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Supreme Court of California
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S275121

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETER QUACH,

Plaintiff and Respondent,

v.

CALIFORNIA COMMERCE CLUB, INC.,

Defendant and Appellant.

After A Decision By The Court Of Appeal
Second Appellate District, Division One
Appellate Court Case No. B310458

Appeal From Los Angeles Superior Court
Hon. Michael L. Stern, Superior Court No. 19STCV42445

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Defendant and appellant California Commerce Club, Inc. (Commerce Club) challenged the denial of its motion to compel arbitration of employment-related claims filed by plaintiff and respondent Peter Quach (Quach). As an employee of Commerce Club, Quach signed a written agreement requiring binding arbitration of all disputes arising out of, or relating to, his employment. Notwithstanding his contractual obligation to engage in binding arbitration, Quach sued Commerce Club in superior court. Although Commerce Club had not availed itself of the litigation process by filing any motions or obtaining any tactical advantage, the trial court found Commerce Club waived its contractual right to arbitrate based on its participation in discovery and presumed Quach suffered prejudice.

The Court of Appeal reversed. Relying on this Court's decision in *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 (*St. Agnes*), the Court of Appeal correctly found waiver does not occur by mere participation in litigation where there has been no judicial determination of the merits of arbitrable issues. Additionally, the Court of Appeal correctly found the expenditure of time and money on the litigation – the only purported prejudice to Quach – was insufficient to establish waiver, particularly where Quach admitted he incurred no costs he otherwise would not have incurred in arbitration.

Quach now asks this Court to grant review in light of the recent United States Supreme Court decision in *Morgan v. Sundance, Inc.* (May 23, 2022) 142 S.Ct. 1708 (*Morgan*). *Morgan* held prejudice is generally not a feature of federal waiver law and therefore there is no arbitration-specific waiver rule demanding a showing of prejudice under the Federal Arbitration Act (FAA). The Court's "sole holding . . . is that [the Court of Appeals] may not make up a new procedural rule based on the FAA's 'policy favoring arbitration.'" (*Id.* at p. 1714.) It does not abrogate *St. Agnes* or in any way indicate that prejudice cannot be considered as a factor.

Putting aside whether this case is governed by the FAA or the California Arbitration Act, Quach asserts this case presents the "ideal vehicle" for this Court to address the "prejudice requirement" for arbitration waiver in California. It is not.

Review by this Court is limited to important questions of law or where there is an apparent need to maintain uniformity of decision among the appellate courts. Yet, even in these circumstances, any such question should be squarely presented by the facts of the case. This case is not the "ideal vehicle" to address the issue of the "prejudice requirement" for arbitration waiver because the Court of Appeal's decision does not rest exclusively on the absence of prejudice. Further, it is a misstatement of the law to proclaim that California has a "prejudice requirement" for arbitration waiver. To the contrary,

as this Court has held "no single test delineates the nature of the conduct that will constitute a waiver of arbitration." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.) Rather, waiver depends upon a variety of factors. As the Court of Appeal in the instant case recognized "'[n]o one of these factors predominates and each case must be examined in context.'" (Typed opn. p. 8.) In assessing Quach's waiver claim, the Court of Appeal properly considered the other relevant factors identified in *St. Agnes* and determined the facts did not support a finding of waiver. Its decision could stand on those factors alone.

Additionally, Quach has failed to demonstrate a need for review to secure uniformity of decision based on the way California's courts of appeal resolve claims of arbitration waiver. The appellate decisions consistently apply the *St. Agnes* factors in assessing waiver and there is no material divergence of results among the appellate courts.

Accordingly, review is not warranted.

LEGAL DISCUSSION

I. THIS COURT SHOULD REJECT THE PETITION'S INVITATION TO ADDRESS THE PREJUDICE REQUIREMENT FOR ARBITRATION WAIVER UNDER CALIFORNIA LAW.

In seeking review, the Petition focuses solely on the Court of Appeal's finding that Quach had not demonstrated any prejudice besides the expenditure of time and money as a result of the delay in seeking to compel arbitration. As discussed below, the issue of prejudice does not need to be reached in this case as the Court of Appeal correctly held other *St. Agnes* factors support the conclusion that Quach did not establish waiver. (See *Iskanian v. CLS Transportation Los Angeles,* LLC (2014) 59 Cal.4th 348, 375 (*Iskanian*)*,* abrogated on other grounds in *Viking River Cruises, Inc. v. Moriana* (2022) ___ U.S. ___ [142 S.Ct. 1906] ["'waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof'"].)

A. The Court of Appeal Did Not Rely Exclusively on the Absence of Prejudice.

In *St. Agnes*, this Court announced the relevant factors used to assess waiver: "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation

machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196, internal quotations omitted.) This Court reiterated these same factors as relevant to the waiver analysis in *Iskanian, supra,* 59 Cal.4th at page 375.

Applying these factors, the Court of Appeal in the present case concluded that Quach had not met the *St. Agnes* test. (Typed opn. p. 11.) While the majority opinion found Quach had not shown any prejudice apart from the expenditure of time and money on the litigation, it did *not* limit its analysis to the absence of prejudice. (*Ibid.*) Its decision was also grounded on other factors. Specifically, the majority held that "there has 'been no judicial litigation of the merits of arbitrable issues,' and therefore no waiver on that basis." (*Id.* at p. 9.) The opinion explained that Quach's "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." (*Id.* at p. 11.) Additionally, Quach did not claim that "Commerce Club [had] gained information or conducted discovery it would not have been able to obtain in arbitration or that the delay led to lost evidence." (*Ibid.*) Further, "Commerce Club moved to compel arbitration almost seven months before the then-operative trial date, not on the 'eve of trial.'" (*Ibid.*)

As such, the Court of Appeal's decision is not exclusively grounded on the absence of prejudice and its decision would be affirmed based on the other enumerated *St. Agnes* factors. For this reason, this case does not present the "ideal vehicle" for this Court to take up the issue of the alleged "prejudice requirement" for arbitration waiver under California law.

B. The Court of Appeal Correctly Held on the Facts Presented that Commerce Club Did Not Waive Its Right to Arbitrate.

Review also is not warranted because the Court of Appeal in this case reached the correct result. As this Court has made clear, mere participation in litigation does not *by itself* constitute waiver. (*Iskanian*, *supra*, 59 Cal.4th at p. 375.) For waiver to apply, a party has to "substantially invoke" the litigation process. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.)

In this case, after being served with the complaint, Commerce Club asserted its right to arbitrate in its answer's affirmative defenses. (AA 31.) Both parties propounded initial sets of discovery in January 2020. Commerce Club responded to the discovery requests, produced documents, and propounded a second set of special interrogatories in March 2020. Quach's counsel initiated meet and confer efforts in early April, and Commerce Club's counsel responded to the meet and confer letter in early May. (AA 105-106.) Thereafter, Commerce Club's litigation efforts effectively ceased.

The Covid-19 pandemic and widespread court closures and business shutdowns in March 2020 put the parties' litigation activities on hold. (AA 64-65.) The pandemic forced Commerce Club to close its operations, impacting access to information and witnesses. (AA 64.) Commerce Club employees involved in Quach's termination were furloughed and unavailable for deposition. (AA 107.) No litigation activities occurred in this case from April 2020 until September 2020 except for one exchange of meet and confer letters (a letter initiated by Quach's counsel and Commerce Club's counsel's response) and the one-day partial deposition of Quach via Zoom. (AA 106-107.)

In September 2020, the trial court continued the December 7, 2020 trial date to July 19, 2021 due to the Covid-19 case backlog, Commerce Club provided verifications for the earlier discovery responses, and Quach's counsel resumed meet and

confer efforts. (AA 36, 65, 106-107.) On October 29, 2020, Commerce Club requested Quach stipulate to stay the action and proceed to arbitration as required by the parties' signed arbitration agreement. (AA 64, 67-68, 108.) At the time Commerce Club requested arbitration, no motions had been filed, no mediation or settlement conferences had been conducted, and the trial date was over eight months away. Under these circumstances, Commerce Club did not "substantially invoke" the litigation process. The Court of Appeal's determination that Commerce Club's litigation activities were insufficient to constitute waiver is correct.

Additionally, the Court of Appeal correctly found Commerce Club's delay was *not* unreasonable. As Commerce Club explained "[i]n the wake of the global pandemic and the widespread judicial shut-downs that occurred in the first half of 2020, the parties' litigation efforts slowed to a virtual stop" and only recently began to resume. (AA 65.) Shortly after the litigation activities resumed in September 2020, Commerce Club asserted its right to arbitrate. (See AA 64-65, 67-68.) Quach did not claim that Commerce Club took advantage of discovery unavailable in arbitration or gained any tactical advantage as a result of delay. (See *St. Agnes*, *supra*, 31 Cal.4th at p. 1196 [in determining waiver, a court can consider "'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'"].) The

Court of Appeal correctly analyzed the case law and found the delay in this case "was qualitatively different from" those cases which found the moving party's delay was unreasonable. (See Typed opn. pp. 13-18.)

Accordingly, the result in this case is correct even without considering the lack of prejudice as a factor.

II. THE *ST. AGNES* FACTORS HAVE NOT RESULTED IN A DISPARITY OF OUTCOMES AMONG THE LOWER COURTS.

The Petition further asserts that review is needed to establish uniformity because the "prejudice requirement" has been applied inconsistently. (Pet. pp. 35-38.) Whether a party has waived the right to arbitrate necessarily turns on the facts of each case as "no single test delineates the nature of the conduct that will constitute a waiver of arbitration." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.) However, Quach has not established that the opinions of this state are in conflict in their analysis or articulation of the law. Indeed, Quach's comparison of the facts of this case with the facts of the unpublished opinion in *Blumenthal v. Jones*[1] as an example of a divergence of opinions falls flat on its face. (Pet. pp. 35-37.)

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[1] *Blumenthal v. Jones* (May 27, 2020, G057864) 2020 WL 2745251 [nonpub. opn.] (*Blumenthal*).

In *Blumenthal*, the Fourth District Court of Appeal held that the moving defendants waived the right to arbitrate after they engaged in extensive motion practice (multiple demurrers and a motion to strike), requested rescheduling a trial date seven months away, and participated in months-long meet-and-confer process without ever producing a single document. (*Blumenthal*, at *9.) It was not until after the demurrers were largely overruled and the plaintiff had moved to compel discovery and seek sanctions, that defendants requested arbitration. (*Ibid.*) The trial court found defendants' "conduct constituted 'bad faith' as 'part of a deliberate strategy . . . to use the litigation process to their advantage if possible, and pursue arbitration only if that failed.'" (*Id.* at *1.)

On appeal, the trial court's waiver finding was affirmed and defendants were *sanctioned* for pursuing an objectively frivolous appeal in bad faith as the justification "for belatedly seeking arbitration was so palpably weak." (*Blumenthal*, *supra*, at *18.) The Court of Appeal condemned defendants and their counsel, observing that "this conduct is not new for [defendants] or its counsel" as "this appellate court found similar conduct by [defendants and its attorneys] supported a waiver finding" in another matter. (*Id.* at *1.)

In contrast, in this case, *no motions* had been filed, the litigation had been brought to a near standstill for nearly six months due to the COVID-19 pandemic, and the trial date was

continued *by the court* due to pandemic-related court congestion. Further, the trial court made *no* factual finding of bad faith or that the delay in seeking arbitration was part of a deliberate tactical strategy. Indeed, as noted in the majority opinion, "[t]he record . . . is bereft of evidence that Commerce Club engaged in bad faith abuse of judicial processes akin to the defendants in *Adolph*,[[2]] 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." (Typed opn. p. 16; see also pp. 18-19 [the dissent's contention "we should infer from Commerce Club's 'lack of candor' [with respect to locating the arbitration agreement] that Commerce Club deliberately delayed the proceedings . . . is pure speculation, and goes far beyond the trial court's findings, which were that Commerce Club's explanations did not excuse the delay"].)

Despite the clear factual differences between the two matters, Quach brazenly asserts "the Second District Court of Appeal reversed the trial court's waiver finding in the instant case on nearly indistinguishable facts" from *Blumenthal*. (Pet. p. 36.) The similar facts of filing case management

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[2] *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443 (*Adolph*)

statements requesting a jury trial and serving discovery were hardly the dispositive factors.[3] There is no material basis of comparison between this case and *Blumenthal*.

Nor has Quach shown any inconsistency exists among the published Court of Appeal opinions. Quach contends the various appellate courts diverge in their application of the *St. Agnes* test and the prejudice factor, but a review of the cases cited by Quach shows the courts apply the waiver factors consistently.

For example, in *Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651 (*Khalatian*), the Court of Appeal found the delay in asserting arbitration insufficient to support waiver because there was no judicial litigation of the merits (demurrer and motion to strike were taken off calendar), "no evidence that defendants stretched out the litigation process, gained information about plaintiff's case they could not have learned in arbitration, or waited until the eve of trial to compel arbitration." (*Id.* at pp. 662-663.)

---

[3] The Petition also claims Commerce Club resisted discovery and "strung Mr. Quach along with respect to key third-party witnesses." (Pet. p. 36.) The record contains no evidence to support any such conclusion. The pandemic forced Commerce Club to close its operations, impacting access to information and witnesses. (AA 64.) Commerce Club employees involved in Mr. Quach's termination were furloughed and unavailable for deposition. (AA 107.) As the Court of Appeal properly determined "[t]here is no indication the trial court inferred nefarious intent, nor shall we on this record." (Typed opn. p. 19.)

Whereas in *Oregel v. PacPizza, LLC* (2015) 237 Cal.App.4th 342 (*Oregel*) and *Adolph*, *supra*, 184 Cal.App.4th 1443, the appellate courts affirmed the trial court's finding of waiver where the defendants manipulated the litigation forum for their own benefit before seeking to compel arbitration. (See *Oregel*, at pp. 356-360 [defendant took full advantage of class discovery but when it appeared the class was going to be certified, it compelled arbitration to prevent certification]; *Adolph*, at p. 1452 ["We are loathe to condone conduct by which a defendant repeatedly 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), all the while not breathing a word about the existence of an arbitration agreement, or a desire to pursue arbitration, and, in fact, withholding production of the arbitration agreement until after the demurrer hearing on the day the demurrer is overruled"].)

Thus, rather than being in conflict, the courts of appeal are consistently applying the relevant factors in assessing waiver claims. There is no demonstrable need for guidance from this Court.

CONCLUSION

For the foregoing reasons, review should be denied.

DATED: July 7, 2022

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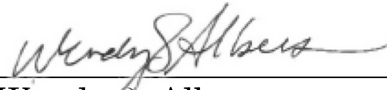

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Pursuant to California Rules of Court, rule 8.504(d), I certify that the total word count of this Answer to Petition for Review, excluding covers, table of contents, table of authorities, and certificate of compliance, is 2,835.

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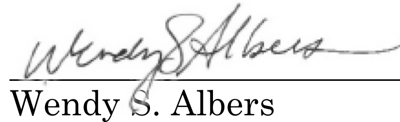

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Executed on July 7, 2022, at Woodland Hills, California.

/s/Tina Lara
Tina Lara

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