SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO: SC03-1610

RAYMOND JAMES FINANCIAL SERVICES, INC., a Florida corporation and RICHARD VANDENBERG,	:
Petitioners,	:
v.	:
STEVEN W. SALDUKAS and STESAL INVESTMENTS, LLC.,	:
Respondents.	:

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEALS
LAKELAND, FLORIDA

RESPONDENTS' BRIEF ON THE MERITS

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JURISDICTIONAL STATEMENT

Plaintiffs/Appellees agree with Defendants that there is a split among the District Courts of Appeal with respect to the legal question of whether a party must prove prejudice in order to establish that another party has waived its right to compel arbitration. Accordingly, Plaintiffs/Appellees do not dispute that jurisdiction is appropriate here.

Jurisdiction is also appropriate because that this case is illustrative of an increasingly common abuse of mandatory arbitration clauses. The premise of the Federal Arbitration Act ("FAA"), according to its supporters, is that resolving disputes through arbitration will be cheaper, quicker and less complex than litigation in court. Unfortunately, quite a few companies who require their customers to arbitrate any disputes engage in gamesmanship with the arbitration process in ways that increase the cost and complexity of litigation. In this case, which has become all too typical of many corporations' approach, Defendants initially flatly refused to recognize an agreement or obligation to arbitrate the Plaintiffs' claims, and stated Defendants' intention to seek a judicial resolution of the dispute. When Plaintiffs proceeded to initiate litigation in court, Defendants went ahead and asked the Circuit Court to finally dismiss the Plaintiffs' claims with prejudice. Only after the Circuit Court ruled against the Defendants' motion and rejected its defense did the Defendants suddenly attempt to initiate arbitration. In this case, as with a surprising number of similar

cases, Defendants have required individual customers with relatively modest claims to spend months of procedural wrangling, and required its customers to jump back and forth from one forum to another. This sort of forum shopping, inconsistency and selective invocation of arbitration only after a court has rejected its initial defense undermines any notion that arbitration will be a streamlined and easier process. This case is all too typical of abusive behavior that shows up again and again. Defendants incorrectly assert that they are insulated from any consequences of this gamesmanship because federal law supposedly overrides normal principles of Florida state contract law relating to waiver. Even though Florida law does *not* require a showing of prejudice to establish the waiver of any other type of contractual right, Defendants claims that the FAA preempts that generally applicable contract law and requires a different resolution for arbitration clauses. Because this principle would encourage and permit extensive abuse that undermines the purpose and value of the FAA, this Court should exercise its jurisdiction and affirm the ruling of the District Court of Appeals.

STATEMENT OF THE CASE AND OF THE FACTS

Plaintiffs/Appellees, Steven W. Saldukas (hereinafter "Saldukas") and Stesal Investments, LLC (hereafter "Stesal") allege that Defendant/Appellant Raymond James Financial Services, Inc. ("Raymond James") and Defendant/Appellant Richard Vandenberg violated several Florida state securities laws, causing economic losses to Stesal and Saldukas.[1] Plaintiffs first asserted these claims by filing an arbitration claim (i.e., a Statement of Claim) with the New York Stock Exchange (hereinafter "NYSE") against Raymond James in February of 2002.[2] (A1:Ex1). Vandenberg was not named as a party in the arbitration.

In March of 2002, Raymond James filed with the NYSE a Motion to Dismiss Plaintiffs' arbitration claim. (A1:Ex3). In its Motion to Dismiss the NYSE arbitration claim, Raymond James claimed that it had no agreement to arbitrate any disputes with Saldukas and Stesal and that there was no customer relationship between the parties. (A1:Ex3:1). Raymond James failed to file an Answer to the arbitration claim.

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[1] Saldukas and Stesal Investments Limited Partnership were customers of Raymond James Financial Services, Inc. and Richard Vandenberg. Stesal is a limited liability company that merged with Stesal Investments Limited Partnership and is the successor in interest to the limited partnership as the surviving entity.

[2] This brief will follow the same conventions for citations to the record as were employed in Defendants' brief.

Raymond James' representative then stated to Plaintiffs that it refused to arbitrate this case with them. On March 15, 2002, Bruce W. Barnes counsel for Raymond James, wrote to plaintiffs' counsel to state "Enclosed you will find a copy of the Motion to Dismiss which I have forwarded to the New York Stock Exchange. You will see in that motion that [Raymond James] takes the position that there is no agreement to arbitrate the claims of Steven W. Saldukas and Stesal Investments, LLC." (A10:ExA). In sharp contrast to statements made in connection with its later Motion to Compel Arbitration, Raymond James' representative went on to flatly declare that it "feels strongly that it has no obligation to arbitrate this case." (A10:ExA).

More importantly, Raymond James' representative stated on its behalf that it believed that a Court – not an arbitrator – should be the final decisionmaker as to the merits of Raymond James' motion to dismiss these plaintiffs' claims. The March 15 letter goes on to state that "[i]f the New York Stock Exchange does not grant the motion to dismiss, Raymond James will file a lawsuit to enjoin the arbitration." (A10:ExA).

Faced with Raymond James' insistence that (a) it recognized no agreement to arbitrate; (b) it explicitly denied having any obligation to arbitrate; and (c) it intended not to respect any decision of the arbitrator that favored Plaintiffs with respect to its

motion to dismiss, and would pursue judicial proceedings if the arbitrator issued such a decision, on July 3, 2002, Plaintiffs filed this litigation against Raymond James in the Collier County Circuit Court. The Complaint named Vandenberg, who was not a party to the NYSE arbitration claim, as a Defendant as well. (A1). After the case was filed in the Circuit Court, Plaintiffs participated in the arbitration only for the purpose of scheduling. Plaintiffs informed the NYSE that they did not intend to further participate in the arbitration until this case was resolved, and that they intended to dismiss the arbitration if this case remained in court. (A16:22).

After the Complaint was filed in the Circuit Court, Defendants' counsel again wrote to Plaintiffs' counsel. These letters, dated July 16, 2002 (A8:ExD) and July 18, 2002 (A8:ExE), are quoted and argued from at length by Defendants in this Appeal. *See, e.g.*, Def.'s Brief at 2-3, 5, 9, 12, etc. Unlike the March 15, 2002 letter, these letters indicated that Defendants may recognize an agreement to arbitrate if the Plaintiffs would provide some informal discovery. (A8:ExD:3), (A8:ExE). Both letters reiterated the arguments contained in Raymond James' motion to dismiss in arbitration, however, and neither retracted the threat to go to court if the arbitrator did not rule in favor of that motion.

At the time that Plaintiffs initiated this case in court, Defendants chose not to file a motion to compel arbitration. Instead, in July of 2002 and in response to the

pending Complaint filed in Circuit Court, both Defendants filed a Motion to Dismiss the Circuit Court Complaint. (A3). In this Motion, Defendants asked the Circuit Court to hold as a matter of law that these Plaintiffs had no sustainable legal claim against these Defendants. The Motion to Dismiss was intended to be dispositive of Plaintiffs' substantive claims, as Defendants sought an order finally dismissing those claims with prejudice. Accordingly, the Circuit Court was obliged to expend significant time and judicial resources in considering and deciding Defendants' Motion to Dismiss. For instance, in connection with the Motion to Dismiss the Circuit Court Complaint, the parties submitted detailed memorandums of law (A5 and A6). The Court also heard extensive oral argument on the Defendants' Motion. (A10:Ex E).

On August 26, 2002, at the hearing on Defendants' Motion to Dismiss, counsel for Defendants continued to state on the record that it disclaimed any obligation to arbitrate the claims of these Plaintiffs:

> But the limited liability company had no relationship with us, however, a few months ago in the New York Stock Exchange arbitration forum, the limited liability company filed a claim against Raymond James. Raymond James resisted that because there is no customer relationship and *we submit no duty to arbitrate*.
>
> And one of the cases that I cited to the Court is Investors Capital Corporation, which is in my memo in the binder. And basically took the position that

> arbitration is a creature of contract, there was no contractual relationship between this limited liability company and this limited partnership.

(A10:Ex5).

Raymond James did not file an "ALTERNATIVE ANSWER AND DEFENSES" in the NYSE arbitration until approximately nine (9) months after the NYSE Rule 612(c) deadline for filing an Answer in the arbitration proceeding. In fact, the Answer was not filed until approximately six (6) months after Plaintiffs filed their Complaint in Collier County Circuit Court. When Raymond James did file its Answer, Raymond James specifically refused to withdraw its Motion to Dismiss the arbitration claim. (A10:4, note 2; A16:15, 21). Raymond James also failed to file a submission agreement in the NYSE arbitration, as is required by the NYSE's rules. An example of a submission agreement was provided to the lower court. (A10:ExD).[3]

On November 7, 2002, the Circuit Court denied the Motions to Dismiss and ordered the Defendants to serve responses to the Complaint within ten (10) days. (A7).

Having lost its Motion to Dismiss in court, Defendants no longer were interested in having the Circuit Court decide if its defenses should defeat Plaintiffs' claims. Accordingly, rather than file an Answer to the Complaint, the Defendants now

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[3] Raymond James refused to file a Submission Agreement through the date of the hearing below. (A16:21)

filed a Motion to Compel Arbitration. (A8). Plaintiffs responded that Defendants had waived their right to demand arbitration through their statements and actions. (A10:8-9; A16:10-24). Plaintiffs pointed to Defendants' actions in filing the motion to dismiss (*e.g.* A16:11, 12) and their statements and actions in the arbitration (A10:8-9; A16:12-21). Plaintiffs also argued that in the Second District Court of Appeals, a waiver is irrevocable even in the absence of any change of position of a party in whose favor the waiver operates. (A16:21).

Defendants responded that they had never waived their right to arbitrate, and that Plaintiffs had not been prejudiced even if they had intentionally relinquished that right. (A11:10-11). Defendants cited to no cases in the Circuit Court suggesting that a showing of prejudice was required in the Second District.

Throughout the litigation in the trial court relating to Defendants' Motion to Compel Arbitration, Raymond James and Vandenberg presented a united front. At no time in the Circuit Court did Vandenberg make any argument that he should be treated any differently than Raymond James. See, e.g., (A16:4), for one of the few mentions that Vandenberg received during the entire hearing in the Circuit court on the motion to compel arbitration.

Once again, the Circuit Court received detailed memoranda of law (A9-11), and listened to extensive oral argument (A16) before taking the Motion to Compel under advisement.

On January 8, 2003, the Circuit Court denied Defendants' Motion to Stay and Compel Arbitration. (A14).

Defendants appealed the Circuit Court's order. The Court of Appeals for the Second District affirmed, holding that:

> Raymond James' repeated presuit assertions that Saldukas and Stesal LLC had no right to arbitration and its threat to file a lawsuit to enjoin the NYSE arbitration proceedings were actions inconsistent with any alleged contractual right to arbitrate the claim at issue.

Defendants' Appendix ("App.") at 5. The Court of Appeals re-affirmed its position that parties "are not required to establish prejudice in order for the court to find a waiver." App. 6, citing *Donald & Co. Secs., Inc. v. Mid-Fla. Cmty Servs., Inc.*, 620 So.2d 192, 194 (Fla. 2d DCA 1993). It noted that "the federal courts of appeal are split on the issue," and turned for guidance to the U.S. Supreme Court's decision in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). App. at 8.

SUMMARY OF ARGUMENT

Defendants raise a legal issue and a factual issue in their brief. The legal issue is whether a party must prove that it suffered prejudice before it can establish that another party waived its right to compel arbitration under an agreement to arbitrate. The factual issue is whether, even if this Court assumes that no showing of prejudice is required, the specific facts of this case support the Circuit Court's decision that Defendants intentionally relinquished their right to compel arbitration.

With respect to the legal issue, this Court should affirm the Court of Appeals' holding that parties are not required to prove prejudice in order to establish that other parties have waived their right to compel arbitration. Longstanding principles of Florida law that are generally applicable to all contracts do not require a showing of prejudice, and the U.S. Supreme Court has made clear that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, does not preempt such neutral principles of contract law.

Defendants assert that federal law requires a showing of prejudice to establish a waiver of the right to arbitrate. This argument is wrong for two reasons. First, as the Supreme Court has made clear, the question of waiver is governed by state contract law, not federal law, so long as the state law does not treat arbitration clauses as inferior to other types of contract terms. Second, there is no requirement of a showing of prejudice under generally applicable state contract law principles.

Notwithstanding Defendants' assertions, there is no conclusive or binding precedent on the question of a requirement of prejudice. Instead, there is a clear split among the federal courts of appeal on this issue, with the D.C. Circuit and the Sixth and Seventh Circuits on Plaintiffs' side, and several other Circuits on Defendants' side. Accordingly, this Court should turn to the FAA itself and the guidance of the U.S. Supreme Court in interpreting that statute. In contrast to Defendants' position, the U.S. Supreme Court has repeatedly made clear that arbitration clauses are to be governed by generally applicable state contract law. The Supreme Court has directed that under the FAA, federal law only comes into play if a state applies a different rule to arbitration clauses that treats those agreements less favorably than other types of contracts. The U.S. Supreme Court has rejected the suggestion that arbitration clauses have special powers or qualities not found in other types of contracts.

Accordingly, this Court should resolve the question according to normal principles of Florida contract law that are applicable to all contracts. Under those principles, a party may waive a contractual right through conduct or statements that evidence an intention to relinquish that right, even if that conduct or those statements do not cause actual prejudice to the other party. In the one case where this Court has set forth the standard for the waiver of the right to arbitrate, it said nothing whatsoever about any requirement to prove prejudice. *See Klosters Rederi A/S v. Arison Shipping*

Co., 280 So.2d 678, 681 (Fla. 1973). Nothing in the FAA preempts or overrides this normal rule of Florida contract law.

With respect to the factual issue, there is ample evidence in the record to support the Circuit Court's decision. In March of 2002, Raymond James' authorized representative flatly stated that the company recognized "no agreement to arbitrate" the claims of the Plaintiffs in this case, and denied having any "obligation to arbitrate this case." It is hard to imagine a clearer statement of an intention to relinquish a right. Indeed, these statements are clearer, more direct, and more explicit than the sorts of conduct from which waivers are normally inferred. In addition, Raymond James declared that if the arbitrator were to hold that it was obliged to arbitrate this case, Raymond James would not recognize that ruling but would instead bring an action in court to seek a judicial declaration that it did not have to arbitrate this case.

Defendants downplay these statements by pointing to later statements that they might be willing to arbitrate the claims of other entities that they might recognize as proper plaintiffs, or that they even might arbitrate the claims of these Plaintiffs if the Defendants received certain informal discovery that would satisfy them. These later statements cannot erase or withdraw the early statements relinquishing the right to arbitrate, however, because (a) the law of waiver in Florida recognizes the black-letter

principle that waivers are irrevocable; and (b) Defendants continued to deny then and later that they had any obligation to arbitrate the claims of these Plaintiffs.

In addition to Defendants' express statements, Defendants relinquished their right to insist on arbitration through their behavior as well. If Defendants truly had wanted an arbitrator and not a court to resolve this case, they should have moved to compel arbitration when the case was filed. Instead, in keeping with their earlier insistence upon a judicial resolution, Defendants invoked the substantive jurisdiction of the trial court by filing a motion to finally dismiss the Plaintiffs' claims with prejudice. Defendants should not be permitted to ask the court to conclusively resolve this dispute and hold that these Plaintiffs have no legal claim, and then, after the court has expended significant time considering and finally rejecting that motion, suddenly change gears and demand arbitration.

I. STANDARD OF REVIEW

Defendants sought to invoke the jurisdiction of this Court on the grounds that this Court should resolve a conflict among the District Courts of Appeal on a broad legal question. That question is whether it is ever possible for a party resisting an arbitration clause to establish that another party's conduct amounts to a waiver of its right to enforce the arbitration contract without first showing that the resisting party

suffered actual prejudice from that conduct. This Court should review the legal question of whether a showing of prejudice is required on a de novo basis.

Now that this Court has exercised its jurisdiction, however, Defendants devote the vast majority of their brief to second guessing the trial court with narrow factual quibbles about whether their conduct constituted a knowing relinquishment of a right.

While Defendants ask this Court to review the trial court's factual finding on a de novo basis as well, "[w]aiver is a question of fact and a trial judge will be reversed only if there is no competent, substantial evidence to support the finding." *Merrill Lynch, Pierce, Fenner & Smith v. Adams, Inc.*, 791 So.2d 25, 26 (Fla. 2d DCA 2001), quoting *Hill v. Ray Carter Auto Sales, Inc.*, 745 So.2d 1136, 1138 (Fla. 1st DCA 1999). *See also Gilman v. Butzloff*, 22 So.2d 263, 265 (Fla. 1945) (reviewing a waiver claim for substantial evidence); *Taylor v. Payne*, 154 Fla. 359, 366; 17 So.2d 615, 619 (1944), *overruled on other grounds by Shriners Hosp. for Crippled Children v. Zrillic*, 563 So.2d 64 (Fla. 1990) (holding that waiver is a question of fact); *Cabinetree of Wisc., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) (Posner, J.) ("Review of a finding that a party has waived its contractual right to invoke arbitration is for clear error only; it is not plenary.").

II. A SHOWING OF PREJUDICE IS NOT REQUIRED TO ESTABLISH A WAIVER OF THE RIGHT TO ARBITRATE.

A. UNDER THE FEDERAL ARBITRATION ACT, THIS COURT SHOULD ANALYZE THE ISSUE OF WAIVER UNDER GENERALLY APPLICABLE PRINCIPLES OF FLORIDA CONTRACT LAW.

Defendants argue that this Court must choose to follow federal law over Florida law concerning waiver in this case. Brief at 18-19. This suggestion is flatly contrary to the way that the FAA was designed to operate. In fact, the FAA contemplates that courts shall apply generally applicable principles of state contract law to arbitration clauses. The U.S. Supreme Court has made clear that arbitration clauses are to be treated the same as other contract terms – neither better nor worse.

In contrast to Defendant's notion that arbitration contracts are governed by federal law, in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), the Supreme Court stated that in dealing with arbitration clauses, courts "should apply ordinary state-law principles that govern the formation of contracts." Similarly, in *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 474 (1989), the Supreme Court wrote in an arbitration case that "the interpretation of private contracts is ordinarily a question of state law." In *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), the Court held that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning

the validity, revocability, and enforceability of contracts generally." (emphasis in original). *See also Mourik Int'l B.V. v. Reactor Services Int'l, Inc.*, 182 F. Supp.2d 599, 604 (S.D. Tex. 2002) ("Whether Mourik waived its right to compel arbitration is an issue squarely determined by state law.").

The Supreme Court has identified only one exception to the rule that the FAA requires the application of state contract law to arbitration clauses: state laws will be preempted by federal law when they target arbitration clauses for less favorable treatment than other types of contracts. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (the FAA preempts a state statute that imposed specific disclosure requirements applicable only to arbitration agreements); *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (the FAA preempts any state policy that "would place arbitration clauses on an unequal 'footing'" with other contract terms).

The U.S. Supreme Court has made clear, however, that the FAA does not require that arbitration clauses receive more favorable treatment than other contact terms: "[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12 (1967) (emphasis added). The Supreme Court has pointed to the FAA's legislative history in reaching this conclusion. "The

House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985), citing H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924).[4]

Despite the Supreme Court's holdings in *Prima Paint* and *Dean Witter*, Defendants' theory is that this Court should make it harder for a party to waive the right to arbitrate than to waive other contractual rights. Even though other contractual rights can be and often are waived without any showing of prejudice, Defendants assert that a stricter standard applies to the waiver of the right to arbitrate. This is contrary to the direct language of *Prima Paint*. In addition, the Supreme Court very recently rejected an analogous theory. In *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Fourth Circuit Court of Appeals had enforced an arbitration clause between an employer and a cook against a federal agency, even though that agency had not been a party to the contract. The Fourth Circuit reached this conclusion (which is plainly at odds with normal contract principles) because it believed this result was required by "the policy goals expressed

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[4] *See also Levitan v. Fanfare Media Works, Inc.*, 2003 WL 21028339, at *6 (Cal. Ct. App. May 8, 2003) (California's common law waiver analysis escapes preemption by the FAA because waiver rules are "generally applicable" to all contracts, within the meaning of the FAA).

in the FAA. . . ." *Waffle House*, 534 U.S. at 284. The U.S. Supreme Court flatly rejected this approach as "inconsistent with our recent cases," explaining that those recent cases had held that "[t]he FAA directs courts to place arbitration agreements on equal footing with other contracts. . . ." *Id*. at 293 (citations omitted).

Defendants ask this Court to side with several federal courts of appeal and hold that it is harder to establish that a party has waived an arbitration clause than it is to establish a waiver of any other contract right. While Defendants do not clearly say so, in seeking to apply federal law in the place of state law, they are actually asking this Court to hold that the FAA preempts and overrides Florida's generally applicable law of contract waivers. Defendants, however, fail to acknowledge what state law they would like preempted, and fail to enunciate any theory of preemption.

The first step in any preemption analysis is to recognize that state law principles may not be lightly set aside. *See Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (a party seeking preemption of state law bears a heavy burden of overcoming the long-standing "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action."). In all preemption cases, a court must start with an assumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id*. (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Hernandez v. Coopervision,*

Inc., 661 So.2d 33, 34-35 (Fla. DCA 2d 1995) ("[T]here is a long-standing presumption against federal preemption of the exercise of the power of the states. Thus, the party claiming preemption bears the burden of proof and must establish that Congress has clearly and unmistakably manifested its intent to supersede state law.") (citations omitted).

The second step is to identify the type of federal preemption at issue and the applicable standard. There are three situations in which federal law preempts state law: where there is an express statutory provision preempting state law; where Congress intended for federal law to "occupy the field"; or where "it is impossible for a private party to comply with both state and federal law." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). In this context, as the U.S. Supreme Court has recognized, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences*, 489 U.S. at 477. Therefore, the FAA can only displace state law through the third type of preemption identified in *Crosby*, which is typically termed implied conflict preemption. *Id*. at 477-78. In order to establish that the FAA impliedly preempts Florida's contract law relating to the waiver of contracts, Defendants must demonstrate that there is an "actual conflict" between federal and state law, either because it is "impossible for a private party to comply with both . .

. requirements" or because the state laws "stand[] as an obstacle to the accomplishment and execution of full purposes" of Congress. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citations omitted). Implied conflict preemption cannot lie here because the FAA contains no independent rules of federal law for governing the waiver of contract terms.

There can also be no claim of conflict preemption because the FAA contains a savings clause that subjects arbitration clauses to the same state contract laws that apply to other types of contracts. 9 U.S.C. § 2. The U.S. Supreme Court and other courts have repeatedly held that under this savings clause, defenses to the enforcement of arbitration clauses are governed by state, not federal, contract law except in those instances where state contract laws target arbitration clauses for treatment that is inferior to other types of contracts. Indeed, the Supreme Court has noted that the primary sources of protection for consumers against corporate over-reaching in cases governed by the FAA are the rules and requirements of state contract law.[5]

B. GENERALLY APPLICABLE PRINCIPLES OF FLORIDA CONTRACT LAW DO NOT REQUIRE A SHOWING OF

[5] *See, e.g., Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'") (citation omitted).

PREJUDICE TO ESTABLISH THE WAIVER OF CONTRACTUAL RIGHT.

According to generally applicable principles of Florida contract law, prejudice is not a prerequisite to a finding of waiver. In its discussion of the waiver doctrine, this Court has never mentioned prejudice as an element of waiver. This Court has defined waiver as "the voluntary and intentional relinquishment of a known right, or conduct which implies the voluntary and intentional relinquishment of a known right." *Major League Baseball v. Morsani*, 790 So.2d 1071, 1077 n.12 (Fla. 2001); *see Gilman*, 22 So.2d at 265. This doctrine applies broadly to all rights – contractual, statutory and constitutional. *See Gilman*, 22 So.2d at 265. Defendants ask this Court to expand upon this traditional formulation, and to add prejudice as a new element.

In the context of contractual arbitration clauses, this Court has further stated that a party's contractual right to arbitration "may be waived by actively participating in a lawsuit or taking action inconsistent with that right." *Klosters Rederi A/S v. Arison Shipping Co.*, 280 So.2d 678, 681 (Fla. 1973). In this formulation as well, this Court gave no indication that prejudice was an element of waiver. Importantly, in the *Klosters* case this Court indicated that general principles of Florida contract law provided the rules for decision. *See id.* (emphasizing twice that the issue before it was the "waiver of any *contractual* right to arbitration" (emphasis added)). Nowhere in its

exposition of the principles of waiver has this Court mentioned any need for a showing of prejudice.

It was entirely appropriate that the *Klosters* opinion did not include prejudice in the requirements for a waiver, because as Florida law makes clear, "[w]aiver does not necessarily imply that the person asserting it has been misled to his or her prejudice or into an altered position." *Fla. Jur. 2d Estoppel and Waiver*, § 31; *see Taylor v. Kenco Chem. & Mfg. Corp.*, 465 So.2d 581, 587 (Fla. 1st DCA 1985); *see also County of Brevard v. Miorelli Eng'g, Inc.*, 703 So.2d 1049, 1052 n.4 (Fla. 1997) (Anstead, J., concurring in part and dissenting in part) ("unlike waiver 'an essential to estoppel is a reliance on the words or conduct of a party which causes a detrimental change in position for the party so relying'") (*quoting Taylor*, 465 So.2d at 587). This is because the determination of whether a waiver has occurred turns on the actions of the party doing the waiving, not on the reaction of the party toward whom that waiver is directed. *See Fla. Jur. 2d Estoppel and Waiver*, § 31, *Am. Jur. 2d Estoppel and Waiver*, § 36. This law is entirely consistent with this Court's definition of waiver in *Klosters*, that a waiver of a party's right to arbitration occurs when that party takes actions inconsistent with that right. 280 So.2d at 681. Whether prejudice has resulted, however, depends not on the words or actions of the waiving party but on how those words and actions are perceived by the opposing party. *See Fla. Jur. 2d Estoppel and*

Waiver, § 31. Thus, prejudice is not an element of waiver under standard principles of Florida law.

Florida's generally applicable law of waiver is in accord with the traditional and normal contract law in numerous other states. *See, e.g., Best Place, Inc. v. Penn America Ins. Co.*, 920 P.2d 334, 353 (Haw. 1996) ("Waiver encompasses either an express or implied voluntary and intentional relinquishment of a known and existing right. Waiver is essentially unilateral in character, focusing only upon the acts and conduct of the insurer. Prejudice . . . or detrimental reliance is *not* required.") (citation omitted); *City of Glendale v. Coquat*, 52 P.2d 1178, 1180 (Ariz. 1935) ("[W]aiver depends upon what one himself intends to do, regardless of the attitude assumed by the other party, whereas estoppel depends rather upon what the other party has done. Waiver does not necessarily imply that the other party has been misled to his prejudice. . . ."); *Cole v. Colorado Springs Co.*, 381 P.2d 13, 17 (Colo. 1963) (same, adopting language from *Glendale*); *Farm Bureau Mutual Auto. Ins. Co. v. Houle*, 102 A.2d 326, 330 (Vt. 1954) ("A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position."); *Brown v. State Farm Mutual Automobile Ins. Co.*, 776 S.W.2d 384, 387 (Mo. 1989) (same, quoting *Farm Bureau*); *Potesta v. U.S.F.&G. Co.*, 504 S.E.2d 135, 143 (W.Va. 1998) (same); *Royal Air Properties, Inc. v. Smith*, 333 F.2d 568, 571 (9th Cir. 1964) ("[N]o detriment to a third

party is required for waiver, it is unilaterally accomplished."). *See also Cabinetree*, 50 F.3d at 390 ("[I]n ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance. E. Allen Farnsworth, *Contracts* § 8.5 (2d ed. 1990); 3A Arthur Linton Corbin, *Corbin on Contracts* § 753 (1960). . . .").

If this Court were to create a new requirement that prejudice be proven as an element of establishing a waiver, this would distort Florida's waiver doctrine by removing intent as the critical factor. Under Defendants' proposed re-interpretation of the law of waiver, a party can intentionally relinquish a known right – in fact (as in this case) a party could state expressly that it will not enforce such a right – and yet that express statement would not create a waiver until the time that prejudice resulted. In essence, Defendants' interpretation would permit a party to voluntarily retract its expression of intent not to enforce a contractual right to arbitration as long as the retraction did not prejudice the opposing party. Such an interpretation, however, contravenes settled principles of Florida contract law which hold that "[w]hen a party waives a right under a contract he cannot, without the consent of his adversary, reclaim it." *Thomas N. Carlton Estate v. Keller*, 52 So.2d 131, 133 (Fla. 1951); 28 *Am. Jur. 2d. Estoppel and Waiver*, § 156 (1966). *See also Bared and Co. v. Specialty Maintenance and Construction Co., Inc.*, 610 So.2d 1, 3 (Fla. 2d DCA 1992) ("One who intentionally relinquishes a known right cannot, without consent of his adversary,

reclaim it, for it is well settled that a waiver once made is irrevocable. . . . And once a right is waived the waiver cannot be withdrawn. . . ."); *Am. Bankers Ins. Co. Of Florida v. Terry*, 277 So.2d 563, 564 (Fla. 3d DCA 1973) ("Once the insurer waives the giving of proof of loss, such waiver is irrevocable."); *Employers' Liab. Assur. Corp. v. Royals Farm Supply, Inc.*, 186 So.2d 317, 320 (Fla. 2d DCA 1966) (same).[6]

The bottom line is that in attempting to rewrite Florida law by inserting a prejudice requirement into the waiver doctrine, Defendants ask this Court to uproot fundamental precepts of generally applicable contract law. This the Court should not do.

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[6] The rule that waivers of contractual rights are irrevocable is a standard generally applicable rule of law throughout the nation. *See, e.g., Ins. Corp. of Ireland, Ltd. v. Bd. of Trustees of S. Ill. U.*, 937 F.2d 331, 337 (7th Cir. 1991) ("ICI's waiver of its defenses to coverage was irrevocable"), citing *Tri-City Jewish Center v. Blass Riddick Chilcote*, 512 N.E.2d 363, 366 (Ill. Ct. App. 1987); *First Ala. Bank of Montgomery v. First State Ins. Co.*, 899 F.2d 1045, 1064 (11th Cir. 1990) ("The fact that a subsequent letter . . . contains nonwaiver language does not work to reverse the waiver because a waiver is irrevocable and cannot be recalled."), citing *Franklin v. All States Life Ins. Co.*, 195 So.230, 231 (Ala. 1940), and two other cases; *Salerno v. Western Cas. & Sur. Co.*, 336 F.2d 14, 19 (8th Cir. 1964) ("waiver of non-coverage, once effected, is irrevocable") (citation omitted, applying Missouri law); *Doan v. Fort Wayne*, 247 N.E.2d 544, 548 (Ind. Ct. App.), *superseded by Doan v. City of Ft. Wayne*, 252 N.E. 2d 415 (Ind. 1969) ("In the absence of consent, the waiver may not be reclaimed and is thus irrevocable, even in the absence of . . . any change in position of the party in whose favor the waiver operates."); *Pokorny v. Pecsok*, 364 N.E.2d 241, 244 n.2 (Ohio 1977) (same); *State ex rel. Johnson v. Indep. Schl. Dist. No. 810*, 109 N.W.2d 596, 602 (Minn. 1961) ("when once established [a waiver] is irrevocable, even in the absence of consideration therefor.").

C. THE MORE PERSUASIVE FEDERAL AND STATE AUTHORITIES AGREE THAT A SHOWING OF PREJUDICE IS NOT REQUIRED TO DEMONSTRATE THAT A PARTY HAS WAIVED ITS RIGHT TO ARBITRATE.

1. Persuasive Federal Authorities Support the Plaintiffs Here.

Defendants note that the majority of federal courts of appeal to consider the question have found that a showing of prejudice is required to establish that a party has waived its contractual right to arbitrate. Brief at 19. Defendants basically assume that if a position is that of the majority of federal courts of appeal, that it is therefore the correct statement of federal law. Brief at 21-22. This bean counting approach to federal law is simply wrong. Defendants confuse the methods of opinion pollsters with the principled approach of legal reasoning. Where the U.S. Supreme Court has not spoken to an issue of federal law, this Court has a constitutional responsibility to independently evaluate questions of federal law. If this Court finds that the position adopted by the majority of lower federal courts is not consistent with the language of the FAA itself and the U.S. Supreme Court's interpretation of the FAA, then this Court should adopt the position of the minority of federal courts.

In this case, two federal courts of appeal have held that a showing of prejudice is not required to demonstrate that a party has waived its right to arbitrate. *See St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Co., Inc.*, 969

F.2d 585 (7th Cir. 1992) ("*St. Mary's*") and *National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772 (D.C. Cir. 1987) ("*National Foundation*"). The reasoning and holding in each of these cases is entirely consistent with the U.S. Supreme Court's instructions that arbitration clauses are no more enforceable than other contracts.

In *National Foundation*, for example, Judge Mikva wrote for the D.C. Circuit:

> The right to arbitration, like any contract right, can be waived. . . . 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. *Byrd*, 470 U.S. at 218-24, 105 S. Ct. at 1241-44. Thus, the question is whether there has been a waiver in the arbitration agreement context should be analyzed in much the same was as in any other contractual context. The essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right.

National Foundation, 821 F.2d at 774. In *National Foundation*, the D.C. Circuit directly answered Defendants' argument, Brief at 20, that the rule of contract interpretation set forth in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) applies to this case:

> Supreme Court pronouncements suggest that if there were any ambiguity as to the scope of the waiver, we would be obliged to resolve the issue in favor of arbitration. *See Moses H. Cone* [citation omitted]. However, no such issue arises here: the only issue is whether there has been a waiver.

National Foundation, 821 F.2d at 774-775. On the facts of that case, the Court held that there had been a waiver of the right to arbitrate.

In *St. Mary's*, the Seventh Circuit also followed the Supreme Court's guidance as to the equality (not superiority) of arbitration clauses to other types of contracts:

> But where it is clear that a party has foregone its right to arbitrate, a court may find waiver even if that decision did not prejudice the non-defaulting party.
>
> This conclusion is not inconsistent with the "strong federal policy" favoring arbitration. Congress's goal in enacting the Arbitration Act was to place arbitration agreements "'upon the same footing as other contracts, where [they] belong.'" *Dean Witter Reynolds, Inc. v. Byrd* [citation omitted]. 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. [citations omitted] Therefore, we should treat a waiver of the right to arbitrate the same as we would treat the waiver of any other contract right. [Citations omitted.]

St. Mary's, 969 F.2d at 590.

A few years later, the Seventh Circuit re-affirmed its holding in *St. Mary's*. In *Cabinetree of Wisc., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995), Judge Posner wrote for the Court the following:

> In determining whether a waiver has occurred, the court is not to place its thumb on the scales; the federal policy favoring arbitration is, at least so far as concerns the interpretation of an arbitration clause, merely a policy of treating such clauses no less hospitably than other contractual provisions. . . . To establish a waiver of the contractual right to arbitrate, a party need not show that it would be prejudiced if the stay were granted and arbitration ensued.

Cabinetree, 50 F.3d at 390. *See also Grumhaus v. Comerica Sec., Inc.*, 223 F.3d 648, 652 (7th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001) ("[T]he central question is whether the party against whom waiver is to be found intended its selection and not whether either party would be prejudiced by the forum change.").

The Sixth Circuit has also joined with the D.C. and Seventh Circuits on this point. *See Worldsource Coil Coating, Inc. v. McGraw Const. Co.*, 946 F.2d 473, 479 (6th Cir. 1991) ("Unless authorized by contract, submission of arbitrable issues in a judicial proceeding constitutes a waiver of the right to compel arbitration *regardless of the prejudice to the other party*.") (emphasis added).

2. The Federal Cases Relied Upon by Defendants Are Not Persuasive.

Defendants claim a consensus of federal courts, but point to only about half a dozen decisions. Brief at 19 n. 5. A closer look at these federal cases reveals that they are largely conclusory and devoid of reasoning on the issue of prejudice. None of these cases acknowledges the Supreme Court's directive in *Prima Paint* that arbitration clauses are no more enforceable than other contracts, none engages in an analysis of traditional principles of generally applicable state contract law, and none articulates a theory of federal preemption. *See, e.g. Cargill Ferrous Int'l v. Highgate MV*, 70 Fed. App. 759, 760 (5th Cir. 2003) (asserting a prejudice requirement in a single sentence, with no analysis or discussion); *S&H Contractors, Inc. v. A.J. Taft*

Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990) (same); *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995) (same).

A closer look at Defendants' federal cases reveals that they are basing these brief and conclusory assertions on similarly brief comments in very old cases that pre-date the U.S. Supreme Court's more recent decisions in *Byrd* and *Waffle House*. The *Leadertex* case, like the other cases discussed above, simply asserts the existence of a prejudice requirement in a single conclusory sentence. The case derives this requirement from the earlier case of *Rush v. Oppenheimer & Co.*, 779 F.2d 885 (2d Cir. 1985). The *Rush* case, similarly, asserts the existence of a prejudice requirement in a single conclusory sentence, and cites to the case of *Dempsey & Associates, Inc. v. SS Sea Star*, 461 F.2d 1009, 1018 (2d Cir. 1972). *Dempsey*, in turn, contains a conclusory sentence and a cite to *Carcich v. Rederie A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968). *Carcich*, in turn, contains a brief conclusory statement, and cites to a still older case that gives an illustration of what would constitute prejudice. Not one of these cases takes note of state contract law, or offers any rationale for preempting it. The rule in these cases stems from a brief assertion that predates the Supreme Court's statements in *Prima Paint*, *Byrd* and *Waffle House* that arbitration clauses are no more enforceable than other types of contracts. This unreasoned line of cases is far less persuasive than the thoughtful discussions in *National Foundation* and *St.*

Mary's, and mere repetition of assertions from old maritime cases (an area dominated by federal law) is a weak basis for preempting Florida's generally applicable and longstanding contract law.

Finally, some of the federal circuits that Defendants cite do not hold that prejudice is always required. In *Gilmore v. Shearson/American Express*, the Second Circuit, held that prejudice is required only when the acts alleged to be inconsistent with a right to arbitrate are ambiguous. *See Gilmore v. Shearson/American Express*, 811 F.2d 808, 812-13 (2d Cir. 1987), *overruling on other grounds recognized by McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co.*, 849 F.2d 761 (2d Cir. 1988). According to the *Gilmore* decision, if the acts resulting in waiver are clear, then no prejudice is required. *See id.* In *Gilmore*, the plaintiff filed a complaint in court, the defendant answered and moved to compel arbitration, and then the defendant subsequently withdrew its motion to compel. *See id.* at 110. The Court held that the defendant's decision to withdraw its motion to compel amounted to an express waiver of its contractual arbitration right. *See id.* at 113; *see also Smith v. Petrou*, 705 F. Supp. 183, 185 (S.D.N.Y. 1989) (finding express waiver where the party seeking arbitration previously filed a motion opposing it).

3. The Florida Cases Relied Upon By Defendants Are Not Persuasive.

Defendants also rely heavily on the decisions of those district courts of appeal that have held that prejudice is a prerequisite of waiver. As with Defendants' federal cases, most of those decisions contain no analysis at all, but simply state that prejudice is an element of waiver of arbitration clauses without any additional explanation. *See, e.g.*, *Eden Owners Ass'n, Inc. v. Eden III, Inc.*, 840 So.2d 419, 420 (Fla. 1st DCA 2003); *Lane v. Sarfati*, 691 So.2d 5 (Fla. 3d DCA 1997). The handful of these cases that *do* contain any reasoning are not persuasive. In *Benedict v. Pensacola Motor Sales, Inc.*, 846 So.2d 1238 (Fla. 1st DCA 2003), for example, the court, relying on this Court's decision in *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla. 1999), held that prejudice was required because motions to compel arbitration should be decided according to federal law, and that federal law uniformly requires prejudice as part of waiver. *See Benedict*, 846 So.2d at 1241. This analysis is flawed in several respects.

First and foremost, as explained in Part II-A above, federal law does *not* favor Defendants' position here. The U.S. Supreme Court has held that the FAA incorporates and relies upon generally applicable state contract law. The notion that federal law overrides such law and requires that arbitration contracts be more enforceable than other types of contracts is simply wrong. Three federal circuits have agreed that a party need not make a showing of prejudice to prove that another party

has waived its right to arbitrate, and these decisions are better reasoned and more consistent with the Supreme Court's directions than the contrary cases.

Second, in *Seifert* this Court did not hold that Florida contract law is generally overridden by federal law in evaluating arbitration claims, but merely held that the standard for waiver of an arbitration clause under Florida law happened to mirror the standard under federal law. *See Seifert*, 750 So.2d at 635. Indeed, this Court held that because arbitration provisions are contractual, they should be interpreted by resort to principles of contract interpretation. *See id.* at 636. As set forth above, prejudice is not required by normal principles of Florida contract law.

The *Benedict* Court further held that its decision was in harmony with the decisions of a number of other Florida courts holding that prejudice is required before compelling strict compliance with certain state procedural requirements. The cases cited by the *Benedict* Court are inapposite, however, because they do not address prejudice in the context of waiver. Additionally, while those cases concern a party's ability to adhere to procedural rules, waiver is a contractual issue that turns on the contracting parties' respective manifestations of intent. *See Seifert*, 750 So.2d at 636 (holding that the interpretation of the scope of an arbitration clause "rests on the intent of the parties" (internal quotation omitted)). That prejudice is sometimes required in

procedural matters does not mean that it should always be required in contractual matters.

Finally, the *Benedict* Court unpersuasively argued that adding a prejudice requirement was necessary to avoid a "hypertechnical application of the law." *Benedict*, 846 So.2d at 1241. There is nothing "hypertechnical" about longstanding, well-honed, nuanced principles of Florida contract law. Indeed, requiring a finding of prejudice is more likely to result in "hypertechnical" lawmaking because it creates a bright-line test for waiver. An approach where courts look to the totality of circumstances in determining whether a waiver has occurred will lead to a more balanced, and less technical, application of the law.

D. CREATING A RULE THAT REQUIRES A SHOWING OF PREJUDICE TO ESTABLISH A WAIVER OF THE CONTRACTUAL RIGHT TO ARBITRATE WOULD LEAD TO FORUM-SHOPPING AND GAMESMANSHIP.

Inserting prejudice as a necessary element of waiver of arbitration clauses has the deleterious effect of encouraging unsavory litigation tactics by giving defendants an opportunity to take two bites at the apple in every case. If waiver can not occur without prejudice, then a defendant who is a party to a mandatory arbitration agreement, either in response to a request to arbitrate or to a complaint filed in court, can file a motion to dismiss with prejudice in court, and then if that motion is

unsuccessful, it can subsequently decide to arbitrate. Under this approach, the defendant is completely insulated from any consequences from such a gambit, because if the motion is granted, then the defendant succeeds in terminating the claim without having to honor the contract's arbitration clause; but if the motion is denied, then the defendant can still elect to arbitrate without suffering any penalty. *See Cabinetree*, 50 F.3d at 391(holding that permitting a party to arbitrate after first going to court allows that party to play "heads I win, tails you lose."). Therefore, defendants could freely file in court motions that ultimately may prove dispositive, while still retaining the right to force the opposing party into arbitration. *See Jones Motor Co. v. Chauffeurs, Teamsters and Helpers Local Union No. 633*, 671 F.2d 38, 43 (1st Cir. 1982) (Breyer, J.) (noting the unfairness of allowing a party a second chance in an arbitral forum after obtaining an adverse result in court). As one court has observed:

> [i]f [a party's] demand for arbitration were to be upheld, there would be nothing to keep any litigant with an arbitration clause from testing the judicial waters, . . . and then nullifying all that has gone before by demanding arbitration. If that is what a deliberately delayed demand for arbitration can do, then all that is bad about litigation – including most particularly unnecessary delay, wasteful expense, and the manipulative impulse to forum-shop – would be fostered, rather than deterred.

Uwaydah v. Van Wert County Hosp., 246 F. Supp. 2d 808, 814 (N.D. Ohio 2002). *See also Christensen v. Dewor Developments*, 661 P.2d 1088, 1092 (Cal. 1983), *superseded on other grounds by statute as stated in Russell v. Trans Pacific Group*,

19 Cal. App. 4th 1717, 1725 (1993) ("The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration.") (citation omitted).

Even worse, adding a requirement of prejudice fosters greater injustice because only defendants, and not plaintiffs, can take advantage of the forum-shopping opportunities that would ensue. Unlike defendants, plaintiffs cannot later seek arbitration if they are first unsuccessful in court. If a defendant's motion to dismiss is granted by a court, the plaintiff cannot then turn around and seek to arbitrate the same claim because it would be barred by *res judicata*. Similarly, a plaintiff who arbitrates but receives an unfavorable result cannot subsequently file a civil complaint in court without suffering any harm from the adverse arbitration outcome. Therefore, not only does a prejudice requirement create an incentive for forum-shopping, it does so in a way that *uniquely* benefits defendants. The court should avoid causing such a harmful result. *Cf.* Defendants' Brief at 23 (requesting that this Court reach a result that minimizes opportunities for forum-shopping).

Allowing parties to litigate, and then later arbitrate after receiving an adverse judicial result, also subverts the FAA's goals of encouraging the speedy and expeditious resolution of claims. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 22 (1983) (holding that Congress' intent in passing the FAA

was to move parties out of court and into the arbitral forum as quickly and easily as possible); *Liskey v. Oppenheimer & Co., Inc.*, 717 F.2d 314, 319 (6th Cir. 1983) (noting that one purpose of the FAA was to help parties avoid the unnecessary expense and delay of litigation).

Defendants' position is not only poor policy, it also runs counter to the purposes of the FAA.

III. THE EVIDENCE SUPPORTS THE CIRCUIT COURT'S FINDING THAT DEFENDANTS WAIVED THEIR RIGHT TO ARBITRATE.

Substantial evidence exists to support the Circuit Court's finding that Defendants waived their right to arbitrate. As noted above, this Court has said that the right to arbitrate "may be waived by actively participating in a lawsuit or taking action inconsistent with that right." *Klosters*, 280 So.2d at 681. In this case, Defendants did both of these things.

A. DEFENDANTS' STATEMENTS AND CONDUCT IN THE ARBITRATION WERE INCONSISTENT WITH ITS RIGHT TO ARBITRATE.

After Plaintiffs initially sought to comply with their contract's arbitration provision by filing an arbitration request, Raymond James responded by filing a motion asserting that Plaintiffs had no right to arbitrate and that there was no agreement between them to arbitrate, and by expressly refusing to submit to the arbitral forum. (A3:Ex4:1-3). This action, alone, was enough to constitute a waiver of the right to arbitrate. *See Smith v. Petrou*, 705 F. Supp. 183, 185 (S.D.N.Y. 1989) (finding an express waiver where a party filed a motion opposing arbitration).

Raymond James made statements at the time of this motion that even more clearly communicated an intention to relinquish its right to arbitrate. It is hard to imagine an action that is more "inconsistent with the right to arbitrate" than a statement by a party's representative, in this case Mr. Barnes' statement for Raymond James, that the party "takes the position that there is no agreement to arbitrate the claims of" the Plaintiffs here. (A10:ExA:1). Even more inconsistent with the right to arbitrate, Raymond James' representative insisted that it "feels strongly that it has no obligation to arbitrate this case." *Id*. These statements flatly refusing to arbitrate, and denying the existence of any agreement to arbitrate, are as explicit statements of

waiver as one could make short of using the exact words "I intend to relinquish a known right."

Not only did Raymond James refuse to arbitrate, but it went so far as to threaten to go to court to enjoin the arbitration if Plaintiffs attempted to proceed. (A10:ExA:1). ("If the New York Stock Exchange does not grant the motion to dismiss, Raymond James will file a lawsuit to enjoin the arbitration.") This statement plainly evidences a belief that a court, not an arbitrator, should resolve the issue of whether these Plaintiffs had any claim against these Defendants. The statement is directly and unequivocally "inconsistent with the right to arbitrate."[7] *Cf. Christensen*, 661 P.2d at 1091 ("A party who brings suit over a dispute which he has agreed to arbitrate has acted in violation of his agreement. . . ."); *Checksmart v. Morgan*, 2003 WL 125130 at *4 (Ohio Ct. App. Jan. 16, 2003) ("[W]e find that Checksmart waived its right to arbitrate the dispute when it instituted its lawsuit against Morgan, and acted inconsistently with this right.").[8]

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[7] Raymond James' statement is also notable in that it assumes that it should get two bites at the apple: Raymond James was declaring its intention to ask the arbitrator to rule for it, but openly also stating that if the arbitrator ruled against it that it would instead ask the court to rule for it. This is precisely the "heads I win, tails you lose" approach that Judge Posner warned against in *Cabinetree*, 50 F.3d at 391.

[8] Defendants state that "[t]hreats to file a lawsuit are not acts inconsistent with the right to arbitrate," citing *Executive Life Insurance Co. v. John Hammer & Assoc., Inc.*, 569 So.2d 855 (Fla. 2d DCA 1990). Brief at 14. It is notable, however, that the

In short, at the very outset of this dispute, Plaintiffs asked Raymond James to submit to arbitration and Raymond James clearly said "no." This express refusal to arbitrate as well as the threat of a lawsuit to enjoin arbitration constitute acts that are clearly inconsistent with an intent to enforce a contractual right to arbitration. *See Beverly Hills Dev. Corp. v. George Wimpey of Fla., Inc.*, 661 So.2d 969, 971 (Fla. 5th DCA 1995) (finding express waiver where a party reversed its position on arbitration).

In this case, the evidence of waiver is much clearer than most. The typical posture of a case involving the alleged waiver of an arbitration clause is one in which the plaintiff initially files a complaint in court and the defendant, without mentioning arbitration, participates in that legal proceeding for a certain amount of time before subsequently demanding arbitration. *See, e.g.*, *Klosters*, 280 So.2d 678. Here, instead of passively acquiescing to a plaintiff's decision to litigate, Raymond James actively attempted to subvert Plaintiffs' attempts to initiate arbitration proceedings.

Defendants focus most of their argument upon later statements by Mr. Barnes to the effect that Raymond James might be willing to arbitrate after all if certain

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threat to sue in *Executive Life* was *not* a threat to sue for the express purpose of preventing arbitration. In addition, the court in *Executive Life* noted that the defendant had not actively participated in the litigation, unlike Defendants here who filed a motion to dismiss. In any case, the inferences to be drawn from a given threat to litigate surely depend upon the language and context of the threat, and there is no basis to hold that the trial court's implicit findings here were clearly erroneous.

conditions were not met. *See, e.g.* Brief at 2-3, 5, 9, 12, etc. Those later statements, however, did not wipe away the impact of the March 15 letter.

First, as set forth in Part II-B above, a generally applicable principle of Florida contract law is that waivers are irrevocable – once a party waives a right, it cannot undo that waiver without the agreement of the other party. Thus, the statements in Mr. Barnes' March 15, 2002 letter resolve the matter of waiver finally. Defendants argue that the later letters offering to arbitrate with other parties or with Plaintiffs only if certain conditions were met did not themselves did not constitute waivers of the right to arbitrate. Even if the Court accepts that assertion, those later letters cannot unring the bell of the clear waivers expressed in the March 15, 2002 letter.

Second, Defendants' current claim that they did not waive their right to arbitrate because they acknowledged in these later letters that they were willing to arbitrate with a different entity – Stesal Investment Limited Partnership – does nothing to diminish their refusal to arbitrate with the actual Plaintiffs in this case. Even if it is true that Raymond James at one point professed a willingness to arbitrate with Stesal Investment Corp., it repeatedly reiterated in both letters and court pleadings that it would not arbitrate with either of the Plaintiffs in this action, unless Saldukas could prove that Stesal Investment Limited Partnership, and Stesal Investments, LLC were the same entity. (A3:8-9; A8:ExD:2; A8:ExE:1; A10:ExA:1; A11:2). At no time

prior to its motion to compel arbitration did Raymond James ever disavow its refusal to arbitrate with Saldukas or Stesal Investments, LLC. As a result, regardless of its willingness to arbitrate with Stesal Investment Limited Partnership, with respect to the two Plaintiffs in this action – Saldukas and Stesal Investments, LLC – Raymond James maintained a consistent position of declining to participate in arbitration.

In addition to its express statements, Raymond James' conduct in the arbitration is inconsistent with exercising its right to arbitrate. NYSE Rule 612 (c) requires that a party file a timely submission agreement. Raymond James did not do so. NYSE Rule 612(c) requires that a party file a timely answer. Raymond James did not do so; its answer was not filed until about nine months after it was due. Raymond James' harping on the imagined absence of a customer relationship as its rationale for refusing to arbitrate (even if it had been correct) also violated the NYSE's rules. *See* Rule 600(a) (requiring arbitration of "any dispute, claim or controversy between a customer or *non-member* and a member . . . arising in connection with the business of such member . . . upon the demand of the customer or *non-member*). (A10:ExF). *See also Lehman Bros. Inc. v. Certified Reporting Co.*, 939 F. Supp. 1333, 1336 (N.D. Ill. 1996) (a contract or agreement is not a "precondition to arbitration" under the NYSE rules). By consistently flouting NYSE's rules governing arbitration, Raymond James demonstrated its wholesale contempt for the entire arbitration process.

B. DEFENDANTS' STATEMENTS AND CONDUCT IN THE CIRCUIT COURT WERE INCONSISTENT WITH ITS RIGHT TO ARBITRATE.

Defendants waived their right to arbitrate because they voluntarily and affirmatively acted to invoke the substantive jurisdiction of the court to finally resolve all of the Plaintiffs claims. After Raymond James' representative had threatened to go to court to enjoin the arbitration proceeding, Plaintiffs reasonably recognized that Defendants refused to arbitrate and filed the complaint in court. If Defendants wanted to arbitrate this case, they should have moved to compel arbitration after the complaint was filed. In keeping with Mr. Barnes' earlier statement on March 15 of a preference to have Defendants' standing defense adjudicated by a court, not an arbitrator, however, Defendants eschewed a motion to compel arbitration and instead filed a motion to dismiss Plaintiffs' complaint. *See Atkins v. Rustic Woods Partners*, 525 N.E.2d 551, 555 (Ill. Ct. App. 1988) (finding waiver where a defendant filed a motion to dismiss a complaint for failure to state a cause of action; "[a] party's conduct amounts to waiver when the party submits arbitrable issues to a court for decision.") (citation omitted); *Mills v. Jaguar-Cleveland Motors, Inc.*, 430 N.E.2d 965, 967 (Ohio Ct. App. 1980) ("Failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver.").

Defendants now argue that it does not matter that they had moved to dismiss in the Circuit Court, because this motion was merely "procedural." Brief at 16. This argument is unpersuasive. First, if the Circuit Court had granted Defendants' Motion to Dismiss, it would have finally and conclusively resolved and extinguished any and all claims that these Plaintiffs had to recover compensation from Defendants. It does not matter whether one labels this motion "procedural" or "substantive," the relevant point is that Defendants were asking the Court (not the arbitrator) to decide their leading defense and to dispose of the controversy in its entirety. Second, Defendants' suggestion that "procedural" issues such as standing should be decided by courts rather than arbitrators, but then that all other issues should be forced into arbitration, is simply wrong. The question of Plaintiffs' standing is itself an arbitrable issue. By consciously submitting that issue to the court rather than demanding arbitration, Defendants voluntarily relinquished their right to arbitrate. *See Cabinetree of Wisc.*, 50 F.3d at 390 ("[A]n election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate."); *Worldsource Coil Coating, Inc. v. McGraw Constr. Co., Inc.*, 946 F.2d 473, 479 (6th Cir. 1991) ("Unless authorized by contract, submission of arbitrable issues in a judicial proceeding constitutes a waiver of the right to compel arbitration regardless of the prejudice to the other party."); *Commonwealth Equity Servs., Inc. v. Messick*,

831 A.2d 1144, 1152 (Md. App. 2003) ("It is well settled, however, that a party who litigates an issue otherwise subject to arbitration waives the right to arbitration of that issue."). If Defendants had truly intended to enforce their arbitration rights, they should have moved to compel arbitration and demanded that the arbitrator decide the question of standing. Instead, Defendants voluntarily chose not to proceed with arbitration, and therefore cannot now be permitted to run back to arbitration in the hopes of receiving a better result. *See Cabinetree*, 50 F.3d at 390.

Finally, this Court should find that Defendants' naked attempt to wait for a ruling on their motion to dismiss before deciding whether or not to arbitrate justifies a finding of waiver. By waiting until after their motion to dismiss was denied before moving to compel arbitration, it is apparent that Defendants wanted to have it both ways: they wanted to use the judicial process to their own advantage to get the claim dismissed, but once they discovered that judicial action might not work in their favor, they wanted to be able to retain the option of bypassing the court altogether by compelling arbitration. It is noteworthy that Defendants filed their motion to compel arbitration on the very same day that the court denied their motion to dismiss, suggesting that Defendants had been ready to file for arbitration all along, but that they had made a strategic decision to wait until they received a ruling on their motion

to dismiss.[9] Other courts routinely have found that a party's effort to test the judicial waters before deciding to seek arbitration is a significant factor in determining if that party has waived its right to arbitrate. *See, e.g.*, *Cabinetree*, 50 F.3d at 391; *Jones*, 671 F.2d at 43 (finding that waiver was necessary to prevent "a party sensing an adverse court decision a second chance in another forum); *Messick*, 831 A.2d at 1156. In fact, in their own motion to compel arbitration, Defendants concede that it would be unfair to allow Plaintiffs' claim to proceed in two different forums. (A8:¶21). Defendants' efforts to move the claim to arbitration after having voluntarily submitted to the jurisdiction of the court and after having attempted and failed to convince the court to dismiss the case, however, would do just that. This Court should not permit Defendants to manipulate the arbitration process in order to obtain a result they tried and failed to get from the court.[10]

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[9] Defendants filed their motion to compel arbitration on November 7, 2002, almost seven months after Saldukas and Stesal Investments, LLC first requested arbitration. Other courts have found that comparable delays sufficed to create a waiver. *See, e.g. Southern Systs. Ltd. v. Torrid Oven, Ltd.*, 105 F. Supp. 2d 848, 855 (W.D. Tenn. 2000) (observing that several courts have found waiver after an eight month delay); *Donald & Co. Secs., Inc. v. Mid-Fla. Cmty Servs., Inc.*, 620 So.2d 192, 194 (Fla. 2d DCA 1993) (finding waiver where the defendant waited thirteen months before moving to compel arbitration).

[10] In the Circuit Court, Defendants made no effort whatsoever to distinguish between Raymond James and Vandenberg with respect to the waiver issue. A review of the briefs filed by Defendants and the transcript of the hearing on their Motion to Compel Arbitration reveals no occasion on which Vandenberg requested that he be

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court affirm the decision of the Second District Court of Appeals.

Respectfully Submitted,

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treated any differently than Raymond James. Defendants' new efforts to raise this issue for the first time on appeal should be rejected.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing was served by U.S. mail, this ____ day of December 2003, upon:

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

Undersigned counsel hereby certifies that the foregoing brief is printed in 14 point Times New Roman font.

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