S275121

No. _____

In the Supreme Court of the State of California

PETER QUACH,

Plaintiff-Petitioner,

v.

CALIFORNIA COMMERCE CLUB, INC.,

Defendant-Respondent.

Second Appellate District, Case No. B310458
Los Angeles County Superior Court, Case No. 19STCV42445
The Honorable Michael L. Stern, Judge

PETITION FOR REVIEW

NILAY U. VORA (SBN 268339)
JEFFREY A. ATTEBERRY (SBN 266728)
WILLIAM M. ODOM (SBN 313428)
AMY (LOU) EGERTON-WILEY (SBN 323482)
THE VORA LAW FIRM, P.C.
201 Santa Monica Blvd., Suite 300
Santa Monica, CA 90402
Telephone: (424) 258-5190
Attorneys for Plaintiff-Petitioner Peter Quach

June 20, 2022

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Rules

Miscellaneous

I. ISSUES PRESENTED FOR REVIEW

In 2003, this Court adopted a non-exhaustive, multi-factor test for deciding whether a party has "waived" its contractual right to compel arbitration — a test lower courts were required to apply under both the Federal Arbitration Act ("FAA") and the California Arbitration Act ("CAA"). (*St. Agnes Med. Ctr. v. PacifiCare of Cal.* (2003) 31 Cal.4th 1187, 1195-1203 (*St. Agnes*); *see also Iskanian v. CLS Transp. L.A., LLC* (2014) 59 Cal.4th 348, 374-78 (applying *St. Agnes* test).)[1] The most "critical" factor, according to the Court, was prejudice to the party asserting waiver. (*St. Agnes*, 31 Cal.4th at 1203.) This focus on prejudice, however, does not exist under California contract law waiver analysis, which has historically focused entirely on the conduct of the waiving party. (*See id.* at 1195 n.4.) *St. Agnes* justified this departure based on a "policy favoring arbitration" under the FAA and the CAA. (*Id.* at 1195-96.)

On May 23, 2022, the United States Supreme Court in *Morgan v. Sundance, Inc.* (U.S. May 23, 2022) 142 S.Ct. 1708 (*Morgan*) unanimously reversed the line of federal cases upon which *St. Agnes* relied. It squarely held that the FAA prohibits courts from requiring a showing of "prejudice" as a condition of establishing waiver. (*Id.* at 1713 (abrogating *Carcich v. Rederi A/B Nordie* (2d Cir. 1968) 389 F.2d 692 (*Carcich*), and similar

[1] As both cases explain, the term "waiver" has become a shorthand term for the loss of the contractual right to arbitrate by waiting too long to assert it. (*St. Agnes*, 31 Cal.4th at 1195 n.4; *Iskanian*, 59 Cal.4th at 374.) This Petition adopts the same terminology.

cases from eight other federal circuits).) *Morgan* makes clear that the FAA must treat arbitration contracts no differently than any other contract in applying waiver or any other contract principles. *Morgan*, then, overturns the *St. Agnes* test at least to the extent that the FAA applies.

In the lower court proceedings, the parties in this case disagreed as to whether the CAA or the FAA applied—though they agreed that the dispute might be immaterial at the time because the standard was the same. But that was before *Morgan*.

Thus, this case presents the following issues:

1. Does the FAA govern the arbitration rights in this case? If so, does the prejudice requirement of *St. Agnes* apply, or does the FAA under *Morgan* prohibit the application of an arbitration-specific waiver and prejudice requirement in favor of the "ordinary procedural rule" of California contract law? If there is a prohibition on arbitration-specific contract rules, what general contract principles apply to claims under the FAA that a party has relinquished its contractual right to arbitration? (*Morgan*, 142 S.Ct. at 1713.)
2. Alternatively, if the CAA applies in this case, should there be a distinction between the CAA and the FAA? Does the CAA (particularly Code of Civil Procedure § 1281) authorize, unlike the FAA, the creation of an arbitration-specific rule of "waiver" requiring a showing of prejudice to the party asserting waiver? Or does Section 1281 (mandating enforcement of arbitration agreements "save

upon such grounds exist for revocation of any contract") bar the creation and application of the arbitration-specific rules, as *Morgan* held with respect to the FAA?

II. INTRODUCTION

This case presents the Court with an ideal vehicle for addressing the core issues that now must be decided by this Court following the U.S Supreme Court's unanimous opinion in *Morgan v. Sundance*. The recent *Morgan* decision abrogates the rule established by *St. Agnes* in 2003 and modified by *Iskanian* in 2014, which makes prejudice the "critical factor" requirement when determining, at least in cases arising under the FAA, whether a party has waived its contractual right to arbitration. In the wake of *Morgan*, therefore, this Court must decide what basic principles of California contract law should be applied to determine whether a party has waived its contractual right to arbitration. Further, this case presents the Court with an ideal vehicle to determine whether there is in fact—or should be—any distinction between the FAA and the CAA on the issue of waiver of the contractual right to arbitrate.

The facts of this case squarely present the issues before this Court after *Morgan*. The Respondent, despite being fully aware of its supposed contractual right to arbitrate, waited thirteen months after engaging in significant discovery before filing a petition to compel arbitration. The trial court found the Respondent had waived its right to arbitration; but the Court of Appeal reversed, relying on the now-abrogated prejudice requirement in *St. Agnes*.

No factual disputes related to waiver exist.[2] Furthermore, the parties fully briefed the issue of whether the FAA or the CAA applied in this case, but neither the trial court nor the Court of Appeal even reached the issue.

Accordingly, this Court should grant review to decide the impact of *Morgan* in California and to provide guidance to state and federal trial and appellate courts regarding the application of California's "ordinary procedural rule[s]" to arbitration agreements. (*Morgan*, 142 S.Ct. at 1713.) The instant case is the ideal opportunity for the following three reasons.

First, *Morgan* has abrogated the prejudice requirement of *St. Agnes* for cases arising under the FAA. *Morgan* declined, however, to decide which state-law contract procedure governed that case because each state's high court retains primary authority to determine the principles of state contract law. (*See Morgan*, 142 S.Ct. at 1712 (declining to determine which applicable standard for unenforceability or revocation of contract applies under state law, such as "waiver, forfeiture, laches, estoppel, procedural timeliness," or other grounds).) It is clear that, at least with respect to cases governed by the FAA, the rule in *St. Agnes* no longer applies, and it remains for this Court to say which rule does. The developed and undisputed factual record in this case lends

---

[2] The waiver analysis presents a pure question of law on undisputed facts. The unpublished portion of the Court of Appeal's opinion, dealing with unconscionability of the arbitration agreement, implicates many factual issues. However, the trial court did not reach the issue of unconscionability and therefore never made factual findings in relation to unconscionability before the Court of Appeal made its own factual determinations.

itself to clear and well-informed rulemaking on the issue of waiver. (*Infra* Part III.)

Second, following *Morgan*, this Court will also have to decide whether a choice of law analysis is required to determine if the CAA or the FAA applies or whether there is no need for a choice of law analysis because the CAA, whose statutory mandate is consistent with the identical language in the FAA, similarly bars the creation of arbitration-specific rules. Unless and until this Court once again harmonizes the CAA with the FAA, California law on waiver of a contractual right to arbitration under *St. Agnes* will be more restrictive than current federal law.

For decades, this Court and Courts of Appeal following its lead have frequently avoided deciding whether the FAA or CAA governs the waiver analysis in any particular case (which is often a fact-sensitive inquiry). (*See*, *e.g.*, *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307; *see also Zamora v. Lehman* (2010) 186 Cal.App.4th 1.) They have done so by asserting that the answer made no difference because the FAA and the CAA express the same "policy favoring arbitration." (*See, e.g.*, *St. Agnes*, 31 Cal.4th at 1194-97; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 188 (*Doers*); *Jordan v. Pac. Auto Ins. Co.* (1965) 232 Cal.App.2d 127, 132 (CAA "reflect[s] the strong legislative policy favoring arbitration").) The understanding that this fundamental principle was shared by both the FAA and the CAA provided the basis for harmonizing state and federal law on the issue of arbitration waiver. *Morgan* upends that harmony. Review of this case will permit a timely determination of whether California

waiver jurisprudence should continue to align with the federal equivalent given the identical statutory mandates of the FAA and CAA.

Third, this Court should grant review to ensure uniformity of opinion amongst the Courts of Appeal on this issue. Even if *Morgan* had not uprooted *St. Agnes*, the existing arbitration-specific waiver test has been applied inconsistently. The Courts of Appeal have diverged remarkably in their application of this arbitration-specific waiver test and its "critical" prejudice factor. Some Courts of Appeal apply it strictly; others are more willing to find waiver when the litigation delay and expense is extreme. Now that *Morgan* has called *St. Agnes*'s reasoning into question, the Court has an ideal opportunity, in reviewing this case, to provide State-wide uniformity of decision for both the lower courts of this State and the related federal courts on an issue of exceptional importance to the civil justice system.

For these reasons, this Court should grant review to resolve these important issues that are of unique timeliness given the U.S. Supreme Court's decision in *Morgan*.

III. STATEMENT OF CASE

A. Factual Background

1. Peter Quach's employment and termination.

Plaintiff-Petitioner Peter Quach ("Mr. Quach") is a currently 72-year-old man (who was 69 at the time of termination) of

Vietnamese descent. (AA010.)[3] In 1989, Defendant-Respondent California Commerce Club, Inc. hired Mr. Quach as a "Floorperson" to supervise activity on the gambling floor of its casino in Commerce, California. (AA010.) Mr. Quach remained in that position for nearly 30 years, until 2018, when Respondent fired him. (AA011.)

In 2015, Respondent hired new upper management. (AA010.) Afterwards, Mr. Quach observed several occasions on which older employees were written up, suspended, and/or terminated for minor, trivial, nonexistent, and even fabricated violations. (AA011.) Mr. Quach himself was abruptly fired over a pretextual incident involving Mr. Quach's acceptance of five allegedly counterfeit $20 bills. (AA011.)

2. Respondent's arbitration agreement and its execution.

In 2015 (the same year as the shift in upper management), Respondent's Human Resources Department notified all casino employees they were required to attend a meeting about arbitration. (AOB9 (citing AA72-79).) Respondent proceeded to call groups of employees into a conference room where they were given a form arbitration agreement and made to watch an eight-minute video about the new arbitration policy. (AOB9.) The video explained that signing the arbitration agreement was a mandatory condition of employment going forward and they had thirty days

[3] Mr. Quach's record citations use the following format: "AA" (appellant's appendix); "AR" (augmented record); "AOB" (appellant's opening brief in COA); "ROB" (respondent's opening brief in COA).

to sign it. (AOB9 (citing AA73-74, 83-84).) Mr. Quach signed and returned his two-page copy of the arbitration agreement the same day so he could get back to work. (AA47, 83-84.)

B. Superior Court Proceedings

1. Respondent produced the arbitration agreement prior to litigation.

Prior to filing his Superior Court action, Mr. Quach requested (i) the entirety of his personnel file; (ii) all his payroll records; and (iii) a copy of every instrument he executed with Respondent. (*See* Labor Code §§ 1198.5 (personnel file), 226 (wage statements), 432 (instruments executed).)[4] In response, on November 8, 2019, Respondent produced a 514-page file that it represented constituted all requested documents. (AA105.)

The file contained both parties' signatures—Mr. Quach on behalf of himself, and Jose Garcia on behalf of California Commerce Club as its Executive Director of Human Resources—to an agreement executed on February 18, 2015 to arbitrate employment-related disputes amongst the parties. (AA112.) Respondent would later produce the full, two-page agreement in discovery. (AA83-84.) However, the first page, which was missing from the pre-litigation production, proved to be nothing more than boilerplate language common to all employees. (AA83.) The signature page was produced before litigation even began. (AA105, 112.)

[4] Mr. Quach also exhausted his administrative remedies prior to filing suit, as Respondent did not dispute below. (AA11.)

The arbitration agreement provides in relevant part as follows:

> PLEASE READ THESE PROVISIONS CAREFULLY, BY SIGNING BELOW, YOU ARE ATTESTING THAT YOU HAVE READ AND UNDERSTOOD THIS DOCUMENT AND ARE KNOWINGLY AND VOLUNTARILY AGREEING TO ITS TERMS, INCLUDING YOUR WAIVER OF A RIGHT TO HAVE THIS MATTER LITIGATED IN A COURT OR JURY TRIAL, OR TO HAVE THIS MATTER RESOLVED ON A CLASS, COLLECTIVE, CONSOLIDATED OR REPRESENTATIVE BASIS.

(AA084.) The arbitration agreement further provides as follows:

> In the event that either party files, and is allowed by the courts to prosecute, a court action on any claim covered by this agreement, the parties agree that they each agree not to request, and hereby waives his/her/its right to a trial by jury.

(AA083.)

2. Mr. Quach filed suit in Los Angeles Superior Court.

On November 22, 2019, Mr. Quach sued Respondent in Los Angeles Superior Court for age discrimination and related claims. The case was assigned to the Hon. Michael L. Stern. Respondent filed its Answer on January 7, 2020, asserting its right to arbitration as an "affirmative defense," though Respondent declined to petition to compel arbitration as permitted by Code of Civil Procedure § 1281.2 and 9 U.S.C. § 3. (AA031.) Respondent did not demand a jury trial at that time.

3. Respondent demanded a jury trial, posted jury fees, scheduled a jury trial in court, and initiated discovery.

Respondent posted jury fees on February 27, 2020 (ROB10), then filed a Notice of Posting of Jury Fees on March 3, 2020 (AR019). A case management conference was held on February 28, 2020. (AA93, 105.) Respondent filed a CMC statement in which it demanded a jury trial and declined to answer questions about the possibility of contractually mandated private arbitration. Instead, Respondent checked the box requesting a jury trial (AR012 ¶ 5); did not check the box for binding private arbitration (AR013 ¶ 5); proposed a plan for completing discovery (AR014 ¶ 16); and attested that its attorneys were "completely familiar with this case and will be fully prepared to discuss the status of discovery *and alternative dispute resolution*, as well as other issues raised by this statement . . . ." (AR015 (emphasis added).)

The parties promptly initiated discovery with both sides propounding the full range of written discovery, followed by nine months of meet-and-confer discussions (AOB13; ROB11-12) and depositions that continued until September 16, 2020. (ROB12.) Early in this process, Respondent produced the other page of Mr. Quach's arbitration agreement on March 5, 2020. (ROB11.)

During this period, Mr. Quach also requested the depositions of several key employees of Respondent. (AA99-100.) Respondent refused to produce those employees for depositions on the ground that it was furloughing those employees due to the COVID-19 pandemic. (AA107.) Despite not making its employees available for deposition, Respondent took Mr. Quach's deposition for a full

day on June 23, 2020, with a planned second session to be scheduled. (AOB14; AA107.)

Mr. Quach also sought "me too" evidence—including the identity of individuals who had allegedly been the subject of age discrimination and termination of employment—by way of Form Interrogatory, Employment Law No. 209.2. (AA107.) Respondent responded that no other employees had complained of age discrimination since 2015. (AA124.) But Respondent's assertion turned out to be entirely false, as Mr. Quach subsequently discovered at his own effort and expense the existence of no fewer than eight age-discrimination lawsuits filed against Respondent in Los Angeles Superior Court alone since 2015. (AA135.)

4. Respondent petitioned to compel arbitration.

With pre-trial proceedings going badly, Respondent petitioned to compel arbitration on December 23, 2020, more than a year after Mr. Quach's filed his lawsuit. (AA38.) Respondent filed its petition more than two weeks after the originally scheduled trial date, which had been continued due to the COVID-19 pandemic. (ROB12-13.) Respondent's excuse for having waited so long was its own purported failure to locate a "complete, signed arbitration agreement" in Mr. Quach's "900+" page employee file (an amount Respondent described as "lengthy") even though it had previously been produced in discovery. (AA49.) Mr. Quach opposed the petition on the grounds of waiver and of unconscionability. (AA87.)

5. Respondent's petition was denied on waiver grounds.

The Superior Court, Hon. Michael L. Stern presiding, found that Respondent had waived its right to compel arbitration by failing to seek arbitration sooner and denied Respondent's petition. (AA158-59 (citing *Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1048).) The court expressly found that defendant "knew of its right to compel arbitration." (AA159.) The court had no need to reach Mr. Quach's unconscionability arguments.

C. Court of Appeal's Split Opinion Reversing Trial Court

Respondent took an interlocutory appeal from the order denying its petition to compel arbitration to the Second District Court of Appeal. For the next two years, appellate proceedings continued. The Court of Appeal issued an initial, unpublished opinion on April 14, 2022. (*See Quach v. California Commerce Club, Inc.* (Apr. 14, 2022) 2022 WL 1113998 (non-precedential).) After granting rehearing on its own motion, the Court on May 10, 2022, issued a revised 2-1 decision, and ordered publication of the portion of its decision reversing the trial court's finding of waiver. (*Quach v. California Commerce Club, Inc.* (May 10, 2022) 78 Cal.App.5th 470, 2022 WL 1468016.) The Court did not order publication of the portion of its opinion finding no unconscionability. (*Id.* at *8-11.) San Luis Obispo Superior Court Visiting Judge Charles Crandall dissented on both grounds. (*Id.* at *11-15.)

1. The majority found no waiver because of a lack of prejudice.

The core holding of the published portion of the opinion focused on *St. Agnes*'s prejudice requirement: "Our Supreme Court has made clear that participation in litigation alone cannot support a finding of waiver, and fees and costs incurred in litigation alone will not establish prejudice on the part of the party resisting arbitration." *Id.* at *1 (citing *St. Agnes*, 31 Cal.4th 1187, 1203).) According to the majority, despite a delay of almost a year, "Quach ha[d] not met *St. Agnes*'s test." *Id.* at *4.

2. The dissent would have affirmed the waiver finding and outlined the mischief that will result from the majority opinion.

Judge Crandall, sitting by designation of the Chief Justice, in dissent explained, "Quach and Commerce Club are well over two years into litigation, far beyond the time when private arbitration would have fulfilled its promise 'as a speedy and relatively inexpensive means of dispute resolution.'" (*Id.* at *13 (quoting *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125).)

> We can readily surmise from Commerce Club's lack of candor (as the trial court implicitly did) why Commerce Club may have wanted to put Quach through the time and effort of litigation by serving discovery, taking his full day deposition, trying to obtain his theory of the case, and then pulling the litigation plug 13 months after first raising the specter of arbitration in its initial response. What better way to intimidate a vulnerable at-will employee who lacks the economic resources to cope with such delay?

(*Id.* at *14.)

At bottom: "Because of the disputed evidence, the deferential standard of review traditionally used in arbitration waiver cases, and the very real prejudice Quach suffered as a result of Commerce Club's tactics," Judge Crandall "respectfully dissent[ed]." (*Id.* at *15.)

D. The United States Supreme Court's Decision in *Morgan* Abrogated the Federal Line of Authority Behind California's Requirement of Prejudice

Less than two weeks after the Court of Appeal's opinion on rehearing, the U.S. Supreme Court issued its opinion in *Morgan*, 142 S.Ct. at 1708. In *Morgan*, a fast-food employee sued her employer that, for eight months, had "defended itself against Morgan's suit as if no arbitration agreement existed" before finally moving to compel arbitration under the FAA. (*Id.* at 1711.)

The plaintiff opposed on the basis of waiver. (*Id.*) The district court found waiver, but the Eighth Circuit reversed, concluding that the prejudice requirement was not satisfied. (*Id.* at 1712.) (citing *Erdman Co. v. Phoenix Land & Acquisition, LLC* (8th Cir. 2011) 650 F.3d 1115, 1117).)

The U.S. Supreme Court in a unanimous decision, reversed and rejected the application of the prejudice requirement for the issue of waiver, which it described as "a rule found nowhere else—consider it a bespoke rule of waiver for arbitration." (*Id.* at 1712.) The Court explained that this "arbitration-specific rule derive[d] from a decades-old Second Circuit decision, which in turn

grounded the rule in the FAA's policy." (*Id.* (citing *Carcich*, 389 F.2d at 696).)[5]

However, as the Court explained, Section 6 of the FAA actually states that an application to compel arbitration "shall be made and heard in the manner provided by law for the making and hearing of motions." (*Id.* at 1714 (quoting 9 U.S.C. § 6).) The Court concluded by holding that "the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one we address here." (*Id.*) However, *Morgan* expressly left open key questions that this Court is now poised to answer:

> In their briefing, the parties have disagreed about the role state law might play in resolving when a party's litigation conduct results in the loss of a contractual right to arbitrate. The parties have also quarreled about whether to understand that inquiry as involving rules of waiver, forfeiture, estoppel, laches, or procedural timeliness. We do not address those issues.

(*Id.* at 1712.) Accordingly, the U.S. Supreme Court vacated the Eighth Circuit's decision and remanded to explore the questions left open.

---

[5] In abrogating *Carcich*, *Morgan* reversed the federal rule in nine different circuits that had implemented a prejudice requirement for waiver of the contractual right to arbitration, each of which could be traced back to the rule in *Carcich*. Similarly, as detailed below, this Court's implementation of the prejudice requirement also originally relied on *Carcich*. (*See Doers*, 23 Cal.3d at 189 (citing *Carcich*, 389 F.2d at 692).)

IV. REASONS WHY REVIEW SHOULD BE GRANTED

In the wake of *Morgan*, this Court should grant review to (A) announce which of California's "ordinary procedural rule[s]" supplies the principles regarding waiver of the contractual right to arbitrate; (B) resolve whether the CAA's statutory command differs from the FAA's statutory command—despite identical language and an identical policy "favoring" arbitration—and if so, which statute applies when; and (C) clarify California law governing arbitration waiver so as to secure uniformity amongst the Courts of Appeal and trial courts on this fundamental issue. (*See* Cal. R. Ct. 8.500(b)(1).)

A. Following *Morgan*, This Court Should Declare Which Ordinary Procedural Rules of California Law Applies to Waiver of the Contractual Right to Arbitration

1. California's current jurisprudence on arbitration waiver.

In 2003, this Court's decision in *St. Agnes* set forth California's test for determining whether a party had waived its contractual right to arbitration. The Court approved of a non-exhaustive list of six factors that are "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*, 31 Cal.4th. at 1196 (quoting *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992), brackets in original.)

Among these factors, *St. Agnes* placed special emphasis on the prejudice factor, declaring that "[t]he presence or absence of prejudice from the litigation of the dispute is the determinative issue under federal law.'" (*St. Agnes*, 31 Cal.4th. at 1203 (quoting *Doers*, 23 Cal.3d at 188).) Relying on this federal law, *St. Agnes* established that "[i]n California, whether or not litigation results in prejudice also is critical in waiver determinations." (*Id.* at 1203 (citing *Keating v. Superior Court* (1982) 31 Cal.3d 585, 605 and *Doers*, 23 Cal. at 188).) In establishing this critical prejudice requirement, *St. Agnes* limited what kinds of burden constitute prejudice in this context by asserting "[w]aiver does not occur by mere participation in litigation if there has been no judicial litigation of the merits of arbitrable issues." (*Id.* (quoting *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 782).)

St. Agnes's inclusion (and elevation) of a prejudice requirement for establishing waiver of a contractual right to arbitration has no basis in California contract law. In any other context, "[w]aiver requires an existing right, the waiving party's knowledge of that right, and the party's actual intention to relinquish the right." (*Lynch v. California Coastal Com.* (2017) 3 Cal.5th 470, 475 (internal quotations omitted).) Rather than

focusing on prejudice, "[w]aiver always rests upon intent." (*Id.* (quoting *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107).) A party's intent may be "express" or "based on conduct that is 'so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.'" (*Id.* (quoting *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal. App. 4th 588, 598).)

There simply is no prejudice requirement for a finding of waiver of any other contractual right. (*See, e.g.*, Judicial Council of California Civil Jury Instructions, series 300 ("Contracts"), § 336 ("Affirmative Defense – Waiver"); *Rubin v. Los Angeles Fed. Sav. & Loan Assn.* (1984) 159 Cal.App.3d 292, 298 ("Los Angeles Federal asserts that its failure to foreclose earlier did not induce Rubin to change his position or act otherwise than he did. However, detrimental reliance is not a necessary element of waiver, only of estoppel."); *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 59 ("Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only. Waiver does not require any act or conduct by the other party. Estoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts," brackets omitted.).)

2. Morgan abrogates the prejudice requirement established in *St. Agnes*.

For cases arising under the FAA, *Morgan* abrogates this Court's decision in *St. Agnes* and expressly bars its "critical" prejudice factor to the extent that this requirement has no basis in general principles of California contract law. *Morgan* expressly overrules nine federal courts of appeals, including the Ninth Circuit, which had "invoked 'the strong federal policy favoring arbitration' in support of an arbitration-specific waiver rule demanding a showing of prejudice." (*Morgan*, 142 S.Ct. at 1712 & n.1.) The case had come from the Eight Circuit, and the U.S. Supreme Court noted that the Eighth Circuit's "arbitration-specific rule derives from a decades-old Second Circuit decision, which in turn grounded the rule in the FAA's policy." (*Id.* at 1713 (citing *Carcich*, 389 F.2d at 696); *see also Erdman Co. v. Phoenix Land & Acquisition, LLC* (8th Cir. 2011) 650 F.3d 1115, 1120 n.4 ("trac[ing] the origins of [the Eighth Circuit's] prejudice requirement to *Carcich*").)

In *Morgan*, the U.S. Supreme Court struck down this precedent, holding that "the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules" and explicitly rejected any prejudice requirement for waiver when the general waiver principles of the state do not include one. (*Morgan*, 142 S.Ct. at 1714.) As of today, following *Morgan*, courts applying the FAA must look to general state-law contract principles to determine waiver, but arbitration-specific rules are prohibited. (*Id.*)

California's prejudice requirement is similarly traced back to *Carcich*. The Court in *St. Agnes* relied heavily on *Doers* for the requirement. However, *Doers* itself relied on *Demsey & Associates v. S.S. Sea Star* (2d Cir. 1972) 461 F.2d 1009, for the proposition that "the presence or absence of prejudice from the litigation of the dispute is the determinative issue under federal law." (*Doers*, 23 Cal.3d at 188 (citing *Demsey* at 1018).) *Demsey*, in turn, relied on *Carcich* for the same proposition. (*Demsey*, 461 F.2d at 1018 (citing *Carcich*, 389 F.2d at 696).) Moreover, *Doers* also cites *Carcich* directly as well, for the proposition that "the basis for the federal rule is the important national policy favoring arbitration." (*Doers*, 23 Cal.3d at 189 (citing *Carcich*, 389 F.2d at 696).)

Other leading California authorities reiterating the prejudice requirement for waiver of a contractual right to arbitration also rely, at bottom, on *Carcich*. (*See Christensen*, 33 Cal.3d at 782 and *Keating*, 31 Cal.3d at 606 (both citing *Carcich*); *see also St. Agnes*, 31 Cal.4th at 1201-04 (citing *Christensen*, *Keating*, and *Doers*).) Thus, *Morgan* wipes the slate clean in California. Moreover, the *St. Agnes* Court observed that California's prejudice requirement is "in accord" with federal law, thereby avoiding a conflict preemption analysis. (*Id.* at 1195.) But that exact federal law has now been overturned, and *St. Agnes*'s reasoning is inconsistent with *Morgan*.

3. <u>The resulting need for clarification of the applicable California law for arbitration waiver in cases arising under the FAA.</u>

Morgan expressly leaves open two key questions: (1) "the role state law might play in resolving when a party's litigation conduct

results in the loss of a contractual right to arbitrate," and (2) "whether to understand that inquiry as involving rules of waiver, forfeiture, estoppel, laches, or procedural timeliness." (*Morgan*, 142 S.Ct. at 1712.)

This Court, as the "highest court of [this] State," is "the final arbiter of what is state law." (*Montana v. Wyoming* (2011) 563 U.S. 368, 377 n.5.) Thus, the federal courts will look to this Court's interpretation of California State law regarding waiver of the right to arbitrate, as left open in *Morgan*. This case presents the ideal, undisputed factual record enabling this Court to clear up any confusion and announce uniform principles and standards for the State, to which federal courts will then adhere.

There is no prejudice requirement in California's general contractual waiver law. Accordingly, under *Morgan*'s reasoning, there should be no prejudice requirement with respect to "waiver" of the contractual right to arbitrate.[6]

Morgan could not have been raised in the trial court below because it issued on May 23, 2022. But *Morgan* implicates an important and far-reaching matters of law and judicial policy.

---

[6] It is not even clear that "waiver" is the proper terminology for relinquishing the right to arbitrate by waiting too long. As *Morgan* observed (but declined to decide), other related concepts a court might consider include "forfeiture, estoppel, laches, or procedural timeliness." (*Morgan*, 142 S.Ct. at 1712.) While this Court has always used the term "waiver," it has recognized the word as "a shorthand statement for the conclusion that a contractual right to arbitration has been lost." (*Iskanian*, 59 Cal.4th at 374.)

(*See, e.g.*, *Bonni v. St. Joseph Health Sys.* (2021) 11 Cal.5th 995, 1011 (refusing to apply outdated law as law of the case, even though intervening change in law was necessarily not argued below, to avoid "saddling courts with an obligation to settle intractable, almost metaphysical problems").) This Court should grant review to capitalize on the opportunity to establish clean, uniform California arbitration-waiver jurisprudence.

B. This Court Should Determine Whether the CAA Should Continue to be Interpreted Consistently with the FAA's Identical Statutory Command Following *Morgan*

This case also presents a perfect opportunity for this Court to decide, following *Morgan*, whether California courts are to apply the same rule for arbitration waiver under the CAA as under the FAA. In other words, does the *St. Agnes* prejudice requirement continue to apply in cases arising under the CAA? In deciding this question, this Court will have to address the fundamental policy question of whether the CAA places arbitration agreements on equal footing with other contracts (as the FAA does following *Morgan*) or whether the CAA authorizes more favorable treatment of arbitration agreements (by, for example, permitting the creation of arbitration-specific rules for waiver).

In this case, the lower courts avoided the question of whether the CAA or FAA applied, despite it being fully briefed by the parties below. The lower courts treated the difference as moot since the applicable standard at the time was the same regardless and applied the waiver standard set forth in *St. Agnes*, including its focus on "prejudice." As such, this case squarely presents the

Court, on an undisputed factual record, with the core issue of the relationship between the CAA and the FAA regarding waiver, which is ripe for decision following *Morgan*.

1. Historically, California courts have largely harmonized the FAA and the CAA.

Historically, California has harmonized the mandate of the CAA with that of the FAA since both statues reflect a policy favoring arbitrations. (*Wagner Constr. Co. v. Pac. Mechanical Corp.* (2007) 41 Cal.4th 19, 31 ("California law, 'like [federal law], reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims.'") (quoting *St. Agnes*, 31 Cal.4th at 1195), brackets in original).)

This harmonization has been facilitated by the similarity in the express mandates of the two statutes. The primary command of the FAA is that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) This statutory command is virtually identical to the CAA's command in Code of Civil Procedure § 1281. Like its federal counterpart, the CAA states simply that "[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, *save upon such grounds as exist for the revocation of any contract*." (Civ. Proc. Code § 1281 (emphasis added).)

Based on this perceived identity of policy preference, this Court and the Courts of Appeal have frequently avoided choice of law questions regarding when the FAA or CAA governed the

analysis of a range of issues. (*See*, *e.g.*, *Platt Pacific,* 6 Cal.4th at 314-16 (reviewing both California and federal law of arbitration waiver and noting the similarities but declining to decide which applies); *see also Zamora*, 186 Cal.App.4th at 15 ("It is not surprising that *St. Agnes* adopted the same waiver test for both the FAA and CAA.").) In such instances, courts have routinely avoided the question by asserting that the answer made no difference because both the FAA and the CAA express the same "policy favoring arbitration." (*See, e.g.*, *St. Agnes*, 31 Cal.4th at 1194-97; *Doers*, 23 Cal.3d at 188; *Jordan*, 232 Cal.App.2d at 132 (CAA "reflect[s] the strong legislative policy favoring arbitration").)

This shared policy preference has, for example, been the justification for imposing a prejudice requirement for waiver of the contractual right to arbitration. (*St. Agnes*, 31 Cal.4th at 1195.) In federal court, since at least the 1960s and until May of 2022, nine circuit courts have held that the FAA's policy favoring arbitration means a party arguing waiver must establish prejudice. (*Morgan*, 142 S.Ct. at 1713 (citing *Carcich*, 389 F.2d at 696).) Similarly, this Court in *St. Agnes* adopted the arbitration-specific prejudice factor before it was rejected in *Morgan*. (*St. Agnes*, 31 Cal.4th at 1203-04.) It did so out of deference to, and in heavy reliance on, the fact that federal courts had the same requirement at the time. (*Id.* at 1203.) Moreover, *St. Agnes* also relied on the argument that both the FAA and the CAA express the same policy favoring arbitration. (*Id.* at 1195-96.)

This case follows the same pattern. The parties disputed below the question of whether the CAA or the FAA controlled the relevant arbitration contract, *i.e.*, whether Mr. Quach's employment contract involved interstate commerce. (*Compare* AA096 *with* AA144.) In finding waiver, the trial court declined to decide the issue. The Court of Appeal, which also lacked the guidance of *Morgan* and which would have remained bound by *St. Agnes* even if it had, also did not decide the issue. Instead, it simply applied the prejudice requirement under *St. Agnes* without further analysis, presumably because at the time, the question was irrelevant given the identity in policy preferences. (*See Quach*, 2022 WL 1468016, at *3.)

2. *Morgan* requires that this Court clarify the relationship between the FAA and the CAA.

In *Morgan*, however, the U.S. Supreme Court made clear that the FAA's "federal policy is about treating arbitration contracts like all others, not about fostering arbitration." (*Morgan*, 142 S.Ct. at 1713.) In short, *Morgan* sweeps away the long-standing notion that the FAA demands a heightened showing of waiver than would be applicable to other kinds of contracts. Meanwhile, under *St. Agnes* and related opinions, it remains the law in California that the CAA continues to "favor" arbitration, and rules like *St. Agnes*'s bespoke prejudice requirement for the arbitration waiver analysis remain in effect for cases applying the CAA.

If the CAA imposes a different waiver standard than the FAA, the Court must consider whether the CAA is preempted to that extent. (*See Viking River Cruises, Inc. v. Moriana* (U.S. June 15,

2022) __ S.Ct. __, 2022 WL 2135491, at *6 ("[U]nder our decisions, even rules that are generally applicable as a formal matter are not immune to preemption by the FAA."). Conversely, this Court may decide that no preemption or choice of law analysis is required by expressly bringing the CAA back in line with the FAA, correcting the policy stance favoring arbitration over other kinds of contract, and barring the use of *St. Agnes*'s prejudice requirement in cases arising under the CAA. Either way, the relationship between the CAA and the FAA must be clarified, and this case presents the ideal vehicle for doing so.

Harmonizing the CAA and FAA on this threshold issue not only avoids the preemption question, but also avoids needless, non-merits litigation regarding which applies. This Court's decision in *Cable Connection* illustrates the point. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334.) There, the question was whether "the parties [may] structure their agreement to allow for judicial review of legal error in the arbitration award." (*Id.* at 1339.)

The Court noted that the U.S. Supreme Court had held that the FAA does not permit the parties to expand the scope of review by agreement. (*Id.* at 1339-40 (citing *Hall Street Associates, L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576, 585).) Nonetheless, the Court re-affirmed its prior holding in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, that under the CAA "contractual limitations may alter the usual scope of review." (*Id.* at 1340.) The Court explained that the FAA's "procedural provisions" do not apply in state court, and that the FAA does not preempt state contract law or procedural

rules as long as they do not invalidate arbitration agreements on grounds applicable only to arbitration provisions. (*Id.* at 1351.) The Court reviewed both federal and state cases and concluded that California's rule was consistent with, and therefore not preempted by, the FAA's substantive command. (*Id.* at 1348-54.) Accordingly, even assuming the FAA did apply, California's law was nonetheless not preempted and therefore controlling. (*Id.* at 1354.)

Similarly, even when the FAA applies, California courts are free to promulgate generally applicable rules regarding waiver so long as they do not conflict with the FAA's substantive command. (*See Morgan*, 142 S.Ct. at 1712; *see also Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC* (2012) 55 Cal.4th 223, 236 ("In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration.").) The Court should use this case as an opportunity to confirm that the CAA's waiver standards remain aligned with those of the FAA and, therefore, are not preempted. Such a holding would avoid costly litigation, on a petition to compel arbitration, over whether the arbitration contract affects "interstate commerce." (*See Southland Corp. v. Keating* (1984) 465 U.S. 1, 11-12.)

By granting review to announce which "ordinary procedural rule[s]" apply to the arbitration waiver determination under California law (*supra* Part IV(A)), this Court can also confirm that the FAA and the CAA remain the same with respect to waiver.

(S*ee St. Agnes*, 31 Cal.4th at 1195 (holding, at the time, that "[o]ur state waiver rules are in accord [with the FAA]").) The instant case is the ideal vehicle for doing so because the parties disputed below whether the CAA or FAA applied, but the facts are such that the distinction is not determinative (hence why neither lower court decided). (*See* AA96-98.) Accordingly, this Court should grant review to determine what differences, if any, exist between the CAA's and the FAA's waiver standards. If a difference exists, a conflict preemption analysis may be required, and the Court should clarify how to determine which analysis controls.

C. *St. Agnes* Has Resulted in Disparity of Results and Inefficiency Among the Courts of Appeal and Abuse in the Trial Courts

Even setting aside *Morgan*'s impact, the prejudice requirement adopted in *St. Agnes* has been applied inconsistently by the Courts of Appeal.

1. The Courts of Appeal diverge in their application of the *St. Agnes* test and prejudice factor.

This Court's decision in *St. Agnes*—and particularly its proclamation that "[i]n California, whether or not litigation results in prejudice also is critical in waiver determinations"—is applied inconsistently in the Courts of Appeal. (*St. Agnes*, 31 Cal.4th at 1203.) This divergence is well dramatized by comparing the facts and result of two recent Court of Appeal cases: the instant case, and *Blumenthal v. Jones*.[7]

[7] (May 27, 2020, Cal. Ct. App. 4th Dist.) No. G057864, 2020 WL 2745251 (cited for judicial notice, not precedential value).

In *Blumenthal*, the defendant waited nine months into the litigation to invoke the arbitration agreement (compared to more than a year here). (*Id.* at *1.) During that time, it filed motions, appeared before the Court, and resisted the plaintiff's discovery efforts. (*Id.* at *6-*8.) It also (like Respondent here) filed a CMC statement "in which it expressly requested a jury trial" and did not request the option of "binding private arbitration." (*Id.* at *7.) The trial court denied the petition to compel arbitration, focusing on the defendant's bad-faith conduct inconsistent with assertion of the right to arbitrate. (*Id.* at *9.) The Fourth District Court of Appeal affirmed in an unpublished decision and sanctioned the defendant for having taken the appeal, determining the appeal was frivolous. (*Id.* at *17-18.)

Meanwhile, thirty miles away in Los Angeles, the Second District Court of Appeal reversed the trial court's waiver finding in the instant case on nearly indistinguishable facts. Respondent here filed a CMC statement demanding a jury trial, served and resisted discovery, and strung Mr. Quach along with respect to key third-party witnesses. (*Quach*, 2022 WL 1468016, at *12-*14 (Crandall, J., dissenting).) Additionally, Respondent had taken Mr. Quach's deposition for a full day, assuring Mr. Quach it would need another full day. (*Id.* at *14.) After 13 months, Respondent petitioned to compel arbitration. (*Id.* at *2.) Respondent's bad faith is readily inferred, but the Court of Appeal, citing *St. Agnes*, reversed merely because it believed the prejudice factor had been insufficiently demonstrated. (*Id.* at *7-*8). As the dissent noted, however, the majority opinion applied a different standard for

waiver than required by asking Quach "to identify the *motivation* for Commerce Club's lack of candor." (*See id.* at *14.)

While these examples show the extremes at either end, many other, published Court of Appeal cases have struggled to implement the *St. Agnes* test fairly and consistently. Some courts, like the Court of Appeal below, focus entirely on the prejudice factor. For instance, in *O'Donoghue v. Superior Court* (2013) 219 Cal.App.4th 245,[8] the court agreed that the moving party's "delay[] seeking" arbitration and "litigation conduct inconsistent with an intent to proceed before a[n]" arbitrator "support[ed] a finding of waiver." (*Id.* at 263.) Nonetheless, the court refused to find waiver because the non-moving party "ha[d] not established prejudice." (*Id.* at 264.) Similarly, in *Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651, the court held that "even though there was a 14-month period from the filing of the original complaint to the filing of the motion to compel, absent prejudice, the delay is insufficient to support the waiver." (*Id.* at 663 (citing *Iskanian*, 59 Cal.4th at 376-77).)

In contrast, some Courts of Appeal have applied the test more flexibly, focusing on the "bad faith" of the moving party (like in *Blumenthal*, and in the trial court and dissent below)—which is not one of the enumerated *St. Agnes* factors—instead of prejudice. For example, in *Oregel v. PacPizza, LLC* (2015) 237 Cal.App.4th

---

[8] *O'Donoghue* was a case about an agreement to appoint a "judicial reference" to decide the dispute, but the court noted it "look[s] to authority concerning waiver of arbitration to determine whether [moving party] waived its right to judicial reference." (*Id.* at 262.)

342, the court held a 17-month delay constituted waiver because "the 'bad faith' or 'willful misconduct' of a party may constitute a waiver and thus justify a refusal to compel arbitration." (*Id.* at 362.) Similarly, in *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, the court vehemently affirmed a finding of waiver, noting "[w]e are loathe to condone conduct by which a defendant repeatedly uses the court proceedings for its own purposes . . . while steadfastly remaining uncooperative with a plaintiff who wishes to use the court proceedings for *its* purposes . . ., all the while not breathing a word about the existence of an arbitration agreement, or a desire to pursue arbitration." (*Id.* at 1452; *see also id.* ("We note that the 'bad faith' or 'willful misconduct' of a party may constitute a waiver and thus justify a refusal to compel arbitration.").)

Accordingly, regardless of whether the Court decides to interpret the CAA consistently with the FAA, review is required to establish uniformity among the Courts of Appeal regarding the application of *St. Agnes*'s test.

2. <u>This Court's review of the *St. Agnes* test is necessary to curtail abuse.</u>

The judicial emphasis on "prejudice," irrespective of the length of delay, encourages gamesmanship at every stage of litigation that may not necessarily be viewed as "prejudicial." Review of this case also provides the Court with an opportunity to curtail tactical abuses enabled by the existing waiver jurisprudence.

At the very outset of litigation, for example, under existing law, a defendant may wait to petition to compel arbitration until after the initial case management conference to first see if the plaintiff has waived (inadvertently or otherwise) their right to a jury trial. (*See, e.g.*, *O'Donoghue*, 219 Cal.App.4th at 263 n.7 (finding no waiver but nonetheless noting "[n]othing prevented [moving party] from advising the court in 2010 or 2011—when two defendants had been served—that it *intended* to move for [arbitration] once all defendants had been served and appeared. Instead of informing the court about the [arbitration] provision in the agreements, [moving party] demanded a jury trial in 2010 and waited until 2012—after it had propounded extensive discovery and after defendants cross-complained—to advise the court of its intention to seek the appointment of a[n arbitrator].").) If the plaintiff does not waive their right to a jury trial, the defendant may seek to compel arbitration. (*See, e.g.*, *id.* at 263-64.)

The opportunities for tactical abuse continue in discovery. In this case, for example, when Mr. Quach sought the depositions of key witness who were employees of Respondent at the relevant time, Respondent repeatedly represented that it had furloughed those employees, making them non-party witnesses whose testimony is no longer available to Mr. Quach in arbitration. (AA107; *see also Aixtron, Inc. v Veeco Instruments, Inc.* (2020) 52 Cal.App.5th 360; *CVS Health Corp. v. Vividus, LLC* (9th Cir. 2017) 878 F.3d 703.) However, the Court of Appeal refused to find prejudice to Mr. Quach because Respondent had not taken "advantage of judicial discovery procedures not available in

arbitration." (*See Quach*, 2022 WL 1468016, at *6-12 (citing *Iskanian*, 59 Cal.4th at 375).)

Similarly, an employer defending against claims may delay making its witnesses available for deposition, while proceeding to take the deposition of the plaintiff for multiple days. (*See, e.g.*, *Quach*, 2022 WL 1468016, at *2 (acknowledging that "[Respondent] took Quach's deposition via Zoom in a full-day session."); *see also id.* at *12 (Crandall, J., dissenting) ("[Respondent] required Quach to sit for a full day of an expected multi-day deposition on the Zoom platform.").) After the plaintiff's deposition has been taken but before any of the employer's witnesses have been deposed, the employer defendant may petition to compel arbitration, at which point the plaintiff would be limited to seven hours of deposition time.

Finally, a defendant might even move for summary judgment and wait to compel arbitration until after their motion for summary judgment has been denied. (*See, e.g.*, *Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal.App.4th 438, 447-51 (reversing the trial court's finding of waiver even though the party seeking to compel arbitration had filed, and forced the other party to oppose, a motion for summary judgment).) Even if a summary judgment motion is heard and denied, there arguably may still be no litigation of the merits and, under existing law, no prejudice to the plaintiff. (*See, e.g.*, *id.* at 450.)

Plainly, such abuses are not only possible, but common, in litigation under California's current arbitration waiver jurisprudence. (*See Quach*, 2022 WL 1468016, at *13-14

(Crandall, J., dissenting).) Review of this case presents an opportunity to curtail them.

V. CONCLUSION

For the foregoing reasons, Mr. Quach respectfully requests that the Court grant plenary review of the Court of Appeal's opinion.

Dated: June 20, 2022 Respectfully submitted,

/s/ Nilay U. Vora

NILAY U. VORA (SBN 268339)
JEFFREY ATTEBERRY (SBN 266728)
WILLIAM ODOM (SBN 313428)
AMY (LOU) EGERTON-WILEY (SBN 323482)
THE VORA LAW FIRM, P.C.
201 Santa Monica Blvd., Suite 300
Santa Monica, CA 90402
Telephone: (424) 258-5190
Attorneys for Plaintiff-Petitioner Peter Quach

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13-point Century Schoolbook font and contains 7,881 words.

Dated: June 20, 2022 Respectfully submitted,

/s/ Nilay U. Vora

NILAY U. VORA (SBN 268339)
JEFFREY ATTEBERRY (SBN 266728)
WILLIAM ODOM (SBN 313428)
AMY (LOU) EGERTON-WILEY (SBN 323482)
THE VORA LAW FIRM, P.C.
201 Santa Monica Blvd., Suite 300
Santa Monica, CA 90402
Telephone: (424) 258-5190
Attorneys for Plaintiff-Petitioner Peter Quach

Filed 5/10/22; on rehearing (prior 4/14/22 nonpub opinion vacated)

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PETER QUACH, Plaintiff and Respondent, v. CALIFORNIA COMMERCE CLUB, INC., Defendant and Appellant.	B310458 (Los Angeles County Super. Ct. No. 19STCV42445)

APPEAL from an order of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Reversed and remanded with directions.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication, with the exception of part B of the Discussion.

Sanders Roberts, Reginald Roberts, Jr., Eric S. Mintz, Ayan K. Jacobs; Benedon & Serlin, Wendy S. Albers and Gerald M. Serlin for Defendant and Appellant.

Law Offices of Dilip Vithani, Dilip Vithlani; Law Office of Jonathan J. Moon and Jonathan J. Moon for Plaintiff and Respondent.

California Commerce Club, Inc. (Commerce Club) appeals from an order denying its motion to compel arbitration of a dispute with its former employee, Peter Quach, respondent here. Quach argued below that Commerce Club had waived its right to arbitrate by waiting 13 months after the filing of the lawsuit to move to compel arbitration, and by engaging in extensive discovery during that period. Quach claimed the delay prejudiced him by forcing him to expend time and money preparing for litigation. The trial court agreed, finding Commerce Club had waived the right to arbitrate by propounding a "large amount of written discovery," taking Quach's deposition, and expending "significant time meeting and conferring."

We disagree with the trial court. Our Supreme Court has made clear that participation in litigation alone cannot support a finding of waiver, and fees and costs incurred in litigation alone will not establish prejudice on the part of the party resisting arbitration. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1203 (*St. Agnes Medical Center*).) This rule has particular force here, where Quach admitted he incurred no costs in litigation that he would not otherwise have expended had the case gone to arbitration earlier.

Although Quach argues later Supreme Court authority has approved of Court of Appeal cases diluting the rule from *St. Agnes Medical Center*, those cases nonetheless involved a showing that a party's unreasonable delay in asserting the right to arbitrate prejudiced the party resisting arbitration. That showing is absent in the instant case.

In the unpublished portion of the opinion, we reject Quach's alternative argument that the arbitration agreement is unconscionable.

Accordingly, we reverse and direct the trial court to grant Commerce Club's motion to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Commerce Club operates a hotel and casino in Commerce, California. In 1989, it hired Quach to supervise activity on the gambling floor of the casino.

In 2015, Commerce Club required all its employees to sign a new arbitration policy as a condition of continued employment. The agreement required employees to submit any covered dispute to an informal resolution process within the company, and, if necessary, to resolve the dispute through arbitration. The agreement covered "all matters directly or indirectly related to [Quach's] recruitment, employment, or termination of employment." Quach signed and returned his copy of the agreement on February 18, 2015.

---

[1] Our factual recitation is presented in the light most favorable to the trial court's ruling, including assuming the trial court found credible the factual assertions in Quach's opposition to Commerce Club's motion to compel arbitration.

On November 16, 2018, Commerce Club terminated Quach's employment after a customer paid the casino with $100 in counterfeit bills during Quach's shift.

On November 22, 2019, after receiving a right-to-sue letter from the Department of Fair Employment & Housing, Quach filed a lawsuit against Commerce Club. Among other things, the lawsuit alleged causes of action for wrongful termination, age discrimination, retaliation, and harassment.

On January 7, 2020, Commerce Club filed its answer to the complaint. Although it asserted Quach should be compelled to arbitrate "[t]o the extent that [he] has agreed to arbitrate any or all of the purported claims asserted in the [c]omplaint," Commerce Club did not move to compel arbitration at that time. It propounded an initial set of discovery requests, consisting of form interrogatories, special interrogatories, requests for admission, and requests for production of documents. It posted jury fees on March 3, 2020, and sent responses to Quach's discovery requests on March 6, 2020.

On March 4, 2020, the Governor declared a statewide state of emergency due to the global COVID-19 pandemic. On March 23, 2020, the Chief Justice of the California Supreme Court issued the first in a series of emergency orders delaying lower court proceedings for the foreseeable future.[2]

On March 25, 2020, Commerce Club propounded a second set of special interrogatories on Quach. It also engaged in a meet and confer process with Quach to address concerns Quach raised with Commerce Club's discovery responses. Among other things,

---

[2] We take judicial notice of these orders sua sponte. (Evid. Code, § 452, subd. (c).)

Quach informed Commerce Club in May 2020 that Commerce Club had not provided verifications for any of its discovery responses. According to a declaration provided by Quach's counsel, "the meet and confer process was put on hold while [Quach] waited for [Commerce Club] to provide verifications."

On June 23, 2020, Commerce Club took Quach's deposition via Zoom in a full-day session.

On September 16, 2020, the trial court on its own motion continued the trial date, previously set for December 7, 2020, to July 19, 2021, with the final status conference continued from November 19, 2020, to July 1, 2021.

Also on September 16, 2020, Commerce Club served the verifications Quach had requested in May 2020.

On October 9, 2020, Commerce Club participated in another meet and confer process with Quach, ultimately agreeing to provide supplemental responses to Quach's discovery requests.

On October 29, 2020, Commerce Club informed Quach's counsel that it had located Quach's complete arbitration agreement, and it asked for Quach's stipulation to stay his lawsuit and resolve the dispute through arbitration. Quach refused, asserting that Commerce Club had waived its right to arbitrate.

On December 23, 2020, 13 months after Quach filed his lawsuit, Commerce Club filed a motion to compel arbitration. The motion, citing a declaration from Commerce Club's executive director of human resources, contended that Commerce Club initially was unable to locate a complete copy of the arbitration agreement signed by Quach, and only discovered it when reviewing Quach's employment file in responding to Quach's requests for production of documents. Commerce Club argued

Quach suffered no prejudice from the delay, because the parties had engaged in only "minimal discovery" due to Commerce Club closing operations during the COVID-19 pandemic, "which has impacted access to information and witnesses."

In opposition, Quach argued that Commerce Club had waived the right to arbitrate. He claimed Commerce Club was aware it possessed a copy of the arbitration agreement from the beginning, because it had provided him a copy of his signed signature page from the agreement before the lawsuit was filed. He asserted that Commerce Club's delay in seeking to arbitrate was prejudicial because he had spent time and money preparing for litigation. Alternatively, he argued the agreement was unconscionable and unenforceable.

On January 22, 2021, the trial court denied Commerce Club's motion, finding that Commerce Club had waived its right to arbitration. The court reasoned that Commerce Club had engaged in a "litany of pretrial exchanges and actions," despite knowing of its right to compel arbitration and its company policy to secure signed arbitration agreements from each employee. The trial court also found that Commerce Club had presented a "large amount of written discovery," "tak[en] [Quach's] deposition," and spent "significant time meeting and conferring over many months," and concluded that this evidence showed "a position inconsistent to arbitrate and resulting prejudice to [Quach]." The trial court did not reach the issue of unconscionability.

Commerce Club timely appealed.

DISCUSSION

A. Commerce Club Did Not Waive the Right To Arbitration

We disagree with the trial court's conclusion that Commerce Club, through its conduct, waived the right to demand arbitration.

1. Applicable law

"California law strongly favors arbitration" " ' "as a speedy and relatively inexpensive means of dispute resolution." ' [Citation.]" (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125 (*OTO*).) Code of Civil Procedure section 1281.2, subdivision (a), however, provides grounds for denying a petition to compel arbitration, including when "[t]he right to compel arbitration has been waived by the petitioner."

" . . . 'California courts have 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. [Citations.] . . . [Citation.]' [Citation.]" (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 374–375 (*Iskanian*).) "In light of the policy in favor of arbitration, 'waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof.' [Citation.]" (*Id.* at p. 375.)

Waiver of the right to arbitrate is assessed through a number of factors, including: " ' " '(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.' " ' [Citation.]" (*Iskanian*, *supra*, 59 Cal.4th at p. 375, quoting *St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1196.)

"No one of these factors predominates and each case must be examined in context." (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 444; see also *St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1195 ["no single test delineates the nature of the conduct that will constitute a waiver of arbitration"].) The question of prejudice, however, "is critical in waiver determinations." (*St. Agnes Medical Center*, at p. 1203; accord, *Iskanian*, at pp. 376–377; see *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1205 (*Hoover*) ["The presence or absence of prejudice from the litigation is a determinative issue" in waiver analysis].)

" 'The question of waiver is generally a question of fact, and the trial court's finding of waiver is binding on us if it is supported by substantial evidence. [Citation.] "We infer all necessary findings supported by substantial evidence [citations] and 'construe any reasonable inference in the manner most favorable to the judgment, resolving all ambiguities to support an

affirmance.' " ' " (*Garcia v. Haralambos Beverage Co.* (2021) 59 Cal.App.5th 534, 541–542.) "Where the relevant facts are undisputed and only one inference may reasonably be drawn from the facts, the waiver issue may be reviewed de novo." (*Fleming Distribution Co. v. Younan* (2020) 49 Cal.App.5th 73, 81 (*Fleming*).)

2. Analysis

Even deferring to the trial court's factual findings under a substantial evidence standard of review, we conclude Quach's showing of prejudice was inadequate as a matter of law, and he therefore failed to meet his " 'heavy burden' " below. (*Iskanian*, *supra*, 59 Cal.4th at p. 375.)

In his opposition below, Quach contended Commerce Club had "acted inconsistently with an intent to arbitrate" "by propounding and responding to discovery, engaging in the meet and confer process regarding those responses, posting jury fees, and taking [Quach's] deposition." He claimed he had "been prejudiced by expending time and money on the litigation in this case." The trial court appears to have accepted this argument, stating that Commerce Club's participation in discovery "shows both a position inconsistent to arbitrate and resulting prejudice to [Quach]."

Quach's showing was insufficient as a matter of law to establish waiver. In *St. Agnes*, our Supreme Court held that " ' "[w]aiver does not occur by mere participation in litigation" ' if there has been no judicial litigation of the merits of arbitrable issues . . . . [Citation.]" (*St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1203.) In the instant case, there has "been no judicial litigation of the merits of arbitrable issues," and therefore no waiver on that basis. (*Ibid.*)

Further, although " ' " 'waiver *could* occur prior to a judgment on the merits if prejudice could be demonstrated,' " ' " (*St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1203, italics added), the Supreme Court has made clear that litigation expenses alone cannot support a claim of prejudice: "Because merely participating in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*Ibid.*)

"Rather," continued the court, "courts assess prejudice with the recognition that California's arbitration statutes reflect ' "a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution" ' and are intended ' "to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing." ' [Citation.] Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1204.) "For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration [citations]; where a party unduly delayed and waited until the eve of trial to seek arbitration [citation]; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence [citation]." (*Ibid.*)

Quach has not met *St. Agnes*'s test. His showing below indicated nothing more than the parties participated in litigation. That participation, moreover, largely was limited to party-directed discovery, with no trial court involvement, and certainly no determinations by the court on the merits. Quach has not shown any prejudice apart from the expenditure of time and money on litigation. He does not, for example, claim Commerce Club has gained information or conducted discovery it would not have been able to obtain in arbitration or that the delay led to lost evidence. Commerce Club moved to compel arbitration almost seven months before the then-operative trial date, not on the "eve of trial."[3] (See *St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1204.)

Quach argues that cases cited in the Supreme Court's later decision in *Iskanian* establish that litigation expenses can support a finding of prejudice if they are the result of a party's "unreasonable" delay in asserting the right to arbitrate. *Iskanian* stated, "Some courts have interpreted *St. Agnes Medical Center* to allow consideration of the expenditure of time and money in determining prejudice when the delay is unreasonable." (*Iskanian*, *supra*, 59 Cal.4th at p. 377.) As an example, the court quoted *Burton v. Cruise* (2010) 190 Cal.App.4th 939 (*Burton*), which held 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."

---

[3] As previously noted, the trial court had previously continued the initial trial date so that when Commerce Club moved to compel arbitration in December 2020, the trial date was set for July 2021.

[Citation.] Arbitration loses much, if not all, of its value if undue time and money is lost in the litigation process preceding a last-minute petition to compel.' [Citation.]" (*Iskanian*, at p. 377, quoting *Burton*, at p. 948.)

Iskanian then cited to "[o]ther courts [that] have likewise found that unjustified delay, combined with substantial expenditure of time and money, deprived the parties of the benefits of arbitration and was sufficiently prejudicial to support a finding of waiver to arbitrate." (*Iskanian*, *supra*, 59 Cal.4th at p. 377, citing *Hoover*, *supra*, 206 Cal.App.4th at p. 1205; *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 845–846 (*Roberts*); *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1451 (*Adolph*); *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558 *(Guess?, Inc.*); *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 996 (*Sobremonte*).)

The court in *Iskanian* found these authorities inapplicable, however, because "[i]n each of them, substantial expense and delay were caused by the *unreasonable* or *unjustified* conduct of the party seeking arbitration." (*Iskanian*, *supra*, 59 Cal.4th at p. 377.) In *Iskanian*, in contrast, the court concluded the delay in seeking arbitration was reasonable and excusable given the fluctuating state of the law at the time as to the arbitrability of the particular claims at issue. (*Id.* at pp. 376–378.)

In light of *Iskanian*, Quach argues that the proper test for waiver is whether Commerce Club's delay in asserting its right to arbitration was "reasonable." (See *Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1048 (*Bower*) ["The distinction in the case law turns on whether any delay in seeking

arbitration is *reasonable*."].)[4] Quach contends Commerce Club's delay was not reasonable, because the evidence showed Commerce Club knew of the arbitration agreement even before the lawsuit was filed, yet waited more than a year before moving to compel arbitration. "By then," he contends, "all benefits of a speedy resolution [Quach] could have obtained through arbitration had been lost."

An examination of the cases cited in *Iskanian*, however, reveals that the showing of prejudice and/or undue delay in those cases was qualitatively different from Quach's showing here.

In *Burton*, the plaintiff moved to compel arbitration so close to the trial date that she had to seek ex parte relief to shorten time to hear the motion. The appellate court concluded that granting the motion would have actually lengthened the proceedings by requiring the parties to take extra time to select the arbitrators: " 'Starting anew in an arbitral forum at that late date would delay resolution of the dispute, not advance it.' [Citation.]" (*Burton*, *supra*, 190 Cal.App.4th at p. 949.) The defendant was further prejudiced because, on the assumption he was preparing for a jury trial, he already had selected and prepared experts specifically suited for testifying to a jury rather than a more technically adept arbitration panel. (*Id.* at pp. 949–950.)

In *Hoover*, the evidence showed that the defendant, the party seeking to compel arbitration, had delayed asserting its

---

[4] It is not clear to us that *Iskanian*, in citing *Burton* and the other Court of Appeal decisions, was endorsing them as opposed merely to distinguishing them. We need not decide that question, because as we explain, those cases are distinguishable from and inapplicable to the instant case as well.

right to arbitrate while it "availed itself of discovery mechanisms like depositions not available in arbitration" and "solicited putative class members, in an effort to reduce the size of the class." (*Hoover*, *supra*, 206 Cal.App.4th at p. 1205.) The defendant also had engaged in extensive litigation requiring court involvement, including two attempts to remove the case to federal court, a demurrer, discovery disputes, and opposing a temporary restraining order. (*Id.* at pp. 1200, 1205.)

In *Roberts*, the defendant's delay in asserting the right to arbitration led to the plaintiff expending substantial time and money conducting class discovery, much or all of which "would be rendered useless" if the matter proceeded to arbitration given a class action waiver in the arbitration agreement. (*Roberts*, *supra*, 200 Cal.App.4th at p. 845.) The defendant also used the delay between filing its answer and moving to compel arbitration to seek out putative class members and attempt to settle with them, an action the reviewing court held was inconsistent with an intent to arbitrate and prejudicial to the plaintiff. (*Id.* at p. 847.)[5]

In *Adolph*, the court affirmed the trial court's finding that the defendants intended to proceed with the court action up until the point the trial court overruled their second demurrer, at which point they suddenly produced the previously undisclosed arbitration agreement and moved to compel arbitration. (*Adolph*, *supra*, 184 Cal.App.4th at p. 1451.) The Court of Appeal stated it was "loathe to condone conduct by which a defendant repeatedly

---

[5] The dissent states that *Hoover* and *Roberts*, as class action cases, "have little relevance to someone in Quach's position." (Dis. opn. *post*, at p. 6.) We agree. We address them only because Quach relies on *Iskanian*'s purported approval of those cases and others to support his position.

uses the court proceedings for its own purposes (challenging the pleadings with demurrers) while steadfastly remaining uncooperative with a plaintiff who wishes to use the court proceedings for *its* purposes (taking depositions) . . . ." (*Id.* at p. 1452.) The court held the evidence supported a finding of bad faith on the part of defendants. (*Ibid.*) As in *Burton*, the court also found that given the late date at which the defendants moved to compel arbitration, switching to the arbitral forum would further delay the proceedings. (*Adolph*, at p. 1452.)

In *Guess?, Inc.*, the court concluded that Guess?, Inc., the party resisting arbitration, had suffered prejudice because of the "substantial expense of pretrial discovery and motions that would have been avoided had Kirkland [the party moving to compel arbitration] timely and successfully asserted a right to arbitrate. Through its use of the discovery process, Guess has disclosed at least some of its trial tactics to Kirkland, certainly more so than would have been required in the arbitral arena." (*Guess?, Inc.*, *supra*, 79 Cal.App.4th at p. 558.)

In *Sobremonte*, akin to *Roberts* and *Guess?, Inc.*, the parties resisting arbitration spent time and money on discovery and proceedings that would have not occurred in arbitration. (*Sobremonte*, *supra*, 61 Cal.App.4th at p. 995.) The party seeking to compel arbitration, moreover, had taken " ' "advantage of judicial discovery procedures not available in arbitration." ' [Citation.]" (*Ibid.*) That party also engaged in substantial litigation requiring judicial involvement, including filing demurrers, resisting motions to compel discovery, seeking protective orders, and attempting to transfer the matter to municipal court. (*Id.* at pp. 995–996.)

Quach has made no showing comparable to those in the cases described above. Perhaps most crucially, he provided no evidence or argument, other than conclusory statements, that he had spent time or money engaging in proceedings or preparation he would have avoided had Commerce Club asserted its right to arbitrate sooner. Indeed, at oral argument Quach's counsel conceded Quach had incurred no such expenses. Nor has Quach made any effort to show that moving to an arbitral forum at this point will delay proceedings, as the late-filed motions to compel arbitration did in *Burton* and *Adolph*.

The record also is bereft of evidence that Commerce Club engaged in bad faith abuse of judicial processes akin to the defendants in *Adolph*, who used judicial mechanisms such as demurrers to their advantage while resisting the plaintiff's use of other judicial mechanisms. Instead, the parties engaged only in party-directed discovery, and had yet to involve the trial court or invoke its powers through demurrers, motion practice, or otherwise.

Quach argues that Commerce Club was recalcitrant in responding to his discovery requests while aggressively pursuing its own discovery, suggesting "it was more interested in delay than expeditious resolution through arbitration." Quach has made no effort to show, however, that this would have been avoided had the parties been in an arbitral forum. That is, Quach makes no effort to show that the arbitrator or the applicable arbitration rules would have altered the discovery the parties sought or prevented Commerce Club's purported delay tactics.

Quach cites additional cases postdating *Iskanian*, but they are similarly unavailing. In *Bower*, the court affirmed a finding

of waiver when the defendant "substantially impaired [the plaintiff's] ability to obtain the cost savings and other benefits associated with arbitration" by "requir[ing] [the plaintiff] to respond to discovery that would have been unavailable in arbitration. It was not just that [the plaintiff] incurred legal fees and costs; those expenses were associated with work that would be useless in arbitration." (*Bower*, *supra*, 232 Cal.App.4th at p. 1046.)

In *Fleming*, the employer did not move to compel arbitration until after its former employee had prevailed on a claim of unpaid wages and commissions before the Labor Commissioner. (*Fleming*, *supra*, 49 Cal.App.5th at p. 78.) The Court of Appeal affirmed the trial court's finding of waiver, stating the employee "suffered the prejudice of waiting several years to collect wages that at least one tribunal has determined he was owed, when the matter could have been arbitrated . . . if [the employer] had sought to compel arbitration" earlier. (*Id.* at p. 83.)

In contrast, again, Quach has made no showing that he has spent any time or money on litigation that he would not have spent had Commerce Club moved to compel arbitration earlier. Nor does he offer any evidence or other basis to conclude that his claims would have been resolved more quickly in arbitration. Commerce Club's delay is not comparable to the employer in *Fleming*, which did not move to compel arbitration until the Labor Commissioner had issued a ruling on the merits against it.

Also distinguishable is the recent decision by our colleagues in Division Eight, *Kokubu v. Sudo* (2022) 76 Cal.App.5th 1074, which upheld the trial court's finding that the appellants had waived their right to arbitrate. (*Id.* at p. 1079.) The appellants

in that case had, *inter alia*, withdrawn an earlier arbitration demand, acknowledged that they "secretly intended to avail themselves of rights unique to the court before seeking to compel arbitration," engaged in judicial discovery not available in arbitration, and "substantially invoked the litigation machinery" by filing a cross-complaint, 10 motions, propounding discovery, and obtaining relief with respect to a lis pendens. (*Id.* at pp. 1086–1087.) The record here shows no conduct akin to that in *Kokubu*.

Quach suggests that Commerce Club's purported reasons for its delay in moving to compel arbitration—closures due to COVID-19 and the inability to find a complete signed copy of the arbitration agreement—were pretextual, and nothing prevented Commerce Club from asserting its right to arbitrate at the outset of the lawsuit. The trial court similarly found that Commerce Club "knew of its right to compel arbitration," and failure to "find the proper documents is not an excuse for not moving to compel arbitration at a much earl[ier] time."

As the case authority we have discussed above establishes, a party's delay in asserting the right to arbitrate is not "unreasonable" merely because the party could have asserted it at an earlier time. Rather, what makes the delay "unreasonable" is that it negatively impacts the party resisting arbitration, such as by requiring that party to expend resources it otherwise would have saved by arbitrating the dispute, or by allowing the party asserting arbitration to take advantage of judicial processes not available in arbitration. Quach has failed to show negative impact from Commerce Club's delay.

The dissent contends we should infer from Commerce Club's "lack of candor" regarding the reasons for its delay that

Commerce Club deliberately delayed the proceedings and subjected Quach to judicial discovery "to intimidate a vulnerable at-will employee who lacks the economic resources to cope with such delay." (Dis. opn. *post*, at p. 8.) Respectfully, this is pure speculation, and goes far beyond the trial court's findings, which were that Commerce Club's explanations did not excuse the delay. There is no indication the trial court inferred nefarious intent, nor shall we on this record.

The dissent at various points intimates we are imposing an unreasonable or unnecessary evidentiary burden on parties seeking to establish waiver of arbitration. We merely hold that when a party resisting arbitration makes *no* showing other than a lengthy delay during which the parties engaged in party-directed discovery—with no indication that discovery would have been unavailable or unnecessary in arbitration or that the party incurred costs that it would not otherwise have incurred had arbitration occurred earlier—that showing runs afoul of *St. Agnes Medical Center*'s admonitions that " ' "[w]aiver does not occur by mere participation in litigation" ' " and "courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1203.) Our holding here is based on Quach's failure to show anything beyond what *St. Agnes Medical Center* already has declared insufficient to prove waiver.

Although the dissent suggests we are "overextend[ing] ourselves to preserve a compulsory arbitration agreement" (dis. opn. *post*, at p. 2), we are merely applying well-established principles set forth by our high court. This we must do regardless of the dissent's views on the fairness of compelling plaintiffs to

arbitrate pursuant to an agreement signed as a condition of employment.

B. Quach Fails To Show The Arbitration Agreement Is Unconscionable

Quach argues that even if Commerce Club did not waive the right to arbitrate, the arbitration agreement is unconscionable and unenforceable. We disagree.

1. Applicable law

" ' "[G]enerally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening" the FAA' or California law." (*OTO*, *supra*, 8 Cal.5th at p. 125.)

"A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party. [Citation.] Under this standard, the unconscionability doctrine ' "has both a procedural and a substantive element." ' [Citation.] 'The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided.' [Citation.]" (*OTO*, *supra*, 8 Cal.5th at p. 125.)

"Both procedural and substantive unconscionability must be shown for the defense to be established, but 'they need not be present in the same degree.' [Citation.] Instead, they are evaluated on ' "a sliding scale." ' [Citation.]" (*OTO*, *supra*,

8 Cal.5th at p. 125.) "The burden of proving unconscionability rests upon the party asserting it." (*Id.* at p. 126.)

If an arbitration agreement contains unconscionable provisions, the court " 'must determine whether these terms should be severed, or whether instead the arbitration agreement as a whole should be invalidated.' [Citation.]" (*Lange v. Monster Energy Co.* (2020) 46 Cal.App.5th 436, 452–453 (*Lange*).) " '[T]he strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement,' " unless the " ' "agreement is 'permeated' by unconscionability." ' [Citations.]" (*Id.* at p. 453.)

In the absence of conflicting evidence, whether an arbitration provision is unconscionable presents an issue of law we review de novo. (*Swain v. LaserAway Medical Group, Inc.* (2020) 57 Cal.App.5th 59, 66.) Thus, although the trial court in the instant case did not reach the issue of unconscionability, we may resolve the issue on undisputed facts as a matter of law in the first instance.

2. Analysis

We will presume Quach has made a showing of at least some procedural unconscionability, given the evidence that Commerce Club required him to sign the arbitration agreement as a condition of continued employment. (See *Najarro v. Superior Court* (2021) 70 Cal.App.5th 871, 883–884.) We nonetheless conclude he has made an insufficient showing of substantive unconscionability to invalidate the agreement.

Quach first attacks the following paragraphs in the arbitration agreement:[6] "In the event of any dispute, prior to commencing any legal action, [the employee] or the Company, whichever is the complaining party, shall give prompt written notice to the other . . . of the nature of the dispute, claim or controversy. Upon the receipt of such written notice, the Parties agree to meet within 30 days in person to discuss in good faith the dispute, claim or controversy for the purpose of attempting to resolve it informally. [¶] If the Parties cannot resolve their differences in that informal dispute resolution process, then all claims relating to [the employee's] recruitment, employment with, or termination of employment from the Company shall be deemed waived unless submitted to final and binding arbitration by JAMS . . . ."

Quach argues the requirement of informal, nonbinding mediation "ha[s] no meaning to [Quach], unless he retains counsel." The very purpose of mediation is to work out disputes without having to proceed to litigation or arbitration, which is of benefit to all parties. We see nothing unconscionable in requiring the parties to do so, and Quach cites no authority to the contrary.

Quach next contends the above quoted language requires him to "resolve the dispute within 30 days." (Italics & boldface omitted.) This misreads the language, which requires only that

---

[6] Quach characterizes the arguments concerning these paragraphs as pertaining to procedural unconscionability, but because he is challenging the terms of the agreement itself, his argument is better characterized as one of substantive unconscionability. (*OTO*, *supra*, 8 Cal.5th at p. 125 [" 'Substantive unconscionability pertains to the fairness of an agreement's actual terms . . . .' [Citation.]"].)

the parties meet to discuss their dispute within 30 days after one has served notice of a dispute on the other.

Quach then challenges the language stating that an employee waives claims not submitted to JAMS for arbitration. Quach reads this language to provide that "if an employee waits 6 months after a failed mediation, he is out of luck." We see nothing in the language setting a deadline for when an employee must arbitrate claims following an unsuccessful mediation. Rather, the language indicates that to the extent the employee wishes to pursue claims following mediation, the employee must do so through arbitration.

Turning to other provisions of the arbitration agreement, Quach contends the agreement unfairly exempts from arbitration claims likely to be brought by Commerce Club, such as claims for violation of confidentiality or theft of trade secrets, while requiring the employee to arbitrate most claims. This argument fails because Quach does not identify any language in the arbitration agreement establishing this purported exemption for employer claims, nor can we find any such language. Rather, the agreement applies to "all matters directly or indirectly related to [the employee's] recruitment, employment, or termination of employment." This broad language would encompass claims by Commerce Club against Quach for confidentiality or trade secret violations, which would be "related to" his "employment." Indeed, the agreement's only express exemptions are for specific claims by the *employee*, such as workers' compensation benefits, unemployment insurance benefits, and claims under the National Labor Relations Act.

Quach next contends the agreement is unconscionable for incorporating JAMS rules that "subjected [Quach] to a risk of

bearing costs forbidden by" case law. Arbitration agreements between employees and employers " 'cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court. . . .' [Citation.]" (*O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 279, italics omitted.) Quach does not cite any JAMS rules contravening this principle. Regardless, the agreement expressly states that any arbitration fees paid by the employee "shall be limited up to the amount the Employee would have had to pay had the matter been filed in court. [Commerce Club] shall pay remaining arbitration administrative costs and arbitrator's fees." Quach's argument ignores this language.

Quach argues the agreement fails to "discuss recovery of fees and costs by [Quach]," suggesting that the agreement might impair his statutory right to fees and costs under the Fair Employment and Housing Act (FEHA). We read the agreement's silence as to attorney fees and costs to indicate the parties intend the arbitrator to apply FEHA or other substantive law without alteration. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 112 [an "agreement to arbitrate a statutory claim is implicitly an agreement to abide by the substantive remedial provisions of the statute"].)

Quach argues the agreement is unconscionable because it requires him to waive his right to bring claims in a "representative proceeding." Quach argues this language waives his right to bring claims under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.; PAGA), a waiver the Supreme Court has held is unenforceable as contrary to public policy. (*Iskanian*, *supra*, 59 Cal.4th at p. 384.) Assuming

arguendo a PAGA waiver is substantively unconscionable, a question on which we express no opinion, the solution would be to sever that provision from the agreement. (See *Lange*, *supra*, 46 Cal.App.5th at p. 453.) The PAGA waiver would not justify invalidating the entire agreement. Also, Quach has not asserted a PAGA claim, and therefore we need not decide whether to sever that provision.

Although not raised on appeal, in his opposition to the motion to compel arbitration below, Quach challenged as unconscionable the following provision: "In the event that either party files, and is allowed by the courts to prosecute, a court action on any claim covered by this agreement, the parties agree that they each agree not to request, and hereby waives his/her/its right to a trial by jury." We have held that a similar provision in an arbitration agreement waiving a right to a jury trial " 'in the event that any controversy or claim is determined in a court of law' " is substantively unconscionable. (*Lange*, *supra*, 46 Cal.App.5th at pp. 451–452.) Assuming arguendo the waiver here also is unconscionable, again, it would be severable.

The only provisions of the agreement identified by Quach that arguably support a finding of substantive unconscionability are severable, and Quach's other claims of substantive unconscionability are without merit. There is thus no basis to invalidate the agreement as unconscionable.

DISPOSITION

The order is reversed. The trial court is directed to grant California Commerce Club, Inc.'s motion to compel arbitration and stay further proceedings. California Commerce Club, Inc. is awarded its costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

BENDIX, J.

I concur:

ROTHSCHILD, P. J.

CRANDALL, J.,* Concurring and Dissenting.

The unfairness of compelling non-unionized employees to forfeit their access to the civil justice system in favor of private arbitration is well recognized. (Greene & O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements–#TimesUp on Workers' Rights* (2019) 15 Stan. J. C.R. & C.L. 43, 45, 47-48 (*Epic Backslide*).) In 2018, there were as many as 60 million American workers subjected to such "agreements," and that number is likely much higher today. (*Id.* at p. 45.) Mandatory arbitration for such employees is pernicious because economic and noneconomic pressures can leave them without any viable forum in which to bring their claims. (*Id.* at pp. 50, 70-71.)

Although the legality of these compulsory arbitration agreements must be acknowledged for the present moment as water under the judicial bridge,[1] we should not overextend

---

[1] Were we writing on a clean slate, I would encourage us to find the entire agreement unconscionable and, hence, unenforceable. Not only had Peter Quach and his fellow employees been forced to sign the agreement upon pain of immediate termination, but, among other things, it made all of them give up any resort whatsoever to the civil justice system, including the right to a jury trial in the event the case ever did make it to court. But the California Supreme Court has made clear that " 'contracts of adhesion' " are " 'indispensable facts of modern life that are generally enforced' " even though they " ' "bear within them the clear danger of oppression and overreaching." ' " (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.) Further, there is a strong legislative and judicial preference to sever any offending term (here: the jury waiver) and

ourselves to preserve a compulsory arbitration agreement that the employer has clearly waived, as appellant California Commerce Club, Inc. (Commerce Club) did in this case with respect to their at-will employee of 29 years, respondent Peter Quach.

There is no litmus test for determining whether a party has waived its right to pursue arbitration under Code of Civil Procedure section 1281.2, subdivision (a). (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 374-375 (*Iskanian*); see *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 ["no single test delineates the nature of the conduct that will constitute a waiver of arbitration"] (*St. Agnes*).) Rather, waiver depends upon a variety of factors, including: " ' " '(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; . . . (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.' " ' " (*Iskanian*, *supra*, at p. 375.)

Despite asserting arbitration as an affirmative defense in its answer and notwithstanding the litigation difficulties caused by the onset of the COVID-19 pandemic, Commerce Club actively

---

enforce the balance of such agreements. (*Lange v. Monster Energy Co.* (2020) 46 Cal.App.5th 436, 455.) Accordingly, I reluctantly concur in the second part of the majority decision.

pursued a course of action evidencing every intention of fully utilizing the civil justice system. It attended case management conferences, propounded multiple sets of written interrogatories and requests for admission, engaged in multiple meet-and-confer meetings with opposing counsel, tasked Quach and his counsel with analyzing over 900 pages of the company's responses to his written discovery, posted jury fees, and required Quach to sit for a full day of an expected multi-day deposition on the Zoom platform.

Under *Iskanian*, Commerce Club's actions were " ' " 'inconsistent with the right to arbitrate' " ' " as it " ' " ' "substantially invoked" ' " ' " the litigation machinery before its motion to compel arbitration was filed. (*Iskanian*, *supra*, 59 Cal.4th at p. 375.) And, because it first moved to compel arbitration on the very day of the originally scheduled trial date (having deliberately waited until 13 months after suit had been filed) we can safely say that Commerce Club " ' " 'requested arbitration enforcement close to the trial date.' " ' " (*Ibid.*)

A critical element in determining whether arbitration has been waived, under both *Iskanian* and *St. Agnes*, is " ' "whether the delay 'affect[s], misle[ads], or prejudice[s]' the opposing party." ' " (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) Such prejudice is ordinarily 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; *Iskanian*, *supra*, 59 Cal.4th at p. 377 [" '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" ' " (italics added)].)

Although Commerce Club blamed its 13-month delay in seeking arbitration on (1) the COVID-19 pandemic and (2) its inability to find a fully executed arbitration agreement, the trial court record raised serious questions about the veracity of these explanations. Most notably, Quach produced evidence showing that, before Quach ever filed his lawsuit, Commerce Club's counsel had turned over his personnel file, including the fully-executed second page of Quach's two-page arbitration agreement, signed in 2015 by Quach and Commerce Club's HR director, Jose Garcia.

Recognizing these (and other) serious inconsistencies in Commerce Club's explanations, the trial court concluded: "The litany of pretrial exchanges and actions by the defendant demonstrate that [Commerce Club] knew of its right to compel arbitration as well as company policy and the employee practice to sign an arbitration agreement. The combined failure of counsel . . . to not find the proper documents is not an excuse for not moving to compel arbitration at a much [earlier] time." In other words, the trial court essentially concluded that Commerce Club's explanations were a pretext that had been fabricated to justify its tardy motion to compel arbitration.

Given our limited standard of review,[2] the trial court's reasoning *by itself* should be sufficient for us to uphold its finding

---

[2] Because the trial court resolved disputed facts regarding Commerce Club's delayed arbitration request, we are required to infer all necessary findings supported by substantial evidence and construe all reasonable inferences in the manner most favorable to the judgment. (*Garcia v. Haralambos Beverage Co.*

of waiver. (*Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1452 [courts are "loathe to condone conduct by which a [litigant] repeatedly uses the court proceedings for its own purposes . . . all the while not breathing a word about . . . [its] desire to pursue arbitration"]; *Iskanian*, *supra*, 59 Cal.4th at p. 377 [" '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" ' " (italics added)], quoting *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 948.)

Case law cautions against resolving arbitration waivers in a rote or formulaic manner. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 444 ["each case must be examined in context"].) Although Quach's showing of prejudice is not identical to the prejudice discussed in other arbitration cases,[3] it is surely meaningful in the context of an at-will

---

(2021) 59 Cal.App.5th 534, 541-542.) "The appellate court may not reverse the trial court's finding of waiver unless the record as a matter of law compels finding nonwaiver." (*Kokubu v. Sudo* (2022) 76 Cal.App.5th 1074, 1083.) This deferential standard of review is critical in waiver cases. (*Id.* at p. 1085 ["Trial courts are uniquely positioned to evaluate the conduct of litigants before them within the broader context of a case. Given that the *St. Agnes* factors are largely concerned with such conduct, the deference we give to the trial courts' factual determinations is especially warranted in the context of alleged arbitration waiver"].)

[3] While Quach's out-of-pocket expenditures in this litigation have not been significant, his trial counsel has already spent considerable *time* litigating this case. The dollars and cents incurred during litigation are only *one* of many considerations in evaluating whether prejudice exists; a party's

employee who lacks even the benefit of a collective bargaining agreement.[4]

As of this writing, Quach and Commerce Club are well over two years into litigation, far beyond the time when private arbitration would have fulfilled its promise " ' "as a speedy and relatively inexpensive means of dispute resolution." ' " (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125.) Indeed, had Commerce Club's arbitration motion been filed at the outset, i.e., during the three and a half months before the onset of the pandemic, the *entire arbitration* could well have been completed by now. (See *Kokubu v. Sudo*, *supra*, 76 Cal.App.5th at p. 1091 [finding that a party caused prejudice by, among other things, "holding their demand [to compel arbitration], [and thus] delay[ing] resolution of the case relative to when it might have concluded had they promptly exercised their right to compel arbitration"].)

Quach should not need to "prove" the obvious point that Commerce Club's serious delay in compelling arbitration has prejudiced him. It is widely known that the alternate dispute resolution business flourished on remote platforms while this

---

and counsel's expenditure of time is another. (See, e.g., *Kokubu v. Sudo*, *supra*, 76 Cal.App.5th at pp. 1087-1088 [evaluating the reasonableness of a party's delayed arbitration demand by examining whether the delay was "accompanied by costs incurred, changes in strategic advantage, use of disputed property, consumption of the time of parties and counsel, and other impacts"].)

[4] His case is also dissimilar to *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1205 and *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 845 and 847. These class action cases have little relevance to someone in Quach's position.

case was being litigated, even as the COVID-19 pandemic significantly disrupted traditional litigation. (Maclachlan, *ADR sees another boom year, becomes 'way of life,'* L.A. Daily J. (Dec. 28, 2021); Maclachlan, *Mandatory arbitrations are up, plaintiffs' attorneys say*, L.A. Daily J. (Dec. 27, 2021).)[5]

We also ask too much of Quach by requiring him specifically to identify the *motivation* for Commerce Club's lack of candor.[6] (*Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1372 ["subjective bad faith is not a required element in a finding of waiver of the right to compel arbitration," but merely "an *alternative* ground for finding waiver," such that "the crucial inquiry is not [necessarily] the subjective motivation of the party seeking arbitration" (capitalization and italics omitted from first quotation)]; see *Adolph v. Coastal Auto Sales, Inc., supra,* 184 Cal.App.4th at p. 1452 ["Although the trial court made no express

---

[5] Judicial notice of these articles is proper pursuant to section 452 of the Evidence Code. (*Id.*, subd. (h) ["Judicial notice may be taken of the following matters . . . [f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy"].)

[6] Nor should we fault Quach for declining to speculate about what sorts of discovery the arbitrator might or might not allow, whether he might be able to use the "judicial" discovery in arbitration, or whether the modest money he has already spent during litigation will save money in arbitration. (Maj. opn., pp. 17 & 18). All we really can say about the arbitration is that it will take place in accordance with the JAMS rules, subject to the agreement's requirement that the arbitration process must include "a fair and simple method for the employee to get information necessary for his/her claim."

finding of [the movant's] bad faith, the tone of its ruling is suggestive of such a finding and, had it been made, sufficient evidence would have supported the finding"].)

Even when an employer's bad faith in delaying arbitration is relevant to a finding of waiver, case law does not hold that an employee must climb such a steep evidentiary hill. Rather, courts typically *infer* a party's motivation from its conduct during litigation. (See, e.g., *Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1207 [finding that a party had waived its right to arbitrate where its conduct showed that "it was the possibility of derailing the trial, rather than a sudden desire to arbitrate, that was the true motivation underlying [its] last-minute motion to compel arbitration"]; *Burton v. Cruise*, *supra*, 190 Cal.App.4th at p. 949 [finding a waiver where a party's conduct suggested that it attempted to use the court " ' " 'as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration' " ' "].)

We can readily surmise from Commerce Club's lack of candor (as the trial court implicitly did) why Commerce Club may have wanted to put Quach through the time and effort of litigation by serving discovery, taking his full day deposition, trying to obtain his theory of the case, and then pulling the litigation plug 13 months after first raising the specter of arbitration in its initial response. What better way to intimidate a vulnerable at-will employee who lacks the economic resources to cope with such delay? **(**Greene & O'Brien, *Epic Backslide*, *supra*, 15 Stan. J. C.R. & C.L. at p. 45.)

But regardless of its subjective motivation, Commerce Club's tactics were prejudicial because they deliberately and

forever undermined the very nature of a quick resolution that is *the* central tenet of arbitration. (*OTO L.L.C. v. Kho*, *supra*, 8 Cal.5th at p. 125.) Quach's appellate brief hits the nail on the head: "[By now], all benefits of a speedy resolution [Quach] could have obtained through arbitration [have] been lost." Although Commerce Club's misconduct surely prejudiced Quach by "stretching out the litigation process," we are nevertheless moving Quach back to the arbitration starting gate—a palpably unfair result.

Because of the disputed evidence, the deferential standard of review traditionally used in arbitration waiver cases, and the very real prejudice Quach suffered as a result of Commerce Club's tactics, I respectfully dissent.

CRANDALL, J.*

---

* Judge of the San Luis Obispo County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

S275121

PROOF OF SERVICE

I certify that the foregoing PETITION FOR REVIEW was electronically served on the following interested parties on June 20, 2022, in the manner described.

California Commerce Club, Inc.	**Sanders Roberts LLP** Reginald Roberts, Jr. (rroberts@sandersroberts.com) Eric S. Mintz (emintz@sandersroberts.com) Ayan K. Jacobs (ajacobs@sandersroberts.com) 1055 W. 7th Street, Suite 3200 Los Angeles, CA 90017
Second District Court of Appeal	Via TrueFiling e-filing
Los Angeles Superior Court Clerk	Via JournalTech e-filing

Dated: June 20, 2022

Respectfully submitted,

/s/ Nilay U. Vora

NILAY U. VORA (SBN 268339)
JEFFREY ATTEBERRY (SBN 266728)
WILLIAM ODOM (SBN 313428)
AMY (LOU) EGERTON-WILEY (SBN 323482)
THE VORA LAW FIRM, P.C.
201 Santa Monica Blvd., Suite 300
Santa Monica, CA 90402
Telephone: (424) 258-5190
Attorneys for Plaintiff-Petitioner Peter Quach