No. S275121

In the Supreme Court of the State of California

PETER QUACH,

Plaintiff-Appellant,

v.

CALIFORNIA COMMERCE CLUB, INC.,

Defendant-Appellee.

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

APPELLANT'S OPENING BRIEF ON THE MERITS

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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" or "determinative" 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 concentrates 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.)

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*

[1] As both cases explain, the term "waiver" has become a shorthand term for the loss of the contractual right to. (*St. Agnes*, 31 Cal.4th at 1195 n.4; *Iskanian*, 59 Cal.4th at 374.) While this Brief generally adopts the same shorthand, the time has come for this Court, as in *Morgan*, to clarify that there is no unique waiver test bespoke to the arbitration context.

A/B Nordie (2d Cir. 1968) 389 F.2d 692 (*Carcich*), and similar 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 inquiry 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 or lost 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), unlike the FAA, authorize the creation of an arbitration-specific rule of "waiver" requiring an inquiry into 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 core issues that now must be decided by this Court following the U.S Supreme Court's unanimous opinion in *Morgan v. Sundance*. For decades, this Court has interpreted the CAA and the FAA to be identical in operation, given the identical language of their statutory commands. But federal law under *Morgan* now diverges dramatically from present California law on the enforceability of arbitrations.

The recent *Morgan* decision abrogates—at least in cases arising under the FAA—the arbitration-specific waiver rule established by *St. Agnes* in 2003 and modified by *Iskanian* in 2014, which makes prejudice the "determinative" factor when inquiring whether a party has waived its contractual right to arbitration by participating in litigation. Instead, *Morgan* requires that ordinarily applicable contract law govern all questions of enforceability of an agreement to arbitrate. *Morgan* directs federal courts to treat questions on the enforceability of arbitration contracts the same as they would treat such questions arising from any other contract—a principle of neutrality. *Morgan* considered and rejected bespoke arbitration waiver rules that required prejudice to a party asserting waiver where ordinary contract waiver analysis would have no such prejudice requirement—

barring application of the arbitration-specific waiver rule of *St. Agnes* in cases arising under the FAA.

While *Morgan* abrogated *St. Agnes* in cases controlled by the FAA, *Morgan* left open to lower courts to determine the appropriate state law contract principles that would replace bespoke waiver tests requiring arbitration. As the final arbiter of state law, this Court should announce that courts hearing cases where the FAA controls are required to apply the usual rule for waiver of a contractual right—*i.e.*, knowledge of the right and express or implied relinquishment of that right.

But given the identical statutory commands of the CAA and the FAA—and their shared policy of ensuring that arbitration agreements are enforceable in the same manner as other contracts—this Court should also explicitly bring the CAA back in harmony with the FAA by declaring that the same ordinary contract rule for waiver applies in cases arising under the CAA. Just as *Morgan* engaged in a course-correction to realign federal law governing enforceability of arbitrations, so too should this Court course-correct decades of precedent that misinterpreted the CAA's legislative command and cases that created arbitration-specific rules that are not only inconsistent with, but also unauthorized by, the legislative text of the CAA. By creating a waiver test specific to arbitrations in *St. Agnes*, this Court deviated from the legislative command of the CAA. This creation of a bespoke rule for waiver of contractual arbitration rights is a sharp divergence from *every* other decision of this Court—which

uniformly apply the usual contract law principles when determining the enforceability of an arbitration contract.

Irrespective of whether the CAA or the FAA controls, applying the ordinary test of contractual waiver to an undisputed factual record here, the Court should reverse the decision by the Court of Appeal and instead affirm the Superior Court's finding of waiver by Commerce of its right to force Mr. Quach into an arbitration. The Superior Court persuasively found that Commerce's demonstrated knowledge of its own arbitration policy and agreement, combined with Commerce's extensive litigation conduct that was inconsistent with—and even barred by—the express terms of that arbitration agreement, demonstrated the express and implied intention to relinquish the right to arbitrate. The Court of Appeal should be reversed, the finding of waiver by the trial court should be affirmed, and Mr. Quach should be permitted on remand to expeditiously litigate before the trial court.

III. STATEMENT OF CASE

A. Factual Background

1. Peter Quach's employment and termination.

Plaintiff-Appellant Peter Quach is a currently 73-year-old man (who was 69 at the time of termination) of Vietnamese descent. (AA010.) [2] In 1989, Defendant-Appellee California Commerce Club, Inc. ("Commerce") hired Mr. Quach as a

[2] Mr. Quach's record citations use the following format: "AA" (appellant's appendix) and "AR" (augmented record).

"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 Commerce fired him. (AA011.)

In 2015, Commerce 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 written up and suspended, for the first time in his career, in April 2016 over a trivial non-issue of "failing to notify" management he discovered and changed out a misplaced Pai Gow game tile. (AA011.) The new upper management also began pressuring Mr. Quach to retire. (AA011.)

Then, in November 2018, while Mr. Quach was working his shift, Mr. Quach was called over by a dealer who questioned five $20 bills she had received from a customer. (AA011.) Mr. Quach instructed the dealer to check the bills with the counterfeit-detecting marker that Commerce provided to all dealers. (AA011.) The dealer checked the bills and determined they were genuine, so she accepted them in exchange for chips. (AA011.) Later, one of Commerce's cashiers alleged that the bills were in fact counterfeit. (AA011.) Mr. Quach received a call at home informing him that he was being suspended over the incident. (AA011.) He was then called into an office and interrogated, during which he was accused of being dishonest. (AA011.) Days later, he learned he was being terminated from his twenty-nine year career with Commerce. (AA011.)

2. Commerce's arbitration agreement and its execution.

In 2015 (the same year as the shift in upper management), Commerce's Human Resources Department notified all casino employees they were required to attend a meeting about arbitration. (AA073.) Commerce 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. (AA073.) The "arbitration meetings ran 24 hours a day, every 30 minutes with the exception of the attendants' meal breaks." (AA073.) The video explained that signing the arbitration agreement was a "condition of continued employment" and that employees had thirty days to sign it. (AA073-74, AA083-84.) Mr. Quach signed and returned his two-page copy of the arbitration agreement the same day so he could get back to work. (AA047, AA083-84.)

B. Superior Court Proceedings

1. Commerce 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 Commerce. (*See* Labor Code §§ 1198.5 (personnel file), 226 (wage statements), 432 (instruments executed).)[3] In response, on November 8, 2019,

[3] Mr. Quach also exhausted his administrative remedies prior to filing suit, as Appellee did not dispute below. (AA011.)

Commerce 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.) Commerce would later produce the full, two-page agreement in discovery. (AA083-84.) 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, AA112.)

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 Commerce in Los Angeles Superior Court for age discrimination, retaliation, harassment, and other related claims. (AA008.) The case was assigned to the Hon. Michael L. Stern. Commerce filed its Answer on January 7, 2020, asserting its right to arbitration as an "affirmative defense," though Commerce declined to move to compel arbitration as permitted by Code of Civil Procedure § 1281.2 and 9 U.S.C. § 3. (AA031.) Commerce did not demand a jury trial at that time.

3. Commerce declined to assert a contractual right to arbitrate in its case management statement and instead demanded and scheduled a jury trial, posted jury fees, and initiated discovery.

A case management conference was held on February 28, 2020. (AA93, 105.) Commerce 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, Commerce 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).) Commerce posted jury fees and filed a Notice of Posting of Jury Fees on March 3, 2020 (AA105; AR019.)

The parties promptly initiated discovery with both sides propounding the full range of written discovery, followed by nine months of meet-and-confer discussions (AA105-08) and depositions that continued until September 16, 2020. (AA107.) Early in this process, Commerce produced the other page of Mr. Quach's arbitration agreement on March 5, 2020. (AA106, AA117.)

During this period, Mr. Quach also requested the depositions of several key employees of Commerce. (AA099-100.) Commerce 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, Commerce took Mr. Quach's deposition for a full day on June 23, 2020, with a planned second session to be scheduled. (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.) Commerce responded that no other employees had complained of age discrimination since 2015. (AA124.) But Commerce'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 Commerce in Los Angeles Superior Court alone since 2015. (AA135.)

4. Commerce moved to compel arbitration.

With pre-trial proceedings going badly, Commerce moved to compel arbitration on December 23, 2020, more than a year after

Mr. Quach filed his lawsuit. (AA038.) Commerce filed its motion more than two weeks after the originally scheduled trial date, which had been continued due to the COVID-19 pandemic. Commerce'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 Commerce described as "lengthy") even though it had previously been produced in discovery. (AA049.) Mr. Quach opposed the motion on the grounds of waiver and of unconscionability. (AA087.)

5. Commerce's motion was denied on waiver grounds.

The Superior Court, Hon. Michael L. Stern presiding, found that Commerce had waived its right to compel arbitration by failing to seek arbitration sooner and denied Commerce's motion. (AA158-59 (citing *Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1048).) The trial 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

Commerce took an interlocutory appeal from the order denying its motion 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 485.) San Luis Obispo Superior Court Visiting Judge Charles Crandall dissented on both grounds. (*Id.* at 485-90.)

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 test and its direction to inquire as to the prejudice to the party asserting waiver resulting from the participation in litigation by the party now seeking to arbitrate: "Quach's showing of prejudice was inadequate as a matter of law, and he therefore failed to meet his 'heavy burden' below." (*Id.* at 478 (quoting *Iskanian*, 59 Cal.4th at 375).) In its statement of the "[a]pplicable law," the Court of Appeal cited the six-factor test set forth in *Iskanian*. (*Id.* at 477 (citing *Iskanian*, 59 Cal.4th at 375).)

However, in its actual analysis, the Court of Appeal focused exclusively on the sixth factor of "prejudice" and, in doing so, relied on *St. Agnes*'s declaration that "the question of prejudice, however, is 'critical in waiver determinations.'" (*Id.* at 478 (quoting *St. Agnes*, 31 Cal.4th at 1203); *see also id.* at 474 ("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.") (citing *St. Agnes*, 31 Cal.4th at 1203).) According to the majority, despite a delay of almost a year, "Quach ha[d] not met *St. Agnes*'s test." (*Id.* at 479.)

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 488 (quoting *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125).) Judge Crandall went on to observe:

> 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 489-90.)

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 490.)

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).)[4]

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[4] 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 v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 189 (citing *Carcich*, 389 F.2d at 692).)

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 must now 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:

> 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."

(*Id.* at 1714 (emphasis added, citations omitted).)

IV. ARGUMENT

The Court of Appeal reversed the trial court's denial of Commerce's motion to compel arbitration and, instead, found that Appellant failed to demonstrate that Commerce had waived its right to arbitration by participating in litigation because "Quach's showing of prejudice was inadequate as a matter of law." (*Quach*, 78 Cal.App.5th at 478.) In so holding, the Court of Appeal imposed a prejudice requirement on Appellant that was based solely on an overly narrow application of this Court's opinion in *St. Agnes*, which in turn was based in relevant part on a line of federal cases that have since been abrogated by the U.S. Supreme Court in *Morgan*. The holding below must be reversed.

In *St. Agnes*, this Court re-established that, in cases arising under the FAA, a party does not waive its contractual right to arbitration by participating in litigation unless the party opposing arbitration was "prejudiced" by such participation. In adopting this rule for FAA cases in California, *St. Agnes* relied on a string of federal cases setting forth "prejudice" as the "determinative" issue in the waiver analysis where participation in litigation was a basis for the waiver. And while *St. Agnes* was a case arising under the FAA, because the FAA and CAA have identical statutory commands, the six-factor *St. Agnes* test has been adopted by Courts of Appeal in cases arising under the CAA, and the prejudice factor has become so "critical" or "determinative" as to operate as a *de facto* requirement in cases where the issue is whether waiver has occurred through participation in litigation.

The United States Supreme court's decision in *Morgan* now renders the *St. Agnes* framework obsolete and inapplicable in cases controlled by the FAA, but leaves to this Court to determine what ordinary California contract rule would govern such an inquiry. This Court should now overturn the prejudice inquiry established by *St. Agnes* in favor of ordinarily applicable California contract law in cases arising under the FAA and under the CAA.

First, this Court should explicitly recognize that the United States Supreme Court's decision in *Morgan* abrogates this Court's holding in *St. Agnes* that, under federal law, prejudice is a necessary or determinative factor in analyzing whether a party has relinquished its contractual right to arbitrate through participation in litigation. Under *Morgan*, the FAA instead requires courts to apply ordinary state law contract principles when inquiring whether participation in litigation resulted in the loss of a contractual arbitration right. A prejudice inquiry is only relevant if prejudice is an element of the ordinarily applicable contract law doctrine under which the arbitration right was asserted to be lost—whether that doctrine be fraudulent inducement, misconduct, estoppel, forfeiture, contractual waiver, or failure to timely perform.

Second, for cases where the CAA controls, the Court should overturn the *St. Agnes* test that requires prejudice to a party resisting arbitration to result from participation in litigation by a party prior to seeking to compel arbitration. The CAA, like the FAA, requires lower courts to apply California's ordinary laws of contract to arbitration agreements. Instead of the *St. Agnes* test,

participation in litigation should result in waiver where it meets the ordinary test for waiver of contractual rights: knowledge and express or implied intent to relinquish the right.

Third, applying the standard inquiry for waiver of a contractual right to Commerce's specific acts during its participation in the litigation, the Court should reverse the decision of the Court of Appeal and affirm the Superior Court's order denying Commerce's motion to compel arbitration. Lower courts would benefit from this Court's application of the ordinary test to the undisputed factual record in this case. The record shows Commerce's (a) actual and constructive knowledge of the arbitration right, (b) pattern of actions in litigation that were inconsistent with—and even explicitly barred by—the arbitration contract, and (c) delay of thirteen months before seeking to enforce the arbitration right. These undisputed facts are sufficient for this Court to reverse the decision of the Court of Appeal, affirm the trial court's finding of waiver, and remand to the trial court so that Mr. Quach may—finally—proceed to a jury trial and have his proverbial day in court.

A. In FAA cases, *Morgan* requires application of ordinary contract law standards for relinquishment of a contractual right—not the bespoke *St. Agnes* rule.

The Court of Appeal below reversed the trial court's finding of waiver on the grounds that "Quach's showing of prejudice was inadequate as a matter of law, and he therefore failed to meet his 'heavy burden' below." (*Quach*, 78 Cal.App.5th at 478 (quoting *Iskanian*, 59 Cal.4th at 375) (internal quotation marks omitted).)

The Court of Appeal relied on *St. Agnes* in analyzing this "showing of prejudice." (*See id.* at 478-79.) Furthermore, in placing this "heavy burden" on Mr. Quach, the Court of Appeal, like *St. Agnes* before it, was guided by "a strong public policy in favor of arbitration." (*Id.* at 479 (quoting *St. Agnes*, 31 Cal.4th at 1204) (quotation marks omitted).)

Given the abrogation of *St. Agnes* by *Morgan*, the decision of the Court of Appeal must be reversed. Instead, ordinary contract principles governing waiver of a contractual right—*i.e.* knowledge and express or implied intent to relinquish the right—must be applied to determine if Commerce relinquished its arbitration rights.

1. *St. Agnes* required lower courts to apply the then-governing federal rule that prejudice from litigation of the dispute is the determinative issue in a waiver analysis.

As is the case here, *St. Agnes* presented issues regarding "waiver" of a party's contractual right to arbitration as result of that party's previous participation in litigation of the issues to be arbitrated. (*St. Agnes*, 31 Cal. 4th at 1193.) Specifically, in *St. Agnes,* the defendant PacifiCare had moved to compel arbitration under a 2000 version of a health services agreement between itself and the Saint Agnes Medical Center *four months after* PacifiCare had sought to void the same agreement in a lawsuit it brought against Saint Agnes in a different forum under an earlier 1994 version of the agreement. (*See id.*) In *St. Agnes*, therefore, this Court was tasked with determining whether a contractual arbitration right was waived where PacifiCare—the party seeking

to enforce the arbitration clause—had initiated litigation in court to, *inter alia*, invalidate the agreement containing the arbitration provision and litigated in transferred and consolidated court proceedings for months before seeking to compel arbitration. (*Id.* at 1193-94.)

The Court began by "setting forth the rules governing waiver of arbitration agreements." (*Id.* 1195.) To begin, the Court noted that waiver had many meanings in statute and case law, but that in the context of arbitration, "waiver" is generally used as "a shorthand statement for the conclusion that a contractual right to arbitration has been lost." (*Id.* at 1195 n.4 (quoting *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315).) Because "waiver" in this broad sense can result from a variety of factual circumstances, "no single test delineates the nature of the conduct that will constitute a waiver of arbitration." (*Id.* at 1195.) Given the range of possible grounds for finding "waiver" has occurred, *St. Agnes* identified six factors that "are relevant and properly considered in assessing waiver clams." (*Id.* at 1196 (listing the six factors enumerated in *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992).). The sixth factor listed was whether any delay in seeking arbitration "affected, misled, or prejudiced the opposing party." (*Id.* (quotations and citations omitted).)

The parties in *St. Agnes* agreed the FAA controlled the arbitration provision at issue. (*Id.* at 1194.)[5] Accordingly, *St.*

[5] The Court noted in passing that "the federal and state rules applicable in this case are very similar," and thus went on to announce rules under both the FAA and the CAA. (*Id.* at 1194 .) (continued…)

Agnes directed lower courts to apply the then-current federal rule: "Under federal law, it is clear that the mere filing of a lawsuit does not waive contractual arbitration rights. The presence or absence of prejudice from the litigation of the dispute is the *determinative issue* under federal law." (*Id.* at 1203 (citing *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 188) (emphasis added).) After a review of "more recent federal authorities," *St. Agnes* concluded that "this rule remains largely intact." (*See id.* & n.6 (collecting cases).)

2. *Morgan* overturns the federal precedents upon which the bespoke *St. Agnes* waiver test was based.

Today, however, the federal rule set forth in *St. Agnes* is no longer intact. The U.S. Supreme Court abolished it in *Morgan*. For cases arising under the FAA, *Morgan* abrogates this Court's affirmation in *St. Agnes* of a federal prejudice requirement for a finding of waiver where the party seeking to compel arbitration has previously participated in the litigation of the issues to be arbitrated. On the contrary, *Morgan* expressly bars *St. Agnes*'s "determinative" prejudice inquiry to the extent that this inquiry has no basis in general principles of California contract law.

Because the parties in *St. Agnes* agreed that the FAA controlled the arbitration contract, in the strictest sense, *St. Agnes*'s pronouncements regarding the CAA are arguably dicta. (*See Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1158 (discussing what constitutes dicta).) Nonetheless, *St. Agnes* has become this Court's leading CAA waiver case. (*See, e.g.*, *Iskanian*, 59 Cal.4th at 374-75 (citing *St. Agnes*); *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1124 (same).)

Morgan expressly overruled 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 Eighth 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.*, 650 F.3d at 1120 n.4 ("trac[ing] the origins of [the Eighth Circuit's] prejudice requirement to *Carcich*").)

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.*)

The Court made clear that the FAA's "federal policy is about treating arbitration contracts like all others, not about fostering arbitration." (*Id.* 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.

For cases arising under the FAA, *Morgan* abrogates this Court's decision in *St. Agnes* and expressly bars its "determinative"

prejudice inquiry to the extent that this inquiry has no basis in general principles of California contract law. (*Id*. at 1714.)

The "determinative" prejudice inquiry established in *St. Agnes* is similarly traced back to the now-abrogated rule in *Carcich*. The Court in *St. Agnes* cited mainly to *Doers*, a decision by this Court which, in turn, relied upon *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*, 461 F.2d 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).)

St. Agnes also relied upon other federal appellate decisions establishing that a finding of prejudice was required to find waiver. (*St. Agnes*, 31 Cal.4th at 1203 n.6 (citing *Creative Solutions Group, Inc. v. Pentzer Corp.* (1st Cir. 2001) 252 F.3d 28, 32; *American Recovery Corp. v. Computerized Thermal Imaging, Inc.* (4th Cir. 1996) 96 F.3d 88, 95–96; *Walker v. J.C. Bradford & Co.* (5th Cir. 1991) 938 F.2d 575, 577; *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 694; *Rush v. Oppenheimer & Co.* (2d Cir. 1985) 779 F.2d 885, 887; *Tenneco Resins, Inc. v. Davy Int'l, AG* (5th Cir. 1985) 770 F.2d 416, 420–422).) It is clear, therefore, that *Morgan* has made the prejudice inquiry required by *St. Agnes* inapplicable to cases controlled by the FAA.

3. In FAA cases, *Morgan* now requires the usual waiver inquiry: knowledge of the contractual right and express or implied relinquishment of that right.

Morgan expressly leaves open "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.) *Morgan* recognizes, however, that the usual principles of contract law would govern such inquiries as to whether the right to arbitrate was unenforceable or had been lost. (*See id.*)

With respect to arbitration contracts governed by California law, the responsibility falls to this Court to determine what "framework" applies to this question. (*See Montana v. Wyoming* (2011) 563 U.S. 368, 377 n.5 ("highest court of [each] State" is "the final arbiter of what is state law").)

This Court, as the highest court of a State, has both power and responsibility to establish uniform waiver jurisprudence for arbitration contracts governed by California law. Instead of the *St. Agnes* bespoke test directing an inquiry into prejudice, the Court should announce that ordinary contract law principles govern the inquiry as to what litigation conduct results in the loss of a contractual right to arbitrate.

4. California's ordinary contract law has no prejudice inquiry and instead requires knowledge of the contractual right and express or implied relinquishment.

Under ordinary contract law, "[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 (quotations omitted).) Rather than focusing on prejudice to the party asserting waiver, "[w]aiver always rests upon intent" of the party alleged to have waived. (*Id.* (quoting *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107); *see also* 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.") (emphasis added, quotation marks and brackets omitted).) A party's intent may be express or implied "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.'" (*Lynch*, 3 Cal.5th at 475 (quoting *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal. App. 4th 588, 598) (quotation marks omitted).)

Thus, there simply is no prejudice requirement for a finding of waiver of any other contractual right under California law. Rather, the only inquiry relevant to the party asserting waiver is whether they expressly relinquished the right or impliedly did so by inducing a reasonable belief that the contractual right has been relinquished. (*Accord Morgan*, 142 S.Ct. at 1713 ("To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right.").)

This standard is derived from ordinary California contract law applicable to any contractual right sought to be enforced by a party. It is, therefore, the proper inquiry because the FAA requires arbitration contracts be found "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) This mandate means that arbitration contracts are "as enforceable as other contracts, but not more so." (*Morgan*, 142 S.Ct. at 1713 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404 n.12).) In other words, "a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation." (*Id.*)

The Court should further clarify, following *Morgan*, that the right to arbitrate can be lost through *any* other ordinary principle of California contract law, such as forfeiture, estoppel, laches, bad faith, fraud, misconduct, or timeliness. (*See, e.g.*, *Platt Pacific, Inc.*, 6 Cal.4th at 314-15 ("waiver" or forfeiture by "failing to timely demand arbitration"); *Engalla v. Permanente Med. Grp., Inc.* (1997) 15 Cal.4th 951, 973-74 (fraud in the inducement of the

arbitration agreement); *Wagner Constr. Co. v. Pac. Mech. Corp.* (2007) 41 Cal.4th 19, 30 ("When no time limit for demanding arbitration is specified, a party must still demand arbitration within a reasonable time. This rule is an application of the general principle of contract law articulated in Civil Code section 1657, to the effect that, '[i]f no time is specified for the performance of an act required to be performed, a reasonable time is allowed.'") (quotation omitted).)

Such an explicit holding would provide guidance to lower courts, in cases where the FAA controls, on the question seemingly left open by *Morgan*, but which is clearly answered by the FAA's mandate. (9 U.S.C. § 2 (arbitration should be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract"); *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.").) Provided that lower courts apply ordinary contract principles to arbitration contracts in the same manner as other contracts, they will comply with the FAA and *Morgan*'s holding.

B. In CAA cases, the bespoke *St. Agnes* waiver inquiry should similarly be replaced with the ordinary contract law governing waiver of a contractual right.

Here, in the trial court below, the parties disputed whether the FAA or the CAA controlled. However, both the Superior Court and the Court of Appeal ignored the distinction. The Court of

Appeal, for example, quoted indiscriminately from *St. Agnes*'s discussion of both the FAA and CAA and simply referred broadly to "*St. Agnes*'s test." (*Quach*, 78 Cal.App.5th at 479.) The Court of Appeal applied *St. Agnes* in a manner that effectively elevated "prejudice" into the "determinative" or "critical" factor when determining whether participation in litigation results in waiver of the contractual right to arbitrate under the six-factor test identified in *St. Agnes* and reiterated in *Iskanian*. (*See St. Agnes*, 31 Cal.4th at 1196; *see also Iskanian*, 59 Cal.4th at 375.)

This interpretation of *St. Agnes* to make prejudice "determinative" was consistent with numerous decisions that have elevated prejudice to be a requirement when determining if participation in litigation has resulted in the loss of a contractual arbitration right. (*See*, *e.g.*, *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1479 ("Waiver does not occur by mere participation in litigation if there has been . . . no prejudice.") (citing *St. Agnes*, 31 Cal.4th at 1203) (brackets and quotation marks omitted); *Metis Dev. LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 690 ("there must be not only 'litigation activity,' but also prejudice.") (citing *St. Agnes*, 31 Cal.4th at 1203); *Bower*, 232 Cal.App.4th at 1042 ("Prejudice is a determinative issue."); *Gamma Eta Chapter of Pi Kappa Alpha v. Helvey* (2020) 44 Cal.App.5th 1090, 1101 ("A party claiming the other party has

waived its right to arbitrate must show prejudice.") (citing *St. Agnes*, 31 Cal.4th at 1203).[6]

The negative consequences of this improper prejudice analysis in cases where participation in litigation is at issue proliferate following *Morgan* because the rules for finding waiver based on a party's participation in litigation potentially differ now for cases arising under the FAA or the CAA. A clear statement from this Court of the applicable rule under the CAA is necessary to prevent even further disarray in the case law. The Court should, once again, bring the CAA into harmony with the FAA by expressly eliminating any bespoke rules for arbitration waiver and applying general principles of contract law as appropriate.

1. <u>The text of the CAA, like that of the FAA, demands that arbitration contracts be treated like any other kind of contract.</u>

The FAA's 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.

[6] Although courts have occasionally found waiver of the right to arbitrate without a finding of prejudice, those decisions recognize how unique those findings are, as the majority of opinions have found only found a waiver of the right to arbitrate upon a finding of prejudice. (*See, e.g., Kokubu v. Sudo* (2022) 76 Cal.App.5th 1074, 1084 ("[I]t is fair to say that virtually every case that has found there to be a waiver of arbitration has cited to the existence of 'prejudice' as one of the factors present.").)

Code § 1281 (emphasis added).) Further like its federal counterpart, the CAA means that arbitration contracts are enforceable only to the same extent as any other type of contract, applying the same standards. (*See Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 98 (arbitration agreement may be "invalidated for the same reasons as other contracts"); *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 501 ("When a party to an arbitration agreement challenges the agreement as unenforceable, we decide the issue based on the same state law standards that apply to contracts generally.").) The identical text of the statutes leaves no room for divergent interpretation.

2. Outside of waiver arising from participation in litigation, the CAA requires, and this Court applies, ordinary contract principles to determine the enforceability of arbitration agreements.

Whether it be the six-factor test set forth in *St. Agnes* and *Iskanian*, or the functionally determinative prejudice analysis used by the Court of Appeal below and by other courts of appeal, California courts have adopted an analytical framework for waiver resulting from participation in litigation that departs from the generally applicable principles of contract law. In this respect, the case law regarding waiver from participation in litigation is anomalous. In other analytic contexts regarding arbitration, this Court has consistently held that doctrines governing enforceability of contracts apply in the same manner to arbitration contracts as any other contract. This consistency is to be expected given the legislative command under both the FAA and the CAA to enforce

arbitration contracts pursuant to the same terms by which any other contract would be enforced under applicable California contract law.

For instance, most recently, in *OTO, L.L.C.*, 8 Cal.5th at 117, this Court determined whether an arbitration agreement was unconscionable by applying the ordinary principles applicable to any other contract in determining whether enforcement a contract's terms were unconscionable. The Court began by reciting the general principle that "[g]enerally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA or California law." (*Id.* at 125 (citations and quotations omitted).)

The Court recognized that "[u]nconscionability can take different forms depending on the circumstances and terms at issue" but that the unconscionability doctrine's "application to arbitration agreements *must rely on the same principles that govern all contracts*" and that the "degree of unfairness required for unconscionability must be *as rigorous and demanding for arbitration clauses as for any other contract clause*." (*Id.* at 125 (emphases added).) The Court went on to recite and apply the ordinary standard for unconscionability of any contract to the arbitration contract at issue. (*See id.* at 125-37.) The Court specifically noted that application of the ordinary unconscionability standard comported with the FAA (and presumably the CAA given the identical statutory command) because it "rest[ed] on generally applicable unconscionability principles." (*Id.* at 137.)

OTO, L.L.C. is not unique; both before and after *St. Agnes*, this Court has applied generally applicable contract principles to a range of issues related to arbitration provisions, other than the possibility of "waiver" due to participation in litigation. (*See*, *e.g.*, *Engalla*, 15 Cal.4th at 973-74 (applying the general rule for fraudulent inducement as a defense to enforcing an arbitration provision); *Wagner Construction Co.*, 41 Cal.4th at 30 (applying general principles of contract law in determining whether arbitration provision was unenforceable due to delay).)

Consistent with the CAA's legislative mandate, this Court has—with the exception of *St. Agnes*—applied ordinary state contract principles to arbitration agreements without requiring any kind of unique, heightened showing on the purported basis of the CAA's policy "favoring" arbitration. *St. Agnes* is an aberration that this Court should correct by bringing the inquiry of waiver of a contractual arbitration right back into line with ordinary contract law.

3. In CAA cases, the bespoke *St. Agnes* waiver rule should be replaced by the ordinary test for waiver of a contractual right.

Both *St. Agnes*'s six-factor test and the *de facto* prejudice requirement that has developed in the wake of *St. Agnes* are bespoke rules that are inconsistent with and depart from California's ordinary rules of contract law. Both approaches arose from the presumption of a CAA policy "favoring" arbitrations. (*See St. Agnes*, 31 Cal.4th at 1203 (citing *Doers*, 23 Cal.3d at 188).) That policy, in fact, has always been merely to ensure that arbitration contracts were not *disfavored*, as evidenced by the legislative

commands of both the CAA and the FAA, which require that ordinary principles of contract law govern arbitration contracts. (*Cf. Rosenthal v. Great W. Fin. Securities Corp.* (1996) 14 Cal.4th 394, 419 ("In assessing the legal sufficiency of plaintiffs' [fraud in the execution] claims, we apply the California law of contracts generally, rather than any rules uniquely tailored to enforcement of arbitration agreements.").) The FAA and the CAA dictate that any otherwise applicable doctrine that could be used to defeat enforcement of a contractual right should be available on equal terms to defeat a contractual right to arbitrate.

The Court should determine that the CAA, like the FAA per *Morgan*, places arbitration contracts on equal footing with all other types of contracts. In other words, the Court should extend *Morgan*'s holding to the CAA and clarify that the CAA's "policy favoring arbitration" does not allow the invention of rules favoring arbitration as compared to other types of contracts. (*Morgan*, 142 S.Ct. at 1713.) As a result, ordinary principles of the loss of a right to enforce a contractual right through knowledge and acts inconsistent to constitute waiver should govern, and the CAA should be brought back into harmony with the FAA.

C. Under the ordinary doctrine of contractual waiver, the Court of Appeal should be reversed and the trial court's waiver finding affirmed.

Here, the Superior Court determined that Commerce waived its right to insist on arbitration, expressly finding that Commerce "knew of its right to compel arbitration" but that Commerce's litigation conduct "shows [] a position inconsistent to arbitrate." (AA158-59.) The Court of Appeal reversed almost entirely based

on *St. Agnes*'s specific prejudice "rule." (*See Quach*, 78 Cal.App.5th at 474 ("This [prejudice] rule has particular force here . . . .").) The Court of Appeal's erroneous imposition of a "prejudice" requirement is evident from the Court's conclusory holding that "Quach's showing of prejudice was inadequate as a matter of law," when no such "showing" should be required. (*Id*. at 478.) The decision of the Court of Appeal should be reversed, and waiver should be found based on the undisputed record applying the ordinary contract law waiver doctrine.

1. Commerce knew of its right to arbitrate.

There can be no serious dispute that Commerce was always aware of its own arbitration agreement. Since 2015, Commerce has had a company-wide policy of forcing every employee to sign an arbitration agreement as a condition of continued employment. (AA073-74.) There is no credible evidence that Commerce believed that Mr. Quach was not subject to this uniform requirement of continued employment. To the contrary, before this litigation even began, Commerce produced the signature page of Mr. Quach's arbitration agreement. (AA112.) Commerce also asserted arbitration as an "affirmative defense," demonstrating full awareness—and even assertion—of the existence of a contractual right to arbitrate. (AA031.) Knowledge is indisputable.

2. Through its own voluntary litigation conduct, Commerce expressly relinquished its right to arbitrate—or, at least, induced a reasonable belief that Commerce had abandoned arbitration.

Despite expressly asserting, before and after commencement of litigation, the existence of a contractual arbitration right,

Commerce never—during the thirteen months after the filing of Mr. Quach's Complaint—made any attempt to compel arbitration. Commerce instead took specific actions that expressly or impliedly indicated the abandonment of the contractual arbitration right.

Seven days after filing its answer (asserting a defense of arbitration), Commerce propounded a wide range of discovery requests on Mr. Quach. (AA105-06.) Approximately three months after Mr. Quach filed his Complaint, Commerce filed a case management conference statement and participated in the conference the next day. (AR011.) Counsel for all parties—as required by Rule 3.724—met and conferred to prepare their case management statements and discuss matters before the case management conference. Commerce never raised the possibility of seeking to enforce the contractual arbitration at that conference. (AA105.)

After the meet and confer, and prior to the case management conference, Commerce filed its case management statement. Commerce represented that it was "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).) Commerce proceeded *in writing* to indicate its abandonment of any intent to enforce the arbitration right asserted in its Answer *throughout* the case management statement:

- Commerce declined to "[i]ndicate the ADR process or processes that the . . . parties . . . have agreed to participate

in" despite its prior assertion and knowledge of a purportedly binding contractual arbitration requirement. (AR013 ¶ 10c.)

- Commerce declined to check the box for "[b]inding private arbitration," and all its subcategories; in contrast, Commerce checked the boxes for mediation and settlement conference. (AR013 10c(4).)
- Commerce explicitly asked the Court for a 7-14 day jury trial, affirmed that the case would be ready for trial within 12 months of the Complaint's filing, and provided its unavailable dates for jury trial in 2020 and 2021. (AR012 ¶ 5-7.)
- Commerce declined to indicate any interest in moving to compel arbitration when asked what motions it expected to file before trial, instead indicating dispositive motions would be filed with the Court. (AR014 ¶ 15.)

Commerce was provided multiple opportunities to indicate an interest in enforcing the arbitration agreement—and declined to do so each time.

Plaintiff, of course, indicated an agreement to have the dispute resolved through court proceedings and, if necessary, a jury trial, and posted his jury fees one day prior to the case management conference. (AA105.) Commerce posted its own jury fees four days after Plaintiff had already posted its jury fees (AR019), indicating an intent to have the matter resolved by jury trial, not arbitration. (*See* Code of Civil Procedure § 631, subd. (b) ("At least one party demanding a jury on each side of a civil case shall pay a nonrefundable fee . . . ."), subd. (c) ("The fee described

in subdivision (b) shall be due on or before the date scheduled for the initial case management conference in the action . . . ."), subd. (f)(5) ("A party waives trial by jury . . . By failing to timely pay the fee described in subdivision (b) . . . .").)

Commerce's seeking a jury trial was inconsistent with the arbitration agreement's terms—which required waiver of court proceedings in favor of arbitration as the exclusive method of resolving disputes. Jose Garcia, Commerce's Executive Director of Human Resources, signed the arbitration agreement on behalf of Commerce. (AA084.) Mr. Quach signed on his own behalf. (*Id.*) The arbitration agreement constituted "YOUR WAIVER OF A RIGHT TO HAVE THIS MATTER LITIGATED IN A COURT OR JURY TRIAL." (*Id.*)

Commerce's request for a jury trial was also inconsistent with the arbitration agreement's requirement that "[i]n 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 (emphasis added).)

Finally, Commerce proceeded to engage in discovery and conferences to seek to resolve discovery disputes for the following thirteen months. (AA105-08.) At no time during this more-than-one-year of proceedings did Commerce raise the possibility of compelling arbitration.

Under established waiver law, the inquiry is whether a party expressly or impliedly waived its known contractual rights. (*See Lynch*, 3 Cal.5th at 475.) Here, Commerce expressly waived its

contractual right to arbitrate where it consistently failed to indicate any intent to enforce its arbitration rights. Moreover, Commerce induced a reasonable belief in Mr. Quach that it had abandoned its contractual right to arbitrate when it failed to timely enforce it and took acts that were explicitly prohibited by the arbitration agreement. (*See, e.g., Rubin*, 159 Cal.App.3d at 299 (affirming trial court's finding of waiver where bank had knowledge of right to foreclose on property based on transfer of ownership but failed to foreclose on the property for more than one year).)

Given Commerce's pattern of actions inconsistent with an intent to enforce an arbitration right, its express declination to enforce the right or indicate an intent to do so, and its demonstrated intent to proceed in court and through a jury trial for thirteen months, Commerce must be found to have expressly or impliedly waived its contractual arbitration rights.

D. Alternatively, the Court should remand to the Superior Court for determination of the full panoply of contract defenses.

Alternatively, if the Court is not inclined to find waiver on the present record, it should remand to the Superior Court for determination of the full panoply of defenses available to the opponent of an arbitration contract. The Superior Court lacked the guidance of *Morgan* when it made its findings, as did the Court of Appeal when it reversed those findings. If this Court adopts *Morgan*'s reasoning, then Mr. Quach is entitled to oppose the arbitration agreement not only on the basis of waiver, but also on

the basis of—for example—equitable forfeiture, estoppel, laches, and procedural untimeliness. (*Morgan*, 142 S.Ct. at 1713.)

If further proceedings on Commerce's motion to compel arbitration are to occur, then the Superior Court should have the opportunity to address each of these defenses, including Mr. Quach's unconscionability defense. Under this Court's precedent, an unconscionability defense "should be determined by the trial court in the first instance." (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1171-72; *see also Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911 ("An evaluation of unconscionability is highly dependent on context.").) Because the Superior Court here found waiver, it did not determine unconscionability. It was therefore improper for the Court of Appeal to resolve this factual conflict as a matter of first impression. (*See, e.g.*, *Sanchez*, 61 Cal.4th at 929 (Chin, J., concurring and dissenting) ("Our decisions establish that where a trial court fails to resolve factual conflicts that must be resolved in favor of a party who alleges that an arbitration provision is unenforceable, the proper course for an appellate court is to remand the case to the trial court to determine those factual issues, not to determine them itself in the first instance.").)

V. CONCLUSION

For the foregoing reasons, Mr. Quach respectfully requests that the Court reverse the judgment of the Court of Appeal, reinstate the judgment of the Superior Court denying Commerce's motion to compel arbitration, and remand to the Superior Court to proceed with Mr. Quach's lawsuit without further delay.

Alternatively, Mr. Quach respectfully requests that the Court remand to the Superior Court for determination of each of Mr. Quach's defenses to enforcement of the arbitration agreement.

Dated: October 7, 2022 Respectfully submitted,

/s/ Nilay U. Vora

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing APPELLANT'S OPENING BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 9,896 words.

Dated: October 7, 2022 Respectfully submitted,

/s/ Nilay U. Vora

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CERTIFICATE OF SERVICE

I certify that the foregoing APPELLANT'S OPENING BRIEF ON THE MERITS was electronically served on the following interested parties on October 7, 2022, in the manner described.

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **QUACH v. CALIFORNIA COMMERCE CLUB**
Case Number: **S275121**
Lower Court Case Number: **B310458**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10/7/2022
Date

/s/Nilay Vora
Signature

Vora, Nilay (268339)
Last Name, First Name (PNum)

The Vora Law Firm, P.C.
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