* 23 Cal.3d 180, which holds that "the mere filing of a lawsuit does not constitute a waiver of the right to arbitrate." (*Id.* at p. 183; see also *Kalai v. Gray* (2003) 109 Cal.App.4th 768, 776 (*Kalai*) [petitioner "did not waive his right to arbitrate merely by filing his claim in court"].) As the above-described chronology establishes, however, *unlike the petitioners in* Doers *and* Kalai, Karel did more than merely file the *Karel* Action; he actively prosecuted it, rejecting any request or opportunity to comply with the alternative dispute resolution procedure required under the Agreement. Indeed, in opposition to Respondents' motion for summary judgment, Karel argued that, if he was "[f]orc[ed] . . . to start arbitration," *he* "would be prejudic[ed]"; the delay "would thwart the legislative intent . . . to save the parties money and time," and "[i]t would effectively be a denial of justice."

The foregoing evidence substantially supports a finding that Karel had previously taken steps inconsistent with an intent to arbitrate.

ii. *Unreasonable Delay in Seeking Arbitration*

Next we consider whether Karel "unreasonably delayed in seeking arbitration." (*Davis v. Continental Airlines, Inc.*, *supra*, 59 Cal.App.4th at p. 211.)

Karel filed the *Karel* Action in July 2014 and the underlying petition to compel arbitration in April 2015 — a delay of nine months.[13] Properly citing *Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, Karel acknowledges that, where an arbitration agreement does not specify the time within which to demand arbitration, a "reasonable" time is allowed; and the determination of what is reasonable is a question of fact for the trial court based on the circumstances of the case. (*Id.* at p. 836; accord, *Doers*, *supra*, 23 Cal.3d at p. 185.)

Notably, however, Karel does not contend on appeal that the record lacks evidence to support a finding that the nine-month delay was unreasonable. Instead, Karel argues only that *Respondents* were responsible for the delay, because *they* chose to file a motion for summary judgment in the *Karel* Action rather than a motion (or petition) to stay the action and compel arbitration. Karel's argument assumes that had Respondents sought to

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13 Karel tells us the delay was *six* months, presumably from July 2014 (the filing of the *Karel* Action) until January 2015 (the grant of summary judgment in the *Karel* Action), suggesting that this was a finding of the trial court. To the contrary, the court here expressly found, "There was thus a *nine-month delay* in seeking arbitration" (italics added); and the record supports this finding, since Karel did not file his petition to compel arbitration until April 2015, *nine months after* he filed the *Karel* Action in July 2014.

stay the *Karel* Action and compel arbitration (rather than seeking summary judgment), the court would have both heard the motion sooner and granted the request. Putting aside the lack of evidence of *either* assumption, we cannot accept Karel's suggestion that, by bringing a motion for summary judgment, Respondents are at (or share in the) blame in any regard.

California law authorizes a motion for summary judgment in response to a civil complaint containing claims subject to an arbitration provision,[14] and Respondents put Karel on notice that they would rely on this procedure in the event Karel chose to proceed with his civil suit. Karel does not argue, and the record does not suggest, that Respondents delayed in the filing or hearing of their summary judgment motion.[15] Given the litigation decisions Karel made in light of his knowledge of the alternative

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[14] Where a plaintiff files a civil action that contains claims subject to an arbitration agreement, "defendant could elect to submit the matter to the jurisdiction of the court"; "defendant may also elect to demur or *move for summary judgment* on the ground that the plaintiff has failed to exhaust arbitration remedies"; or "defendant may also elect to move for a stay of proceedings pending arbitration if defendant also moves to compel arbitration." (*Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888, 899, italics added; accord, *Kalai*, *supra*, 109 Cal.App.4th at p. 773 ["The distinct options, for the defendant who does not choose to voluntarily submit the matter to the jurisdiction of the court, [are] to demur or *move for summary judgment* on the ground that the plaintiff has failed to exhaust arbitration remedies, or to seek a stay and compel arbitration." (Italics added.)].) This 45-year-old statement of the law from our Supreme Court is quoted in *Johnson*, *supra*, 84 Cal.App.4th at page 1097 — the case Respondents cited to Karel when they initially contacted him in July 2014 after they were served with the complaint in the *Karel* Action.

[15] Code of Civil Procedure section 437c does not allow for the filing of the motion until more than 60 days after the filing of the action and requires at least 75 days' notice of the hearing. (*Id.*, subd. (a)(1) & (2).)

dispute resolution procedure in the Agreement, Karel cannot criticize *Respondents* for not seeking what *he* now contends is a more "expeditious and cost[-]effective" procedure. Indeed, if Karel's concerns had truly included delay or expense, in response to Respondents' motion for summary judgment Karel could have either stipulated to the summary judgment or suggested that the parties stay the *Karel* Action to arbitrate the dispute or petitioned to compel arbitration.

Even after the adverse summary judgment ruling, Karel further delayed in seeking arbitration by (1) filing an ex parte application to reinstate his complaint in the *Karel* Action, and (2) demanding arbitration through JAMS without first participating in the related settlement negotiation procedure required in section 12.1 of the Agreement.

For these reasons, the record contains substantial evidence that Karel unreasonably delayed in seeking arbitration.

iii. *Karel's Bad Faith or Willful Misconduct*

The next consideration is whether the record contains substantial evidence that Karel "acted in bad faith or with willful misconduct." (*Davis v. Continental Airlines, Inc.*, *supra*, 59 Cal.App.4th at pp. 211-212.) Because Karel does not argue on appeal that the record lacks substantial evidence of his bad faith or willful misconduct, we deem him to have forfeited the issue. (*William Jefferson & Co., Inc. v. Orange County Assessment Appeals Bd. No. 2* (2014) 228 Cal.App.4th 1, 15.)

In any event, the record contains substantial evidence to support findings of *both* bad faith *and* willful misconduct on Karel's part. With full knowledge of the requirements of article XII of the Agreement and the risks associated with proceeding

with the *Karel* Action, Karel nonetheless did whatever he could to avoid complying with his alternative dispute resolution obligations.[16] "Such procedural gamesmanship provides ample support for the [inference] that [Karel] filed [the Karel A]ction in bad faith, and by doing so waived [his] right to arbitrate. 'The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration.' " (*Christensen, supra*, 33 Cal.3d at p. 784.)

iv. *Prejudice*

We finally consider whether the record contains substantial evidence that Respondents were prejudiced by the delay that resulted from Karel's actions. (*Davis v. Continental Airlines, Inc.*, *supra*, 59 Cal.App.4th at p. 211.)

Prejudice typically is found where the petitioner's conduct has "substantially undermined" the important public policy in favor of arbitration or has "substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*St. Agnes*, *supra*, 31 Cal.4th at 1204.) The trial court here found both.

In his opposition to Respondents' motion for summary judgment — at a time when the *Karel* Action had been pending for *merely five months* — Karel took the position that "[f]orcing" him to commence the alternative dispute resolution procedures required under article XII of the Agreement "would be prejudicial" *to him* and "would thwart the

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16 In addition to the prosecution of the *Karel* Action, this also includes Karel's threat, at a time when the *Karel* Action was still pending, that he would spend whatever money it took to defeat Dicarlo.

legislative intent of the arbitration policy designed to save the parties money and time." This fact alone is substantial evidence to support a finding that *Respondents* were prejudiced by the *nine-month* delay between Karel's filing of the *Karel* Action and Karel's filing of the petition to compel arbitration. Stated differently, Karel's belief that the five-month delay would have prejudiced *him* (by undermining the important public policy in favor of arbitration and by impairing *his* ability to take advantage of the benefits and efficiencies of arbitration) is substantial evidence that a nine-month delay would result in the same, or four months more of, prejudice to *Respondents*.[17]

On appeal, Karel does not mention this evidence — i.e., the specific evidence on which the trial court relied in finding prejudice — let alone attempt to explain why it is not substantial. By failing to "set forth, discuss and analyze *all the evidence* on that point, both favorable and unfavorable," Karel has forfeited appellate review of the prejudice finding. (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218, italics added; accord, *Foreman*, *supra*, 3 Cal.3d at p. 881.)

In any event, even if we were to consider Karel's argument, the result would be no different. According to Karel, for a finding of prejudice based on Karel's prosecution of the *Karel* Action, the trial court was required to determine that Karel's resort to the court

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17 While the length of the delay alone is not sufficient to establish prejudice, we note that even shorter periods of delay have resulted in an affirmance of a finding of waiver, including the requisite finding of prejudice. (E.g., *Lewis*, *supra*, 205 Cal.App.4th at p. 445 [five-month delay]; *Roberts v. El Cajon Motors* (2011) 200 Cal.App.4th 832, 844 [five-month delay]; *Augusta v. Keehn & Associates* (2011) 193 Cal.App.4th 331, 339-340 [six-month delay].)

system resulted in "some advantage . . . , such as an adjudication of some aspect of the merits, or access to discovery which would not have been available in the arbitration forum" — neither of which occurred here. While those examples of obtaining a litigation advantage will support a finding of prejudice (e.g., *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1198), they are not the only forms of prejudice. As Karel argued in opposition to Respondents' motion for summary judgment in the *Karel* Action, undermining the public policy in favor of arbitration and impairing the adversary's ability to take advantage of the benefits and efficiencies of arbitration are the "typical[]" forms of prejudice that result from delay. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1204.)

Accordingly, the record contains substantial evidence to support the trial court's finding of prejudice.

3. Kalai *Does Not Compel a Different Result*

Karel's principal argument on appeal is that *Kalai*, *supra*, 109 Cal.App.4th 768, requires a reversal. We disagree.

In *Kalai*, the trial court granted summary judgment in favor of the defendant on the ground the parties had agreed to arbitrate their dispute. (*Kalai*, *supra*, 109 Cal.App.4th at p. 771.) The court included in the judgment that the plaintiff had waived his right to arbitrate his claims by filing the lawsuit in court. (*Ibid*.) The appellate court reversed. "At most, such an effort might lead to a waiver of that party's right to thereafter enforce the arbitration agreement against an unwilling opposing party." (*Ibid*., italics omitted.)

In disapproving the waiver finding in the judgment, the *Kalai* court observed: "We are aware of no other situation in which courts could properly impose a litigation 'death penalty' merely because a party chose an improper forum or otherwise committed a curable procedural faux pas." (*Kalai, supra*, 109 Cal.App.4th at p. 776.) Karel relies on all or part of this quotation in at least five different places in his appellate briefing.

Unlike the present appeal, however, in *Kalai* there had been no attempt to compel arbitration and, thus, there was no issue as to waiver. All that was at issue in the *Kalai* defendant's motion for summary judgment was whether the claims in the plaintiff's complaint were subject to the parties' agreement to submit their disputes to arbitration. (*Kalai*, *supra*, 109 Cal.App.4th at p. 771.) The court's additional finding regarding waiver was beyond the scope of the motion. (*Id.* at p. 773 [plaintiff's waiver "was never advanced factually in [the defendant's] summary judgment motion"].) Unlike the present appeal (where the record contains substantial evidence of Karel's efforts to avoid complying with the alternative dispute resolution procedures while prosecuting a civil suit), in *Kalai* there is no evidence, or inferences from evidence, to suggest that *anything* had occurred other than the filing of the plaintiff's complaint and the defendant's motion for summary judgment.

Accordingly, neither *Kalai* nor its references to a "litigation 'death penalty' " or a "curable procedural faux pas" (*Kalai*, *supra*, 109 Cal.App.4th at p. 776) are applicable to the present appeal. Indeed, the record in the present appeal does not suggest a

" 'procedural faux pas.' "[18] (*Kalai*, at p. 776.) To the contrary, the record contains substantial evidence that Karel's efforts to avoid arbitration were done with intent and with the knowledge of their risks; there is no evidence of a procedural blunder or error.

Although waiver is not to be found lightly and all doubts are to be resolved in favor of arbitration (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195), the trial court here applied the appropriate standards, and we are satisfied that the record contains more than substantial evidence in support of the court's finding of waiver. We — like the trial court — are aware and appreciate that our ruling may deprive Karel of a forum in which to have his claims against Respondents heard. However, "[t]his consequence flows from *h*[*is*] *decision* to repudiate the arbitration agreement" by his actions. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1216, fn. 12, italics added.) Karel "waived [his] right to arbitrate . . . and, while perhaps genuinely regretting this now that [he] find[s himself] without any recourse against [Respondents], *ha*[*s only himself*] *to blame* for [his] predicament." (*Martinez*, *supra*, 83 Cal.App.4th at p. 1251, italics added.)

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18 Webster's Third New International Dictionary (2002) defines "faux pas" as a "blunder" or "error." (*Id.* at p. 830, col. 1.)

DISPOSITION

The May 1, 2015 order denying Karel's petition to compel arbitration is affirmed. Dicarlo and AFM are entitled to recover their respective costs on appeal from Karel. (Cal. Rules of Court, rule 8.278(a)(2).)

BENKE, Acting P.J.

WE CONCUR:

HUFFMAN, J.

HALLER, J.