No. _____

In the
Supreme Court of the United States

ROBERT CORLISS,
Petitioner,

v.

CROSSROADS FINANCING, LLC, SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF MONTEREY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER "PREJUDICE" TO THE PARTY OPPOSING ARBITRATION IS EVEN A FACTOR, LET ALONE THE DETERMINATIVE FACTOR, A CALIFORNIA STATE COURT OR ANY STATE OR FEDERAL COURT MUST CONSIDER IN DECIDING WHETHER THE PARTY MOVING TO COMPEL ARBITRATION HAS WAIVED ITS RIGHT TO COMPEL ARBITRATION?

2. WHETHER THIS PETITION FOR WRIT OF CERTIORARI IS RELATED TO AND SHOULD BE CONSOLIDATED WITH THE CASE OF *MORGAN V. SUNDANCE, INC.*, CASE NO. 21-328?

LIST OF PARTIES

Petitioner is ROBERT CORLISS, the Defendant in the California Superior Court for County of Monterey action below

Respondents are CROSSROADS FINANCING, LLC, the Plaintiff and Real Party in Interest in the California Superior Court for County of Monterey action below; the CALIFORNIA SUPERIOR COURT FOR COUNTY OF MONTEREY, the court that issued the order compelling arbitration; the CALIFORNIA COURT OF APPEAL, SIXTH DISTRICT, the court that denied Petitioner's Petition for Writ of Mandamus; and the SUPREME COURT OF CALIFORNIA, the court that denied Petitioner's Petition for Review

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robert Corliss hereby petitions for a writ of certiorari to review the California Supreme Court's January 5, 2022 denial of review of the California Sixth District Court of Appeal's November 12, 2021 denial of Mr. Corliss' Petition for Writ of Mandamus to correct the California Superior Court County of Monterey's Order Compelling Contractual Arbitration in reliance on the California Supreme Court decision in *St. Agnes* supra 31 Cal.4th at 1203 holding that prejudice to the party asserting waiver of arbitration is the "determinative factor" in deciding whether the contractual right to arbitration has been waived. *Id.* Petitioner also requests that his petition be granted and consolidated with *Morgan v. Sundance, Inc.*, Supreme Court Case No. 21-328 now pending in this Court.

OPINIONS BELOW

The unpublished January 5, 2022 decision of the California Supreme Court (App. 1) denying Petitioner's Petition for Review of the California Sixth District Court of Appeal's denial of Petitioner's Petition for Writ of Mandamus (App. 2) to vacate the April 27, 2021 California Superior Court of Monterey's unpublished Order Compelling Arbitration. (App. 3)

JURISDICTION

The order of the Supreme Court of California was entered on January 5, 2022. This Court has jurisdiction of this timely petition under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, made applicable to California by the Fourteenth Amendment (Equal Protection and Due Process), and California Code of Civil Procedure §1281.8(d) are reproduced at App. 7 through App. 10.

BACKGROUND

The Parties

The Petitioner is Robert Corliss ("Corliss"), the purported guarantor of a $3.7 Million. He is the sole defendant in the trial court below for alleged breach of the "guarantee".

Crossroads Financing, LLC ("Crossroads"), the Real Party in Interest, is the Plaintiff who filed the lawsuit in the superior court (not in arbitration) to collect on the Corliss guarantee.

The Respondent is the California Superior Court in and for the County of Monterey ("superior court"), which issued the order compelling arbitration.

Timeliness of the Petition

The respondent superior court orally granted Crossroads' motion to compel arbitration on April 27, 2021. (App. 3)

On June 23, 2021, Petitioner Corliss timely filed a Petition for Writ of Mandamus (with exhibits) to the Sixth District Court of Appeal to order the Respondent to vacate its Order compelling arbitration. On

November 12, 2021, the Sixth District issued a summary denial of the Petition (App. 2).

Petitioner Corliss timely petitioned the California Supreme Court for review, which Petition was denied on January 5, 2022.

STATEMENT OF THE CASE

The Subject Loan and Purported Guaranty

On September 27, 2018, Mr. Corliss executed a deficiency only Guaranty Agreement guaranteeing repayment of any deficiency on an underlying $3.7 Million loan.

The take it or leave it Guaranty Agreements, written by Crossroads, contained an arbitration provision which provided that any dispute in connection with the Guaranty "shall at Guaranteed Party's [lender's] discretion", [but not at Mr. Corliss' discretion], be settled by arbitration conducted by three arbitrators at the American Arbitration Association ("AAA") in San Francisco, California.

The borrowers subsequently defaulted on the loan.

Crossroads Initiates Litigation in the Court Below

On December 27, 2019, Crossroads exercised its unilateral discretion and voluntarily chose to file, as Plaintiff, in the Monterey County Superior Court below, its $3,631,555.92 claim against Mr. Corliss, for alleged breach of the Guaranty. Crossroads specifically asserted jurisdiction and venue in the Monterey

County Superior Court. (Exhibit 8[1]) Crossroads did not reserve arbitration in its Complaint. (Exhibit 8)

Crossroads did not file a claim in arbitration with the AAA, at the time of filing or at any time after filing its Complaint, in the superior court.

Crossroads Seeks Attachment in the Superior Court

On January 2, 2020, Crossroads filed a motion in the superior court for a $4.5 Million writ of attachment to attach Mr. Corliss' home, which Mr. Corliss had had listed for sale prior to Crossroads filing its Complaint. (Exhibit 1A, p. 10) Crossroads did not reserve arbitration in its writ of attachment papers as required by California Code of Civil Procedure, C.C.P. § 1281.8(d).

Mr. Corliss vigorously opposed the attachment, in the superior court. (Exhibit 11, pp. 132 through 151)

On March 20, 2020, the superior court granted Crossroads a writ of attachment in the amount of $3,066,000 but required Crossroads to post an $800,000 surety bond. (Exhibit 12, pp. 153-154) Crossroads posted the $800,000 bond in the superior court on June 15, 2020. (Exhibit 12A, p. 157)

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[1] References to "Exhibit__" are to the Exhibits filed in the California Sixth District Court of appeal.

Crossroads Files First Amended Complaint in the Superior Court

On April 1, 2020, Crossroads voluntarily chose to file a First Amended Complaint against Mr. Corliss in the superior court. (Exhibit 9, pp. 86-112) Crossroads did not reserve arbitration in its amended complaint or otherwise and again invoked the jurisdiction and venue of the superior court. (Exhibit 9, ¶ 8 and ¶ 9, p. 88).

Mr. Corliss filed his Answer and Cross-Complaint on July 16, 2020. (Exhibits 13 and 14)

On August 3, 2020, Crossroads filed, in the superior court, its Answer and 37 "distinct" affirmative defenses to Mr. Corliss' Cross Complaint. Crossroads did not assert, in its Answer or affirmative defenses, that its Complaint or Mr. Corliss' Cross Complaint should be resolved by arbitration (Exhibit 15, pp. 191 through 200).

Crossroads Expressly Waives Arbitration and Requests a Jury Trial in the Superior Court

On August 3, 2020, Crossroads filed its Case Management Statement ("CMS"), in the superior court, requesting a 4-6-day jury trial. (Exhibit 16, ¶¶ 5 and 7, p. 204).

Crossroads expressly waived (*did not request*) any binding, private arbitration (Exhibit 16, ¶ 10c(5), p. 205).

Crossroads also notified the superior court and Corliss' counsel that there were "no other matters" [like an arbitration agreement] that might affect the

superior court's jurisdiction or proceeding with the case in the superior court. (Exhibit 16, ¶ 12, p. 206).

Crossroads deposited jury fees on April 7, 2020, in the superior court. (Exhibit 17, p. 210).

Crossroads also indicated in its CMS that there were no other related cases (Exhibit 16, ¶ 13, p. 206) and that it intended to conduct discovery and file a motion for summary judgment in the superior court. (Exhibit 16, ¶ 15 and ¶ 16, p. 206).

On August 14, 2020, Mr. Corliss filed his Case Management Statement, also requesting a jury trial and likewise, *not* requesting binding private arbitration. (Exhibit 18, ¶ 5, p. 214, and ¶ 10c(5), p. 215).

Based on the parties' CMS's, the superior court set the case for a 4-6-day jury trial to begin on August 9, 2021.

Discovery

Crossroads propounded 35 special interrogatories on Mr. Corliss, as to the merits of the case and Mr. Corliss' defenses and the basis of his Cross Complaint claims. (Exhibit 19, Nos. 1-35, pp. 221-231).

Crossroads propounded on Mr. Corliss, a second set of 16 additional special interrogatories as to his defenses and claims along with a declaration attempting to justify seeking the additional interrogatories. (Exhibit 19 A, pp. 235 through 239).

On February 2, 2021, in the superior court, Crossroads propounded a set of form interrogatories on Mr. Corliss. (Exhibit 19 B, pp. 243 through 250).

On March 9, 2021, Mr. Corliss responded, in the superior court, to Crossroads' form interrogatories. (Exhibit 20 A, pp. 327 through 334).

On October 26, 2020, Crossroads propounded, in the superior court, a Request for Production of 48 items of Documents. (Exhibit 21, pp. 337 through 353).

On February 2, 2021, Crossroads also propounded on Mr. Corliss, in the superior court, 85 Requests for Admissions along with a declaration attempting to justify requesting the excessive number of requests for admissions. (Exhibit 23, pp. 357 through 370).

On March 9, 2021, in the superior court, Mr. Corliss responded to Crossroads' 85 requests for admissions. (Exhibit 24, pp. 373 through 386).

On March 12, 2021, in the superior court, Crossroads met and conferred to compel further discovery. (Exhibit 25, pp. 389 through 391).

Settlement Negotiations

In January 2021, Crossroads and Mr. Corliss met by telephone and attempted settlement negotiations in the superior court litigation. (Exhibit 26, p. 393). Mr. Corliss' son, at Mr. Corliss' request and expense, subsequently flew to Atlanta, Georgia to inspect the inventory collateral, as part of Mr. Corliss' settlement negotiations.

Crossroads Moves for Additional Attachment in the Superior Court

On February 22, 2021, Crossroads moved, ex parte in the superior court, to attach $1.5 Million of the assets Mr. Corliss had in his UBS retirement stock brokerage account. Crossroads again did so without reserving arbitration. (Exhibit 10, pp. 114 through 130).

The superior court, at Crossroads ex parte request, issued a temporary protective order enjoining Mr. Corliss from accessing or trading $1 Million of the assets in his stock brokerage account. (Exhibit 37 A, pp. 583 through 584).

Mr. Corliss Moves in the Superior Court to Enjoin Crossroads' Sale of Collateral

On April 7, 2021, after learning that Crossroads was engaged in self-help, Mr. Corliss moved the superior court for a temporary restraining order to enjoin Crossroads from selling the collateral that secured the loan that Mr. Corliss had "guaranteed". (Exhibit 27, pp. 395 through 438).

A hearing on Mr. Corliss' motion for TRO was held on April 8, 2021, in the superior court. At the conclusion of the hearing, the court denied the motion for TRO. (Exhibit 29, p. 443; Exhibit 30, p. 475).

After a Year and a Half of Litigation in the Court Below, Crossroads Moves to Compel Arbitration

On March 24, 2021, after a year and a half of litigation in the superior court, and after a jury trial

had been set for August 9, 2021 in the superior court (Exhibit 41, p. 654), Crossroads filed a motion in the superior court to compel arbitration of the case. (Exhibit 40, pp. 594 through 636).

Mr. Corliss opposed Crossroads' motion to compel arbitration, pointing out that Crossroads had waived any right it may have had to compel arbitration by voluntarily choosing to file a complaint in the superior court (rather than initiating arbitration) (Exhibit 41, p. 639), by filing an amended complaint, by litigating in the superior court for nearly a year and a half (Exhibit 41, p. 640), by answering Mr. Corliss' Cross Complaint and asserting affirmative defenses (but not arbitration), by propounding substantial merits discovery, by requesting and obtaining a scheduled jury trial set for August 9, 2021, by posting jury fees, by engaging in self-help, by opposing a TRO to enjoin Crossroads' sale of collateral, by obtaining two writs of attachment totaling nearly $5 Million, and by obtaining a temporary protective order against Mr. Corliss' use of his retirement stock brokerage account. (Exhibit 41, pp. 639 through 673).

Crossroads filed a reply memorandum in support of its motion to compel arbitration, arguing there had been no showing of prejudice to Mr. Corliss. (Exhibit 42, pp. 676 through 681).

A hearing on Crossroads' motion for additional attachment and on its motion to compel arbitration was held on April 23, 2021, in the superior court. (Exhibit 44, pp. 690 through 733).

At the conclusion of the hearing, the court ruled that it would grant additional attachment and made a conclusory order granting Crossroads' motion to compel arbitration. The court directed counsel for Crossroads to prepare orders. (Exhibit 44, pp. 731 through 732).

On June 4, 2021, counsel for Crossroads served on counsel for Mr. Corliss a Notice of Entry of Order Compelling Binding Contractual Arbitration. (Exhibit 47, pp. 767 through 771).

On June 23, 2021, Mr. Corliss timely filed a Petition for Writ of Mandate to vacate the Order compelling arbitration.

On September 12, 2021, the Court of appeal summarily denied the Petition. (A copy of the denial is attached as part of the Appendix attached hereto.)

Mr. Corliss timely petitioned the California Supreme Court which denied his Petition for Review on January 5, 2022.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Certiorari should be granted so this Court can resolve and correct the conflicts among the Federal Courts of Appeal and State Supreme Courts as to whether prejudice to the party asserting waiver must be established in order in order for there top be a waiver of the contractual right to arbitration.

On November 15, 2021, this Court granted certiorari in *Morgan v. Sundance, Inc.*, Case No. 21-328; 142 S. Ct. ___ to decide the issue of whether

prejudice is a required element in determining whether a party has waived its contractual right to arbitration under federal law. This petition seeks certiorari to decide the similar and important, related issue of whether California and other state courts, which base their waiver of contractual arbitration analyses on federal law, improperly impose a requirement that the party asserting a waiver of the right to arbitration must establish that he/she/it has been prejudiced by the litigation actions or inaction of the party seeking to compel arbitration?

In *St. Agnes Medical Center v. PacifiCare of California* 31 Cal.4th 1187, 1203, the California Supreme Court, relying on the then "majority position" of Federal Circuit Court decisions and earlier California Supreme Court and appellate decisions, held:

> More than two decades ago, we observed that "[u]nder 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." (*Doers, supra,* 23 Cal.3d at p. 188, 151 Cal.Rptr. 837, 588 P.2d 1261, fn. omitted, (federal citations omitted). Our review of more recent federal authorities discloses that this rule remains largely intact.6
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> . . .
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> 6 . . . cf. *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.* (7th Cir.1995) 50 F.3d 388, 390 [admittedly taking "the minority

position" in holding that prejudice is not required to find waiver of right to arbitrate].)

The Courts of Appeal in California and in the various federal circuit courts and state Supreme courts are in conflict as to whether prejudice is a required element to establish waiver of a contractual arbitration provision. *Wagner Construction Co. v. Pacific Mechanical Corp.*, 41 Cal.4th 19, 29 and 30 (2007) (no requirement for prejudice); *Allstate Insurance Co. v. Gonzalez*, 38 Cal.App.4th 783, 793 (1995) (no requirement for prejudice). Compare *Sobremante v. Superior Court*, 61 Cal.App.4th 980 (1998) (prejudice required); *Lewis v. Fletcher Jones Motor Cars*, 205 Cal. App.4th 436 (2012) (prejudice required).

Unlike the equitable doctrines of laches and estoppel, which require a showing of prejudice, common-law waiver is traditionally a unilateral concept. 31 C.J.S. *Estoppel and Waiver* § 87 (2021). It consists of "the intentional relinquishment or abandonment of a known right." *Lynch* supra.

But in the contractual right to arbitration context, these contract waiver principles have devolved into a muddled mess.

Some courts, like the Courts of Appeals for the Seventh and D.C. Circuits and the high courts of Alaska, Florida, Maryland, and West Virginia, follow an equal-treatment approach. They treat waiver of the right to arbitrate like the waiver of any other contractual right by focusing solely on the actions of the allegedly waiving party, without requiring that the other party suffer prejudice from those actions.

In California (*St. Agnes Medical Center v. PacifiCare of California* 31 Cal.4th 1187, 1203 (2003)) and other federal courts, the courts consider prejudice the crucial, dispositive facet of the analysis. E.g., *Rota-McLarty v. Santander Consumer USA,* 700 F.3d 690, 702 (4th Cir. 2012) ("The dispositive determination is whether the opposing party has suffered actual prejudice."); *Citibank, N.A. v. Stok & Assocs., P.A.,* 387 F. App'x 921,924-25 (11th Cir. 2010), cert. granted, 562 U.S. 1215 (2011), cert. dismissed, 563 U.S. 1029 (2011) (finding no waiver despite substantial litigation conduct inconsistent with right to arbitrate, solely because the other party failed to prove prejudice).

In the decision below, the California Supreme Court and the Sixth District Court did not indicate why they granted the motion to compel arbitration, but the Respondent's only grounds for opposing waiver was that supposedly there was no showing of prejudice.

This addition of a prejudice requirement to the contractual waiver analysis when the contract at issue involves arbitration, is not supported by the text of C.C.P. §1281.8(d) and, in fact, effectively eviscerates it. A prejudice requirement also violates what this Court has called "the primary substantive provision" of the Federal Arbitration Act, which directs that agreements to arbitrate future disputes be placed on "an equal footing with other contracts." *Rent-A-Center, W. v. Jackson,* 561 U.S. 63, 67 (2010).

With different arbitration-specific waiver tests proliferating around the country and in California, there are inconsistent "standards" that do not guide parties, their attorneys or the federal and state courts.

In some California cases, prejudice to the non-waiving party is not required to have waiver. *Allstate Insurance Co. v. Gonzalez* (1995) 38 Cal.App.4th 783, 793 In some cases, extended delay alone is labeled "prejudice". *Wagner Construction Co. v. Pacific Mechanical Corp.* 41 Cal.4th 19, 29-30 In other cases, not getting a speedy resolution in arbitration alone, is labeled prejudice. *Adolph v. Coastal Auto Sales Inc.*, 184 Cal.App.4th 1443, 1452 (2010) In others, invoking the machinery of litigation to the other party's detriment, is prejudice. *St. Agnes* supra 31 Cal.4th at 1195 fn. 4. In others still, the filing of a case management conference statement and failing to check off the request for arbitration box or demanding a jury trial, thereby "affecting" the non-waiving party, are sufficient to constitute waiver. *Orogel v. PacPizza LLC*, 237 Cal App.4th 342, 350 (2015).

Finally, in most states, including California, the ordinary test for waiving contractual rights (*Lynch v. California Coastal Commission* 3 Cal.5th 470 supra) differs from the test for waiving the right to arbitrate (*St. Agnes* supra 31 Cal.4th at 1203), contravening this Court's repeated admonition that states treat arbitration agreements the same as other contracts.

This Court should grant review to provide clarification and uniformity to this area of law and to reconsider the holding in *St. Agnes* to align with the holdings of the Federal Courts of Appeal in the Seventh Circuit and D.C. Circuit and this Court's anticipated clarification in *Morgan v. Sundance, Inc.* supra. Both are badly needed.

SUMMARY OF ARGUMENT

A party asserting that the contractual right to arbitration has been waived is not required to establish that he/she/it has been "prejudiced" by the other party first litigating in court.

In California, prejudice is required to establish waiver when an arbitration contract is at issue (*St. Agnes Medical Center v. PacifiCare of California* 31 Cal.4th 1187, 1203 (2003)) but is not required when analyzing waiver of other contractual rights. *Lynch v. California Coastal Commission* 3 Cal.5th 470, 475 (2017) Treating waiver of contract rights differently than waiver of contractual arbitration rights flies in the face of this Court's principle of equal treatment of arbitration contracts and other contracts.

The federal courts that have eschewed a prejudice requirement have pointed out that the FAA sought to make private agreements to arbitrate as enforceable as other types of contracts, not to promote arbitration over litigation at all costs. *Cabintree of Wisconsin Incorporated v. Kraftmaid Cabinetry Incorporated* 50 F.3d 388, 390 (7th Cir. 1995):

> Today we take the next step in the evolution of doctrine and hold that an election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate. . . . for we have deemed an election to proceed in court a waiver of a contractual right to arbitrate, without insisting on evidence of prejudice beyond what is inherent in an effort to change forums in the

> middle (and it needn't be the exact middle) of a litigation.

This case presents an excellent vehicle for correcting the confusion. To avoid an endless multitude of litigation over supposedly factual issues of prejudice, this Court should place contractual arbitration waivers on the same footing as other contractual waivers by eliminating the prejudice inquiry and instead, examining the waiving party's actions to establish intent to waive. This Court should adopt a per se waiver rule (consistent with C.C.P. §1281.8(d)) that a choice to file litigation without a written reservation for arbitration as required by C.C.P. §1281.8(a) is a waiver of the right to arbitrate. *Cabintree of Wisconsin Incorporated v. Kraftmaid Cabinetry Incorporated* supra 50 F3d at 390. What could be more indicative of a party's waiver of arbitration than choosing to file litigation in court? Likewise, if the waiving party expressly waives arbitration by, for example filing a case management statement which does not seek to arbitrate, or if he/she requests a jury trial, or delays seeking arbitration, even for a short time (30 days) (*Cabintree* supra 50 F.3d at 391), to invoke arbitration, any one of those acts alone should be a per se waiver of arbitration, especially so that the fundamental right to a jury trial in a breach of contract case can be preserved.

This Court should grant review and put an end to the chaos this area of law has spawned.

ARGUMENT

I. WHETHER PREJUDICE IS REQUIRED TO PROVE WAIVER IN THE ARBITRATION CONTEXT HAS DIVIDED FEDERAL AND STATE APPELLATE COURTS.

A. Nine Federal Courts of Appeals Require a Finding of at Least Some Prejudice to Establish Waiver of the Right to Arbitrate Through Litigation Conduct.

The concept of prejudice first began creeping into arbitration waiver opinions in the Second Circuit. In *Carcich v. Rederi A/B Nordie,* 389 F.2d 692, 696 (2d Cir. 1968). This Court has followed that reasoning in St. Agnes supra 31 Cal.4th at 1203-1204. The court held that mere participation in litigation was not sufficient to establish a waiver of the right to arbitrate the same dispute "without resultant prejudice to a party." The sole basis for this new prejudice requirement appeared to be that "there is an overriding federal policy favoring arbitration," and so waiver "is not to be lightly inferred." *Id.*

From these beginnings, and with the federal policy favoring arbitration acting as an accelerant, the prejudice view spread quickly to the Third and Ninth Circuits. See *Gavlik Constr. Co. v. H. F. Campbell Co.,* 526 F.2d 777, 783-84 (3d Cir. 1975), overruled on other grounds by *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271 (1988) (following Second Circuit approach in *Carcich* and testing waiver "by the presence or absence of prejudice"); *ATSA of Cal., Inc. v. Cont'l Ins. Co.,* 702 F.2d 172, 175 (9th Cir. 1983)

("[I]nconsistent behavior alone is not sufficient; the party opposing the motion to compel arbitration must have suffered prejudice.")

But not all federal courts that require prejudice as part of the arbitration waiver analysis require it to be present to the same degree. In the First Circuit, the separate requirement of prejudice is "tame at best": If a lengthy delay in seeking arbitration was accompanied by sufficient litigation activity, prejudice to the opposing party can be inferred. *Joca-Roca Real Estate, LLC v. Brennan,* 772 F.3d 945, 949 (1st Cir. 2014).

At the other end of the spectrum, the Second Circuit has held that "pretrial expense and delay[,] ... without more, do not constitute prejudice sufficient to support a finding of waiver." *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.,* 67 F.3d 20, 26 (2d Cir. 1995).

Motions practice is also relevant to multiple circuits' prejudice inquiries, but again, in differing ways. The Fifth Circuit has found motions practice to be prejudicial based on expense alone. *In re Mirant Corp.,* 613 F.3d 584, 588, 591 (5th Cir. 2010) (plaintiffs experienced prejudice where they incurred $265,559 in attorneys' fees and costs defending multiple motions to dismiss). By contrast, the California Supreme Court, in *St. Agnes* supra 31 Cal.4th at 1203, and some but not other California Courts of Appeal hold that litigation costs and attorney's fees *alone* are not sufficient prejudice to create a waiver.

B. The Seventh, Tenth, and D.C. Circuits Consider Prejudice a Relevant Factor in the Waiver Analysis but Do Not Consistently Require Its Presence.

Once the prejudice requirement had begun taking hold throughout the federal courts, parties charged with litigation-conduct waiver would argue that as a matter of federal substantive law, the opposing party must be able to show prejudice before they could be found "in default . . ." Not all federal circuits require a showing of prejudice. 821 F.2d at 777 (D.C. Cir.) In *NFCR v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772 (D.C. Cir. 1987), the D.C. Circuit declined to include "prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration." Instead, that circuit held that "whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context," namely, "whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right." *Id.* at 774. Prejudice is a relevant factor considered under this totality of the circumstances, but "waiver may be found absent a showing of prejudice." *Id.* at 777.

The Tenth Circuit also considers prejudice to be a relevant factor in the waiver analysis, including it in a six-factor test along with such factors as "whether the litigation machinery has been substantially invoked" and whether "important intervening steps" like discovery have occurred (*Peterson v. Shearson/ American Exp., Inc.,* 849 F.2d 464, 467-68 (10th Cir.

1988)), but in some *post-Peterson* cases, the Tenth Circuit has applied these factors without explicitly making a finding on prejudice. See *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 39 F.3d 1482, 1490 (10th Cir. 1994) (finding waiver based on "the totality of [the defendant's] conduct").

The Seventh Circuit has offered the most thorough analysis of any federal court in reaching its conclusion that prejudice should not be an essential element of litigation-conduct waiver. Explaining that the Second, Fourth, and Ninth Circuits required a showing of prejudice while the D.C. Circuit did not, the Seventh Circuit sided with the D.C. Circuit's minority view, holding that "an election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute, is a *presumptive* waiver of the right to arbitrate." (Emphasis added) *Cabintree* supra 50 F.3d at 390.

The Seventh Circuit, in *St. Mary's Medical Center of Evansville v. Disco Aluminum* 969 F.2d 585, 590 (7th Cir. 1992), went on to explain that a failure to require prejudice was not inconsistent with the strong federal policy favoring arbitration manifested in the FAA. Citing the Supreme Court's enunciation of the equal-treatment principle, the Seventh Circuit observed that Congress's goal in enacting the FAA was to ensure that courts enforced private contracts to arbitrate, not to "prefer [] ... arbitration over litigation." *Id.* (citing *Dean Witter Reynolds,* 470 U.S. at 219-21). In other contractual contexts, the court noted, such as an insurer's contractual right to insist on prior notice of loss, the insurer is deemed to have waived its right to

insist on such notice if it proceeds to defend the claim, regardless of whether the insurer was prejudiced by the lack of notice. *Id.* at 591. Similarly, a party who has a right to insist on arbitration of a dispute but elects to litigate it instead has waived that right through its inconsistent conduct, and "[t]here is no more reason to insist" on prejudice in the arbitration context than the insurance context. *Id.*

In subsequent years, as more and more circuits have grafted prejudice requirements onto their litigation-conduct waiver tests, the Seventh Circuit has steadfastly refused to do so. See, e.g., *Smith v. GC Servs. Ltd. P'ship,* 907 F.3d 495, 499 (7th Cir. 2018); *Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prods., Inc.,* 660 F.3d 988, 994 (7th Cir. 2011).

C. Parties Are Subject to Disparate Litigation-Conduct Waiver Standards in State and Federal Court.

But at least four state supreme courts differ from the California Supreme Court and share the minority federal view that prejudice should not be required, and all of those states are in circuits that follow the majority view. *Hudson,* 387 P.3d at 47-49 (Alaska court following Seventh Circuit); *Raymond James Fin. Servs., Inc. v. Saldukas,* 896 So.2d 707, 711 (Fla. 2005) (following D.C. Circuit); *Cain v. Midland Funding, LLC,* 156 A.3d 807, 819 (Md. 2017) (finding no prejudice required under Maryland law, distinguishing waiver from estoppel); *Parsons v. Halliburton Energy Servs., Inc.,* 785 S.E.2d 844, 850 (W. Va. 2016) (common-law waiver of contract rights under West

Virginia law does not require proof of prejudice or detrimental reliance). Conversely, the Illinois Court of Appeals has chosen to follow the majority federal view, rejecting the Seventh Circuit's approach as wrongly decided. *LAS, Inc. v. Mini-Tankers, USA,* 796 N.E.2d 633, 637-38 (Ill. App. Ct. 2003).

By granting a writ of certiorari in *Morgan v. Sundance, Inc.* 2021 WL 5284603, this Court apparently decided to try to unravel these conflicting decisions regarding waiver of contractual arbitration,

II. THE EQUAL-TREATMENT PRINCIPLE REQUIRES THAT THE STANDARD FOR WAIVER OF ARBITRATION RIGHTS BE THE SAME AS WAIVER OF OTHER CONTRACTUAL RIGHTS.

A. Under this Court's Equal-Treatment Principle, Arbitration Contracts Must be Treated the Same as Other Contracts.

This Court has repeatedly and consistently explained that the purpose of the FAA is to place arbitration "agreements upon the same footing as other contracts." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.,* 489 U.S. 468, 478 (1989) (cleaned up) (quoting *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 511 (1974)). As such, under the FAA, "courts must place arbitration agreements on an equal footing with other contracts." *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011) Indeed, as this Court has emphasized, contract "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" are

precluded by the FAA-precisely *because* the FAA demands that arbitration agreements be treated just like any other contract. *See id. See also Kindred Nursing Ctrs. Ltd. P'ship v. Clark,* 137 S. Ct. 1421, 1426 (2017) (describing this approach as the "equal treatment principle").

This equal-treatment principal is not superseded by the "liberal federal policy favoring arbitration." *See Moses H. Cone,* 460 U.S. at 24. Rather, in keeping with the FAA, the policy in favor of honoring arbitration agreements goes hand-in-hand with applying ordinary contract law to contracts to arbitrate. As this Court has explained, the FAA was intended to make "arbitration agreements as enforceable as other contracts, but not more so." *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404 n.12 (1967). *Hall Street Assocs., L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 581-82 (2008) (describing policy favoring arbitration as placing arbitration contracts on equal footing).

B. Outside the Arbitration Context, Prejudice Is Not Required to Demonstrate Waiver of a Contractual Right.

In California, prejudice is not required in order to waive contractual rights. Waiver of a contractual right generally requires the voluntary and intentional relinquishment of a known right. That intent can be expressed either through an explicit statement of intent or can be ascertained from the waiving party's conduct. *Lynch* supra 3 Cal.5th at 475.

Because the analysis focuses on the intent and actions of the *waiving* party, prejudice is not normally required to establish waiver. *Id.* Accord *Cabinetree* supra 50 F.3d at 390 ("[I]n ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance.") (Citing 2 E. Allan Farnsworth, *Contracts* § 8.5 (2d ed. 1990); 3A Arthur Linton Corbin, *Corbin on Contracts* § 753 (1960)).

Adding a prejudice requirement to the requirements for waiver is inconsistent with the core issue in waiver-the *intent* of the waiving party.

In short, outside of the arbitration context, contractual waiver simply does not require prejudice-only the waiving party's actions are relevant.

C. Because Ordinary Contract Law Does Not Require Prejudice for Waiver, the Equal-Treatment Principle Requires the Same for Arbitration Contracts.

Because the equal-treatment principle requires that arbitration agreements be subject to the same contract law as other contracts, and ordinary contract law does not impose a prejudice requirement for waiver of a contractual right, prejudice should *not* be required to demonstrate waiver through litigation conduct of the right to arbitrate.

Nor does the general, public policy favoring arbitration, demand the addition of a prejudice requirement to ordinary contract waiver analysis. As the Seventh Circuit explained in declining to require prejudice: "In other words, the federal policy embodied

in the Arbitration Act is a policy favoring enforcement of contracts, not a preference for arbitration over litigation. Therefore, we should treat a waiver of the right to arbitrate the same as we would treat the waiver of any other contract right." *St. Mary's,* 969 F.2d at 590 (citations omitted); *see also NFCR,* 821 F.2d at 774 ("The Supreme Court has made clear that the 'strong federal policy in favor of enforcing arbitration agreements' is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism. Thus, the question of whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context." (Citation omitted)). Requiring a finding of prejudice encourages inefficiency and forum-shopping.

Permitting the opportunity for this type of gamesmanship and forum shopping should not be encouraged by requiring prejudice as an element of waiver. *Khan v. Parsons Glob. Servs., Ltd.,* 521 F.3d 421, 427 (D.C. Cir. 2008) (courts do not tolerate delaying the invocation of arbitration "as a strategy to manipulate the legal process").

III. THIS CASE DIRECTLY PRESENTS THE OPPORTUNITY FOR THIS COURT TO RECONSIDER THE NEED FOR A PREJUDICE SHOWING IN A WAIVER OF CONTRACTUAL ARBITRATION CASE, IN LIGHT OF THE EVOLVING LAW IN THE SUPREME COURT, AND STATE AND FEDERAL COURTS, INCLUDING THE INCONSISTENT CALIFORNIA STATE COURT DECISIONS.

In this case, while neither the superior court or the Sixth District articulated the reason for compelling arbitration or denying writ review, Crossroads' sole basis for disputing waiver was a supposed lack of prejudice. That is not a defense to waiver. The law and the facts regarding unequal treatment of the waiver law, as applied to Corliss, regarding a prejudice requirement, were briefed and show that *a party **can** waive*, and Crossroads has waived, its right to arbitration by taking action in court by filing a Complaint. *Orogel v. PacPizza LLC* (2015) 237 Cal App.4th 342, 350; *Guess? Inc. v. Superior Court*; filing an Answer to a Cross Complaint; *Guess? Inc. Id*, filing a Case Management Statement ("CMS") asking for a jury trial *Spunk*, supra; *Law Offices of Dixon Howell*, supra at 1102-1104; failing in the CMS to request arbitration *Orogel v. PacPizza LLC*, supra at 356; posting jury fees, not seeking a stay of litigation when it first sought provisional remedies, C.C.P. §1281.8(d); seeking discovery and seeking to compel discovery and thereby obtaining opponent's strategies and theories of the case; *Law Offices of Dixon Howell*, supra at 1102-1104; forcing opposing party to incur legal fees *Id*, and

delaying for a year and a half, before moving to compel. *Sprunk* supra; *Lewis v. Fletcher Jones Motor Cars*, 205 Cal App.4th 436, 446 (2012) and by waiting until a few months before trial, before seeking arbitration. *Lewis v. Fletcher Jones Motor Cars, Inc., supra*, 205 Cal.App.4th 436 at 444 (2012); *Sobremonte v. Superior Court*, *supra*, 61 Cal App.4th 980 at 992 (1998).

This Court should grant certiorari and consolidate this case with the Morgan v. Sundance, Inc. Case No. 21-328, so federal and state courts, including California state courts, can have uniform guidance that prejudice is ***not*** a factor to be considered in a waiver of right to arbitration analysis.

CONCLUSION

This Court should grant certiorari in order to resolve conflicting state and federal decisions on the issue of whether prejudice is an element in a waiver of right to arbitration analysis. This Court should also consolidate this case with the pending *Morgan v. Sundance, Inc.* case (Case No. 21-328) and, in accordance therewith, to correct and clarify the holding in St. Agnes that prejudice is a required element to establish waiver of arbitration.

Respectfully submitted,

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