No. S275121

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

REPLY TO ANSWER TO PETITION FOR REVIEW

DILIP VITHLANI (SBN 199474)
LAW OFFICES OF DILIP VITHLANI, P.C.
18000 Studebaker Road, Ste. 700
Cerritos, CA 90703
Telephone: (562) 867-6622

JONATHAN J. MOON (SBN 282522)
THE LAW OFFICE OF JONATHAN J. MOON
18000 Studebaker Road, Ste. 700
Cerritos, CA 90703
Telephone: (213) 867-1908

*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., Ste. 300
Santa Monica, CA 90402
Telephone: (424) 258-5190

ATTORNEYS FOR PLAINTIFF-PETITIONER PETER QUACH

July 18, 2022

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I. INTRODUCTION

This Court's review is necessary after the U.S. Supreme Court's decision in *Morgan v. Sundance, Inc.* (2022) 142 S.Ct. 1708—both for cases controlled by the Federal Arbitration Act (FAA) and cases controlled by the California Arbitration Act (CAA). *Morgan* is a case controlled by the FAA, but it calls upon lower and state courts to determine which ordinary contract law doctrines or procedural rules govern the question of whether the contractual right to arbitrate has been relinquished under the FAA, *i.e.*, "waived."[1] As the final authority on California law and interpretation of California statutes, only this Court can answer how the mandate of *Morgan* will apply in California courts in cases controlled by the FAA. Similarly, for cases controlled by the CAA, this Court should review whether the multi-factor, non-exhaustive test, announced in *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, continues to govern—as opposed to the same ordinary contract law doctrines and procedural rules that now govern under the FAA per *Morgan*.

The instant case is indeed the ideal factual and procedural vehicle for addressing these post-*Morgan* issues. The parties disputed below whether the FAA or the CAA controlled the waiver inquiry, but agreed—before *Morgan*—that the standards and result would be the same under either. (*Compare* AA096 *with*

[1] As in the Petition, this Reply adopts the term "waiver" for ease of reference, through *Morgan* recognizes that relevant state-law doctrines might include, for example, "forfeiture, estoppel, laches, or procedural timeliness." (*Id.* at 1712.)

AA144.) Importantly, the text of the arbitration contract at issue does not specify whether CAA or FAA governs. (AA83-84.) Neither lower court had to decide the choice-of-law question because, until *Morgan*, the FAA and CAA were harmonized on the issue of waiver per *St. Agnes*. By squarely presenting both the FAA and CAA simultaneously, this case is a timely opportunity to (i) answer the questions of state law left open by *Morgan* under the FAA; and (ii) bring the CAA's waiver analysis back into harmony with its equivalent under the FAA.

Respondent's Answer to Petition for Review urges the Court to "[p]ut[] aside whether this case is governed by the FAA or the [CAA]." (Ans. 5.) But this attempt to side-step the choice-of-law issue, in fact, begs the question. California courts analyzing waiver could and did put the issue aside prior to *Morgan* (like the courts below), but no longer can. *Morgan* makes clear that the FAA does not authorize courts to invent arbitration-specific rules, such as a prejudice requirement for the waiver analysis, while *St. Agnes* literally creates a bespoke, multi-factor waiver test with a "critical" prejudice factor. Confusion will remain until this Court intervenes and clarifies how to apply *Morgan* given the mandate of *St. Agnes* in FAA cases. Confusion will also remain as to whether the FAA and CAA waiver standards differ and, if so, what the CAA's waiver standard is. In cases like this one, the distinction could be outcome determinative—squarely presenting the issue to this Court.

The Court should, therefore, reject Respondent's "move along, nothing to see here" approach. The Court should, instead, grant

review to provide much-needed guidance to courts applying the holding of *Morgan*.

If the FAA controls here, then *Morgan* applies directly, and the Court of Appeal below applied an arbitration-specific procedural rule that *Morgan* bars—but only this Court can determine the correct procedural standard or contract law doctrine. Indeed, *Morgan* invites this Court's determination of those questions. Respondent's description of the "sole holding" of *Morgan* (Ans. 5) is divorced from the context in which it appears:

> [T]he 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.*** The Courts of Appeals, including the Eighth Circuit, have generally resolved cases like this one as a matter of federal law, using the terminology of waiver. For today, we assume without deciding they are right to do so. We consider only the next step in their reasoning: that they may create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's "policy favoring arbitration." They cannot. For that reason, the Eighth Circuit was wrong to condition a waiver of the right to arbitrate on a showing of prejudice.
>
> . . .
>
> Stripped of its prejudice requirement, the Eighth Circuit's current waiver inquiry would focus on Sundance's conduct. Did Sundance, as the rest of the Eighth Circuit's test asks, knowingly relinquish the right to arbitrate by acting inconsistently with that right? On remand, the Court of Appeals ***may resolve that question, or (as indicated above) determine that a different procedural framework (such as***

> ***forfeiture) is appropriate***. Our sole holding today is that it may not make up a new procedural rule based on the FAA's "policy favoring arbitration."

(*Morgan*, 142 S.Ct. at 1712-14 (emphases added).)

Morgan explicitly leaves open, and effectively delegates to lower and state courts, "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 "whether to understand that inquiry as involving rules of waiver, forfeiture, estoppel, laches, or procedural timeliness." (*Id.* at 1712.) Review is therefore appropriate—particularly since this Court is the final arbiter of California law—to provide guidance for lower courts applying the FAA to California contracts given the current disparity between *St. Agnes* and *Morgan*.

If the CAA controls here, then only this Court can revisit *St. Agnes* and either overturn, modify, or reaffirm it considering *Morgan*'s parallel guidance under the FAA. *St. Agnes* represented an attempt to keep FAA and CAA waiver jurisprudence uniformly consistent—presumably to avoid questions of preemption and inefficient litigation regarding which controlled. *Morgan* destroyed that uniformity, but this Petition provides an opportunity to unify the now-divergent standards once more.

For instance, perhaps California's ordinary substantive contract-law defense of waiver supplies the relevant standard under both the FAA and the CAA. (*See* Pet. 25.) If so, prejudice to the party asserting waiver is not relevant, and *St. Agnes*—with its "critical" focus on such prejudice—must be explicitly abrogated. As another example, this Court has announced a rule of "equitable

forfeiture," distinct from waiver, "which results when a party fails to preserve a claim by raising a timely objection." (*Lynch v. Cal. Coastal Com*. (2017) 3 Cal.5th 470, 475; *see also Morgan*, 142 S.Ct. at 1713.) Either way, like the Eighth Circuit rule in *Morgan*, the "waiver inquiry would focus on [Respondent's] conduct," not prejudice to Mr. Quach, as the Court of Appeal below did. (*Id.* at 1714.)

Respondent's observation that *Morgan* does not explicitly "abrogate *St. Agnes*" misses the point. (Ans. 5.) *Morgan* was an FAA, not CAA, decision and did not implicate a California contract (like the instant case does). Yet, *Morgan* does explicitly abrogate the "decades-old Second Circuit decision," *Carcich*, from which the FAA's arbitration-specific prejudice requirement derived—the same decision from which the CAA's arbitration-specific prejudice requirement ultimately derives. (Pet. 27.) *Morgan* thus represents a "substantial shift in the prevailing understanding" of federal law, justifying the reconsideration of *St. Agnes* under this Court's *stare decisis* policy. (*See People v. Lopez* (2019) 8 Cal.5th 353, 381.)

In either instance—whether the FAA or the CAA controls this case—this Court's review is necessary to clarify the proper state contract law and/or procedural rules governing the inquiry into whether the contractual right to arbitrate has been relinquished. And unless this Court determines that the FAA and the CAA waiver inquiries should be re-harmonized, courts and litigants like Respondent will no longer be able to "[p]ut[] aside the issue." (Ans. 5.) This case presents a timely opportunity to answer all these

questions, which *Morgan* invites this Court to address, and which *St. Agnes* makes necessary to address.

II. LEGAL DISCUSSION

A. *Morgan* necessitates this Court's review to determine which California contract law standards and procedural rules govern waiver of the right to arbitrate under the FAA, and whether the CAA should be interpreted identically.

If the FAA controls the waiver inquiry here, then *Morgan* directly requires vacatur of the Court of Appeal's decision. (*See Morgan*, 142 S.Ct. at 1714 ("Section 6 instructs that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA.").) Critically, however, *Morgan* does not decide what the correct standard is for determining if a contractual right to arbitrate has been legally abandoned. *Morgan* calls upon lower and state courts to determine, in cases controlled by the FAA, "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 "whether to understand that inquiry as involving rules of waiver, forfeiture, estoppel, laches, or procedural timeliness." (*Morgan*, 142 S.Ct. at 1712.) This Court is well-equipped to answer those pure questions of law and should grant review to do so.

If this case is controlled by the CAA, the Court should take the opportunity to reconsider *St. Agnes* in light of *Morgan*. Respondents do not dispute that *Morgan* overturned the very federal precedent upon which *St. Agnes* ultimately relied to announce a similar prejudice requirement under the CAA. (Pet.

27.) Given the newfound divide between the CAA and the FAA, the Court should also grant review to determine whether to re-harmonize the CAA with its federal counterpart.

The instant case squarely presents all these questions. In substance, Respondent argues only that the Court should wait for a different case to examine the impact of *Morgan*. Its points are unavailing.

1. In finding against waiver, the Court of Appeal majority relied heavily on the absence of prejudice—irrelevant under ordinary California contractual and procedural law of waiver.

Numerous passages in the Court of Appeal's majority opinion reveal that the perceived absence of the correct kind of prejudice fueled its decision. (*See Quach v. California Commerce Club, Inc.* (2022) 78 Cal.App.5th 470, 478 ("The question of prejudice, however, 'is critical in waiver determinations.'"); *id.* ("'The presence or absence of prejudice from the litigation is a determinative issue' in waiver analysis."); *id.* ("[W]e conclude Quach's showing of prejudice was inadequate as a matter of law, and he therefore failed to meet his 'heavy burden' below."); *id.* at 479 ("Quach has not met *St. Agnes*'s test. . . . Quach has not shown any prejudice apart from the expenditure of time and money on litigation."); *id.* at 481 ("[T]he showing of prejudice and/or undue delay in those cases was qualitatively different from Quach's showing here.").) Even the purported analysis of the other *St. Agnes* factors, such as the length of delay, still focused on prejudice. (*See id.* at 484 ("Rather, what makes the delay 'unreasonable' is that it negatively impacts the party resisting

arbitration.").) Indeed, each passage quoted by Respondent as supposedly being "grounded on other factors" is, in fact, some variant of the prejudice argument. (*See* Ans. 8-9.)

But, if the FAA controls here, *Morgan* makes quite clear that the proper waiver inquiry does not focus on prejudice unless the applicable "ordinary procedural rule" does so. (*Morgan*, 142 S.Ct. at 1713.) Thus, this case squarely presents this Court with the question of which ordinary California rule of contract or procedure—"waiver or forfeiture or what-have-you"—governs this question with respect to California contracts, and whether that rule demands a showing of prejudice. (*Id.*) If the answer is California's ordinary substantive contract defense of "waiver," then as explained in the Petition, prejudice has no role to play. (Pet. 25; *see also Infra* Part II(A)(2).)

Other, similar doctrines in California law, such as forfeiture or estoppel, also could potentially apply. (*See Lynch*, 3 Cal.5th at 475-76 ("Waiver differs from estoppel, which generally requires a showing that a party's words or acts have induced detrimental reliance by the opposing party. … It also differs from the related concept of forfeiture, which results when a party fails to preserve a claim by raising a timely objection. … Although the distinctions between waiver, estoppel, and forfeiture can be significant, the terms are not always used with care. As we have observed previously, forfeiture results from the failure to invoke a right, while waiver denotes an express relinquishment of a known right; the two are not the same.") (cleaned up).) This Court should clarify

what the appropriate analysis is for lower courts in cases controlled by the FAA.

If the CAA controls here, the question is whether *St. Agnes* and its prejudice requirement continue to govern despite *Morgan*'s guidance. Perhaps ironically, Respondent demonstrates the need for review by persisting that *St. Agnes* remains applicable irrespective of whether the CAA or the FAA applies and arguing the Court should affirm based on its "other" factors. (Ans. 7-9.) At a minimum, to avoid further confusion over the applicability of *St. Agnes* to cases under the FAA, the Court should grant review to clarify that *St. Agnes* is indeed abrogated to the extent it announces a prejudice requirement based on now-overturned federal precedent.

Respondent would have the Court wait to take up these issues until a Court of Appeal opinion is "exclusively grounded on the absence of prejudice." (Ans. 9.) But that will never happen; *St. Agnes* approves a non-exhaustive list of factors, and it is unlikely that a decision from the Court of Appeal will have "exclusively" considered prejudice. Whether intended or not, *St. Agnes*'s designation of prejudice as a "critical" factor has resulted in courts below (like the majority opinion) treating prejudice as a necessary element of establishing waiver of the right to arbitrate.

The instant case presents the Court with as clean a factual and procedural record with respect to waiver as possible. There are no factual disputes in this case related to Respondent's belated assertion of its right to arbitrate and conduct preceding. Respondent waited for over a year to petition to compel arbitration

after Mr. Quach filed suit, despite undisputedly being aware all along of the existence of a signed arbitration agreement. During that year, Respondent displayed an intention to proceed in court by any objective metric—demanding a jury trial, posting jury fees, scheduling the jury trial, serving discovery, and resisting Mr. Quach's discovery. The facts relevant to the waiver analysis, therefore, come to this Court undisputed and well-analyzed. The open questions after *Morgan* are what sets of rules apply under the FAA and the CAA to evaluate those facts—a question this Court alone can answer for California.

2. Under ordinary standards for relinquishment of a right, the inquiry focuses on the conduct of the party belatedly seeking to assert the right.

Seeking to minimize the impact of *Morgan*, Respondent argues against review, urging that the majority opinion below can be affirmed because "the result in this case is correct even without considering the lack of prejudice as a factor." (Ans. 12.) But aside from citing *St. Agnes*'s "other" factors, Respondent offers no guidance as to what the proper standard under the FAA should be after *Morgan* or why the instant case's outcome would be the same under that standard. As the Petition demonstrated, the outcome would almost certainly have been different under a post-*Morgan* analysis.

Under the logic of *Morgan*, the standard applicable to California contracts might be California's ordinary substantive waiver defense against the enforcement of any contract. (Pet. 25.) If so, then for California contracts (like the contract here), waiver has two elements: (1) "that [Respondent] knew [Mr. Quach] was

required to [arbitrate];" and (2) "that [Respondent] freely and knowingly gave up [its] right to have [Mr. Quach] perform [this] obligation." (Judicial Council of California Civil Jury Instructions, series 300 ("Contracts"), § 336 ("Affirmative Defense – Waiver"); *see also Lynch*, 3 Cal. 5th at 475 ("As we have explained in various contexts, 'waiver' means the intentional relinquishment or abandonment of a known right.").) Additionally, "[a] waiver may be oral or written or may arise from conduct that shows that [Respondent] gave up that right." (CACI § 336.) Indeed, California courts have explained, in distinguishing the concept of waiver from the concept of estoppel, that establishing waiver does not require a showing of any kind of "detrimental reliance" or other kind of prejudice on behalf of the party asserting waiver—waiver focuses only on the conduct and intention of the waiving party. (Pet. 25.)

Alternatively, perhaps this Court's definition of "equitable forfeiture" supplies the proper California standard. (*See, e.g.*, *Lynch*, 3 Cal.5th at 476 ("As we have observed previously, forfeiture results from the failure to invoke a right, while waiver denotes an express relinquishment of a known right; the two are not the same.") (citation omitted).) If so, again, the focus is on the conduct of the forfeiting party, and prejudice to the party asserting forfeiture is not a relevant consideration. (*Id.* at 473 ("We hold that the owners forfeited their challenge because they accepted the benefits the permit conferred.").) And there are other possibilities, which the parties should have the opportunity to brief fully on the merits. It falls to this Court to determine what California contract

doctrine or procedural rules apply to contracts providing a right to force arbitration under the *Morgan* framework.

Hence, why the instant case is indeed the ideal factual and procedural vehicle for taking up these issues. The trial judge below, and the dissent from the Court of Appeal's decision (written by a superior court judge sitting by designation), found that Respondent waived arbitration through its intentional conduct in these circumstances. The panel majority disagreed, explaining that its "holding here is based on Quach's failure to show anything beyond what *St. Agnes Medical Center* already has declared insufficient to prove waiver." (*Quach*, 78 Cal.App.5th at 484.) Thus, the question of whether *St. Agnes*'s prejudice requirement remains valid after *Morgan* is squarely presented by the record.

B. Review is warranted because the *St. Agnes* test results in disparate outcomes in similar cases, fostering delay and gamesmanship inconsistent with both federal and state policy "favoring" arbitration as a speedy alternative to court.

Finally, by taking up these post-*Morgan* FAA and CAA issues, the Court has the unique opportunity to adopt a standard that will not only result in more consistent outcomes, but also achieve the policy goal of arbitration as a speedy alternative to court by curtailing delay tactics that are increasingly common. Respondent's characterization of *St. Agnes*—that "[w]hether a party has waived the right to arbitrate necessarily turns on the facts of each case" (Ans. 12)—illustrates the point. The malleability of the existing *St. Agnes* test gives defendants—particularly employers and big business defendants—the ability to

test the water in court for a year, then engender unfair delay by belatedly petitioning to compel arbitration, but avoid waiver by arguing a lack of prejudice to employees or consumers from such delay. (Pet. 38-40.) The *St. Agnes* test creates significant, case-specific litigation having nothing to do with the merits of any claims, but rather delving into the minutiae of trial court proceedings, discovery, case management, and motion practice. (Pet. 35-38.) Then, when defendants lose a petition to compel arbitration, they have the right to take an interlocutory appeal, creating further delay over forum selection while the merits are effectively paused pending the appeal.

Contrary to Respondents' assertion (Ans. 13-16.), Petitioner does not seek this Court's review because Petitioner's case presents an outcome that diverges from an *identical* factual and procedural pattern to *other* decisions by the Courts of Appeal. Rather, Petitioner has cited to cases with *similar* procedural and factual histories to illustrate how commonplace the tactic has become to engage in nearly a year or more of trial court proceedings and then belatedly seek to compel arbitration. (Pet. 37-38.)

But *Morgan* now requires that this Court adopt a new standard at least in cases controlled by the FAA. Viewed in that light, the procedural distinctions highlighted by Respondents (Ans. 13-16) demonstrate why review by this Court is particularly appropriate here. If the FAA standard for determining whether the right to arbitrate had been relinquished because of waiver, estoppel, forfeiture, timeliness, or some other doctrine, the

procedural distinctions noted by Respondents would inform the FAA analysis in a manner that is significantly different than *St. Agnes* would have required before *Morgan*.

The instant case illustrates the point. Under the mandate of *Morgan*, one appropriate inquiry may be the "bad faith" of the party alleged to have waived. Respondent argues the record "contains no evidence to support" a finding of bad faith (Ans. 15 n.3), but in fact, the record reflects that the timing of Respondent's petition to compel arbitration coincided with its informing Mr. Quach that it had furloughed key third-party witnesses, meaning he would have to subpoena their testimony—a procedure not available in arbitration, which Respondent then sought to compel. (Pet. 15-18; *see also Quach*, 78 Cal.App.5th at 489 (Crandall, J., dissenting).) Moreover, Respondent does not dispute its knowledge of the right to arbitrate as demonstrated by its assertion of a right to arbitrate in its answer to the complaint, its conduct inconsistent with such a right such as asking the court for a jury trial and posting of jury fees, and its participation in trial court proceedings for a year. (Pet. 15-18; *see also Quach*, 78 Cal.App.5th at 489-90 (Crandall, J., dissenting).) Under *Morgan*'s mandate that ordinary California waiver law apply, it is likely that Respondent would be found to have waived its right to arbitrate.

But why should this be the result only where the FAA controls, but not where the CAA controls, given their identical statutory mandates and stated policy goals "favoring" arbitration? (*See OTO, LLC v. Kho* (2019) 8 Cal. 5th 111, 125.) This Petition provides this Court the opportunity—given the FAA's new

procedural requirements under *Morgan*—to harmonize the CAA and the FAA and replace the *St. Agnes* test for both with the neutral rule of California contract or procedure that would otherwise govern the question of whether a party is no longer able to enforce a contractual right to arbitrate (such as the ordinary legal doctrine of waiver or forfeiture).

After *Morgan*, at least in federal courts, it is clear that the FAA's mandate requires focus on the timeliness and conduct of the party belatedly seeking to enforce a contractual arbitration right, rather than on the prejudice to the party asserting waiver. (*Morgan*, 142 S.Ct. at 1714 ("Stripped of its prejudice requirement, the … current waiver inquiry would focus on Sundance's conduct").) This will almost certainly have the positive effect of incentivizing defendants in federal courts to seek arbitration promptly if they desire to enforce their contractual rights to do so. Lower courts applying the FAA should be provided guidance by this Court as to what the inquiry of enforceability should be given *St. Agnes*'s procedural rule is unique to arbitration and therefore barred by *Morgan*, and there is good reason for this Court to consider whether the same should be true where CAA governs. For the orderly and efficient administration of proceedings in the lower courts, this Court should grant review to determine whether the CAA and FAA should be interpreted consistently, as *St. Agnes* previously sought.

III. CONCLUSION

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

Dated: July 18, 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 REPLY TO ANSWER TO PETITION FOR REVIEW uses a 13-point Century Schoolbook font and contains 3,883 words.

Dated: July 18, 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

PROOF OF SERVICE

I certify that the foregoing REPLY TO ANSWER TO PETITION FOR REVIEW was electronically served on the following interested parties on July 18, 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 **Benedon & Serlin, LLP** Wendy S. Albers wenty@benedonserlin.com Gerald M. Serlin (gerald@benedonserline.com) 22708 Mariano Street Woodland Hills, CA 91367

Dated: July 18, 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

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Wendy Albers Benedon & Serlin LLP 166993	wendy@benedonserlin.com	e-Serve	7/18/2022 1:38:27 PM
Dilip Vithlani Law Offices of Dilip Vithlani, APC	dilipvithlani@yahoo.com	e-Serve	7/18/2022 1:38:27 PM
Susan Donnelly Benedon & Serlin, LLP	admin@benedonserlin.com	e-Serve	7/18/2022 1:38:27 PM
Tina Lara Benedon & Serlin, LLP	accounts@benedonserlin.com	e-Serve	7/18/2022 1:38:27 PM
Nilay Vora The Vora Law Firm, P.C. 268339	nvora@voralaw.com	e-Serve	7/18/2022 1:38:27 PM
William Odom The Vora Law Firm, P.C. 313428	will@voralaw.com	e-Serve	7/18/2022 1:38:27 PM

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Vora, Nilay (268339)

Last Name, First Name (PNum)

The Vora Law Firm, P.C.

Law Firm