

No. 21-1359

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**

**PETITIONER'S SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

SAMUEL KORNHAUSER
Counsel of Record
LAW OFFICES OF SAMUEL KORNHAUSER
155 Jackson Street, Suite 1807
San Francisco, CA 94111
Telephone: (415) 981-6281
Facsimile: (415) 981-7616 (fax)
Email: samuel.kornhauser@gmail.com

Counsel for Petitioner

TABLE OF AUTHORITIES

CASES

*Cabinetree of Wisconsin Inc. v. Kraftmaid
Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995) 2

Hoover v. American Home Life Insurance Co.,
206 Cal. App. 4th 1193 (2012) 2

*Merrill Lynch, Pierce, Fenner and Smith Inc.
v. Lecopulos*, 553 F.2d 842 (2d Cir. 1977) 2

Morgan v. Sundance, Inc.,
2022 WL 1611788 (May 23, 2022) 1, 2, 3

Quach v. California Commerce Club, Inc.,
2022 WL 1468016 (May 10, 2022) 2

Rosenthal v. Great Western Fin. Securities Corp.,
14 Cal. 4th 394 (1996) 2

St. Agnes Medical Center v. PacifiCare of California,
31 Cal. 4th 1187 (2003). 1, 2

RULES

Sup. Ct. R. 15.8. 1

Pursuant to Rule 15.8 of the Rules of the United States Supreme Court, Petitioner, Robert Corliss, files this Supplemental Brief in light of this Court’s May 23, 2022 decision in *Morgan v. Sundance, Inc.*, 2022 WL 1611788 (May 23, 2022); ___ S. Ct. ___.

In the *Morgan* decision, this Court held that “prejudice is not a condition of finding that a party, by litigating too long, waived its right to . . . compel arbitration under the FAA.” *Morgan v. Sundance, Inc. supra* 2022 WL 1611788 at *4.

This Court’s May 23, 2022 decision in *Morgan* came ten (10) days after Respondent in this case, Crossroads Financing, LLC, waived its right to file a Response, and one day (on May 24, 2022) after the Petition for Writ of Certiorari in this case was distributed for consideration at this Court’s June 9, 2022 conference.

While this Court’s decision in *Morgan* makes clear that prejudice is not a condition of finding waiver of a right to compel arbitration under the FAA, arguably it leaves open the question of whether prejudice can still be a condition of finding waiver of a right to compel arbitration under state, statutory, common arbitration law (in a state such as California) which is based on the FAA and federal law. *Morgan supra* 2022 WL 1611788 at *3 [the Supreme Court did not address ‘the role state law might play in resolving when a party’s litigation conduct results in the loss of a contractual right to arbitrate’].

In California, the California Supreme Court, in *St. Agnes Medical Center v. PacifiCare of California*, 31 Cal. 4th 1187 at p. 1203 (2003), held that “prejudice . . .

is critical in waiver determinations.” The California Supreme Court based its holding that “prejudice” is a critical factor in determining waiver of a right to compel arbitration under the FAA and federal case law. *St. Agnes supra* 31 Cal. 4th at p. 1194 [“the FAA generally preempts any contrary state law regarding the enforceability of arbitration agreements. *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal. 4th 394, 405 . . .”]. The California Supreme Court went on to hold, in *St. Agnes supra* 31 Cal. 4th at p. 1203, “The presence or absence of prejudice . . . is the determinative issue under federal law” citing *Merrill Lynch, Pierce, Fenner & Smith Incorporated v. Lecomulos* 553 F.2d 842, 845 (2d Cir. 1977) and other federal cases, and that recent federal authorities “disclose that the rule remains largely intact” and referring to *Cabinetree of Wisconsin Inc. v. Kraftmaid Cabinetry, Inc.* 50 F.3d 388, 390 (7th Cir. 1995) (which held that prejudice is not a factor) as a then minority view. This Court’s decision in *Morgan* approves the *Cabinetree* holding and makes it the law.

This Court’s decision in *Morgan* negates the validity of those federal cases and the presumption that the FAA imposed a “prejudice” condition in determining waiver. Thus, Petitioner submits that the entire basis of current California law¹ on waiver of the right to

¹ Indeed, the most recent California case, *Quach v. California Commerce Club, Inc.* 2022 WL 1468016 at *3-4 (Second District Court of Appeal, Case No. B310458, May 10, 2022) ___ Cal. App. 4th ___ states [“The question of prejudice, however ‘is critical in waiver determinations *St. Agnes Medical Center* at p. 1203 . . . See *Hoover v. American Home Life Insurance Co.*, 206 Cal. App. 4th 1193, 1205 (2012). . . ’ [The presence or absence of prejudice from

arbitration, i.e., that prejudice is a critical factor, has been negated by the *Morgan* decision.

Since this case and California law and the law of most other states, on waiver of the right to compel arbitration, is based on the FAA and pre-*Morgan* federal case law, that prejudice is a substantial factor in determining waiver of the right to compel arbitration, and since this Court, in *Morgan*, did not address the role that state law might play in determining waiver, Petitioner submits that this Petition for Writ of Certiorari should be granted, to determine that California law and various state laws improperly require a showing of prejudice in determining whether a waiver of arbitration has occurred, so that California's waiver of arbitration laws and various other state waiver of arbitration laws are in line with the holding in *Morgan*.

CONCLUSION

For the reasons set forth above and in Petitioner's Petition for Writ of Certiorari in this case, the Petition should be granted, or the case should be remanded to the California Supreme Court to reconsider its decision in this case consistent with this Court's decision in *Morgan v. Sundance, Inc.*

the litigation is a determinative issue in waiver analysis.”]

Respectfully submitted,

By: /s/ Samuel Kornhauser

Samuel Kornhauser

Counsel of Record

Samuel Kornhauser, Esq. Bar No. 83528

LAW OFFICES OF SAMUEL KORNHAUSER

155 Jackson Street, Suite 1807

San Francisco, California, 94111

Telephone: (415) 981-6281

Facsimile: (415) 981-7616

Email: samuel.kornhauser@gmail.com

Attorney for Petitioner, Robert Corliss

DATED: May 27, 2022