No. _____

IN THE

Supreme Court of the United States

MORGENTHAU VENTURE PARTNERS, L.L.C., and MORGENTHAU ACCELERATOR FUND, L.P.,

Petitioners,

v.

ROBERT A. KIMMEL,

Respondent.

On Petition for a Writ of Certiorari to the Florida Fourth District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Florida court of appeal's one-word refusal to compel arbitration disregards this Court's decision in *KPMG LLP v. Cocchi,* 565 U.S. 18 (2011) that a blanket order denying arbitration without addressing the arbitrability of all claims violates the Federal Arbitration Act ("FAA").

2) Whether waiver defenses to a motion to compel arbitration under the FAA require a showing of prejudice.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below are,

Robert A. Kimmel, Plaintiff-Appellee, Respondent on Review;

Morgenthau Venture Partners, L.L.C., Defendant-Appellant, Petitioner on Review; and

Morgenthau Accelerator Fund, L.P., Defendant-Appellant, Petitioner on Review.

No parent corporation or any publicly held company owns 10% or more of Morgenthau Venture Partners, L.L.C., or Morgenthau Accelerator Fund, L.P. stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Morgenthau Venture Partners, L.L.C., and Morgenthau Accelerator Fund, L.P., ("Morgenthau") respectfully petition for a writ of certiorari to review the judgment of the Florida Fourth District Court of Appeal in this case.

OPINIONS BELOW

The Florida Fourth District Court of Appeal ("Fourth DCA") panel opinion (App. A, *infra*, 1a-2a) is unreported. The Fourth DCA order denying panel rehearing and rehearing en banc (App., *infra*, 3a-4a) is unreported. The trial court's order denying Morgenthau's motion to compel arbitration (App., *infra*, 5a) is unreported.

JURISDICTION

The judgment of the Fourth DCA, a *per curiam* affirmance without opinion, was entered on September 27, 2018. The Fourth DCA denied Morgenthau's timely motion for rehearing and rehearing en banc on November 2, 2018. On January 17, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 4, 2020.[1] *See Morgenthau Venture Partners, LLC, et al., v. Robert A. Kimmel,* No. 18A757. A *per curiam* affirmance without opinion is not reviewable by the Florida Supreme Court, making the Fourth DCA "the highest court of [Florida] in which a decision could be had" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a). *See, e.g., Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967); *Wells v. State*, 132 So. 3d 1110, 1111 (Fla.

[1] The extension to "2020" was apparently a scrivener's error.

2014) (reiterating that the Florida Supreme Court "lacks discretionary review jurisdiction over unelaborated per curiam affirmances and denials"). This Court therefore has jurisdiction over the Fourth DCA's order affirming the denial of Morgenthau's motion to compel arbitration pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, mandates enforcement of arbitration agreements contained in contracts evidencing transactions in interstate commerce. Section 2 of the FAA provides,

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

INTRODUCTION

This case represents the second time Florida's Fourth DCA has disregarded this Court's unambiguous rejection of "blanket refusal[s] to compel arbitration" under the FAA. *See Cocchi,* 565 U.S. at 19. In *Cocchi*, this Court *per curiam* vacated a Fourth DCA decision affirming an order denying arbitration

"after determining that two of the four claims in a complaint were nonarbitrable." *Id.* at 20–21. This Court found it apparent that the Fourth DCA "failed to determine whether the other two claims in the complaint were arbitrable," as its affirmance revealed "nothing to suggest" the appellate court examined those claims for arbitrability. *Id.* at 20–21. The Fourth DCA repeated the violation here.

After bringing a straightforward case for breach of a Limited Partnership Agreement and an accounting, Plaintiff Robert Kimmel learned Morgenthau had an ironclad defense. The claims depended on a contractual dissolution date having passed; however, Morgenthau's Limited Partner Board had extended the date. Kimmel responded with a radically altered amended complaint. He alleged conflicts of interest by Morgenthau's Limited Partner Board and added a claim for breach of fiduciary duty.

Morgenthau then moved to compel arbitration. The trial court denied the motion on a single basis—Morgenthau had supposedly waived arbitration by litigation conduct, a ruling pertinent only to the original complaint and not the new and materially different theories in the amended complaint. The Fourth DCA *per curiam* affirmed the ruling without opinion.

Like *Cocchi*, the ruling revealed "nothing to suggest" either the trial court or the Fourth DCA considered the arbitrability of the new claims. Also like *Cocchi*, the Fourth DCA's summary affirmance avoided having to address the new claims at all. The result is a denial of arbitration under § 2 of the FAA without a single word of discussion from two state courts about the arbitrability of the new, materially different claims Kimmel injected into the case. Because this decision is in direct and flagrant conflict

with *Cocchi* and the FAA, this Court should grant the petition and summarily vacate the Fourth DCA's decision.

This Court should also resolve the waiver question at the heart of the lower court's refusal to compel arbitration—whether waiver-by-litigation-conduct defenses to arbitration require a showing of prejudice under the FAA. This Court granted certiorari from an Eleventh Circuit decision on exactly this issue in 2011. *Stok & Associates, P.A. v. Citibank, N.A.*, 562 U.S. 1215 (2011). But *Stok* settled. *Stok & Associates, P.A. v. Citibank, N.A.*, 563 U.S. 1029 (2011) (dismissing writ). In the eight years since then, the issue has continued to thwart otherwise valid and enforceable arbitration agreements in a minority of jurisdictions.

Almost certainly, this Court granted review in *Stok* because of a 10-2 Circuit split over whether the FAA requires prejudice to prove a party seeking to enforce an arbitration agreement waived the right. Ten Circuits, including the Eleventh Circuit, require prejudice. Two Circuits, the Seventh and D.C. Circuits, require no prejudice.

And Florida, though it sits in the Eleventh Circuit, follows the minority view. The trial court in this case, bound to follow Florida Supreme Court precedent that adopted the minority view, denied Morgenthau's motion to compel arbitration accordingly.

The issue this Court agreed to review in *Stok* has never been resolved. This case is the ideal vehicle for resolving it now. The trial court based its decision on Florida's expansive view of waiver, where merely filing an answer, as Morgenthau did in response to the original complaint, waives arbitration regardless of

prejudice. Deep conflicts between the Circuits and state courts remain over when conduct arguably inconsistent with arbitration overrides § 2's mandate. The conflict invites forum shopping. In Florida alone, the difference between a waived arbitration agreement and an enforceable one likely depends on what courthouse a party is in. That is inconsistent with the FAA's goals of efficient, uniform enforcement of arbitration agreements. The Court should grant the petition to resolve this underlying question as well.

STATEMENT OF THE CASE

A. FAA background, and the Circuit split over waiver.

Congress enacted the FAA in 1925 to combat "widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *see, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). The statute "reflects an emphatic federal policy in favor of arbitral dispute resolution." *Cocchi*, 565 U.S. at 21 (citing *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)) (internal quotes omitted).

The FAA's core mandate, embodied in § 2, makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has recognized "only two limitations on the enforceability of arbitration provisions governed by the [FAA]: they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'" *Southland Corp. v.*

Keating, 465 U.S. 1, 10–11 (1984). The FAA's substantive mandate to enforce arbitration agreements is "applicable in state as well as federal courts," as "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id*. at 16.

To achieve this goal, Congress built into the FAA a number of rules and procedures recognized by this Court as heavily favoring arbitration. State and federal courts must "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Courts further must "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," and resolve "any doubts concerning the scope of arbitrable issues … in favor of arbitration," *Moses H. Cone*, 460 U.S. at 22, 24–25.

If there are arbitrable and non-arbitrable claims in a case, courts must send the arbitrable claims to arbitration "even if the result is 'piecemeal' litigation." *Dean Witter*, 470 U.S. at 221. Moreover, "state and federal courts must examine with care the complaints seeking to invoke their jurisdiction in order to separate arbitrable from nonarbitrable claims," and courts "may not issue a blanket refusal to compel arbitration." *Cocchi*, 565 U.S. at 19.

State contract law is preserved in § 2's savings clause, but this Court interprets the clause to preserve only "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Concepcion*, 563 U.S. at 339. Defenses "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" are preempted. *See id*. (citing *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687 (1996); *Perry v. Thomas,* 482 U.S. 483, 492–493, n. 9 (1987)). The FAA also preempts

defenses thought to be "generally applicable" when courts apply them "in a fashion that disfavors arbitration," when the defense "would have a disproportionate impact on arbitration agreements," and when they "stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 341-43.

Waiver is a defense to the enforcement of arbitration agreements. *See Moses H. Cone*, 460 U.S. at 25. Where the waiver question arises from the contract, "*i.e.,* whether prerequisites such as *time limits,* notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate," this Court holds that it is an issue for the arbitrator to decide. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002) (citing Revised Uniform Arb. Act of 2000, cmt. 2, 7 U.L.A. at 13 (Supp.2002)) (emphasis in original). However, where the alleged waiver arises from litigation conduct, courts have generally determined that it is an issue for them to decide.

The Circuits have split over what standards govern waiver under the FAA. The majority view, followed by the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits, holds that a waiver defense requires a showing of prejudice. *See, e.g., Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018); *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707, 713 (4th Cir. 2015); *Sutherland v. Ernst & Young, LLP*, 600 Fed. Appx. 6, 8 (2d Cir. 2015) ("The key to a waiver analysis is prejudice."); *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 774 (10th Cir. 2010); *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 231 (3d Cir. 2008) (finding "prejudice is the touchstone for determining whether the right to arbitrate has been waived by litigation conduct."); *Gordon v. Dadante*, 294 Fed.

Appx. 235, 238 (6th Cir. 2008); *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 15 (1st Cir. 2005); *Cargill Ferrous Intern. v. Sea Phoenix MV*, 325 F.3d 695, 700 (5th Cir. 2003); *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002); *Dumont v. Saskatchewan Gov't Ins. (SGI)*, 258 F.3d 880, 886 (8th Cir. 2001).

On the minority side, the Seventh and D.C. Circuits require no prejudice at all. *See, e.g., Khan v. Parsons Glob. Services, Ltd.*, 521 F.3d 421, 425 (D.C. Cir. 2008); *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Products Co., Inc.*, 969 F.2d 585, 590 (7th Cir. 1992); *Nat'l Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777 (D.C. Cir. 1987). These courts view waiver as a generally applicable contract defense requiring nothing more than conduct inconsistent with arbitration.

The States are also divided. Relevant to this case, Delaware requires prejudice. *See, e.g., H & S Ventures, Inc. v. RM Techtronics, LLC*, CV N15C-11-082 JRJ, 2017 WL 237623, at *3 (Del. Super. Ct. Jan. 18, 2017) (explaining, "Courts generally look to whether the party opposing arbitration has suffered any prejudice as a result of the delay in demanding arbitration"); *Halpern Med. Servs., LLC v. Geary,* 2012 WL 691623, at *3 (Del. Ch. Feb. 17, 2012) (holding "[I]t is not merely the inconsistency of a party's actions, but the presence or absence of prejudice which is determinative of waiver.") (quoting *Gavlik Constr. Co. v. H.F. Campbell Co.,* 526 F.2d 777, 783 (3d Cir. 1975)); *Action Drug Co. v. R. Baylin Co.*, Civil Action 9383, 1989 WL 69394, at *3 (Del. Ch. June 19, 1989) (holding "Baylin has not satisfied its heavy burden of establishing that it was prejudiced by Action's allegedly tardy effort to compel arbitration.")

(citing for the requirement of waiver *Rush v. Oppenheimer & Co.,* 779 F.2d 885 (2nd Cir. 1985); *J & S Construction Co., Inc. v. Travelers Indemnity Co.,* 520 F.2d 809 (1st Cir.1975); *Tenneco Resins, Inc. v. Davy Intern., A.G.,* 770 F.2d 416 (5th Cir.1985)).

Florida does not. The Florida supreme court addressed this issue in *Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707 (Fla. 2005). That court reasoned that since "the United States Supreme Court has not decided this issue as to the Federal Arbitration Act, Florida courts are free to interpret the federal statute as being consistent with Florida court decisions analyzing this same issue under the Florida Arbitration Code." *Id.* at 710. The court decided therefore that Florida's definition of waiver—"the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right"—should apply to FAA arbitration. *Id.* at 711. And the court adopted the D.C. Circuit's reasoning 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." *Id.* (quoting *A.G. Edwards*, 821 F.2d at 774–75). Thus, the Florida supreme court concluded, the FAA imposes "no requirement for proof of prejudice" to prevail on a waiver defense. *Saldukas*, 896 So. 2d at 710.

B. Factual and Procedural Background

Kimmel sued Morgenthau in Florida state circuit court alleging breach of contract and seeking an accounting. Kimmel based the claims on a contractual dissolution provision in the Limited Partnership Agreement that required a return of investment by a date certain. Morgenthau answered and produced

documents showing Morgenthau's Limited Partner Board had, consistent with the Limited Partnership Agreement, already extended the dissolution date. Therefore, no return of investment was due.

The case would have ended there, but Kimmel responded with an amended complaint and an entirely new theory. He claimed Morgenthau's Limited Partner Board had supposed conflicts of interest and that, as a result, the extension of the dissolution date was supposedly "null and void." Kimmel altered his breach of contract theories to reflect the new allegations and added a new breach of fiduciary duty claim.

Morgenthau responded by moving to compel arbitration under the FAA. An arbitration clause in the Limited Partnership Agreement broadly provided that "any dispute or disagreement concerning, pertaining or relating to this Agreement . . . shall be submitted to arbitration under the laws of the American Arbitration Association. . . ."

Kimmel's entire defense to the motion was waiver. He contended Morgenthau's answer and document production waived its right to arbitration under Florida law. A contractual choice-of-law provision, however, adopted "applicable Federal laws and the laws of the State of Delaware." The FAA and Delaware required Kimmel to show prejudice to prove waiver, Morgenthau argued, and Kimmel had none. Morgenthau also argued Kimmel's new, materially different theories revived Morgenthau's right to arbitration under persuasive Eleventh Circuit case law.

The trial court denied Morgenthau's motion solely on waiver grounds. App., *infra*, 3a-4a. The court determined that Delaware law supposedly adopts the

forum's choice of law rules for waiver. In spite of the parties' choice of Delaware and FAA law, therefore, the trial court ruled the question of waiver was, paradoxically, still controlled by Florida law. *See id.* at 3a. Accordingly, the Florida supreme court's decision in *Saldukas* that prejudice is not required controlled, and the trial court deemed Morgenthau's limited litigation conduct to be a waiver of arbitration. App., *infra*, 3a. The trial court's order made no mention of, much less addressed in any meaningful way, the new and materially different claims raised by the amended complaint or Morgenthau's revival argument. *See id.*

Morgenthau appealed to the Fourth DCA. Morgenthau argued that this Court's decision in *Cocchi* required reversal, as the trial court gave no indication it considered the arbitrability of Kimmel's new and materially different theories and claims. Morgenthau further argued the new theories were indisputably arbitrable, that no alleged waiver argument applied to them, and that the new theories revived the right to arbitration in any case. The Fourth DCA affirmed the denial of arbitration without opinion. App., *infra*, 1a-2a. The Fourth DCA similarly denied Morgenthau's motion for rehearing en banc without discussion. The one-word decisions foreclosed any opportunity to seek review in the Florida supreme court. *See Wells*, 132 So. 3d at 1111.

REASONS FOR GRANTING THE PETITION

I. The Fourth DCA flagrantly violated this Court's decision in *Cocchi* and the FAA.

This Court's decision in *Cocchi* enforced the FAA's longstanding principle that "when a complaint contains both arbitrable and nonarbitrable claims, the Act requires courts to compel arbitration of pendent

arbitrable claims … even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Cocchi*, 565 U.S. at 22 (citing *Dean Witter*, 470 U.S. at 217) (internal quotes omitted). It was "not altogether free from doubt" whether the Fourth DCA had examined two of the alleged claims for arbitrability. *Cocchi*, 565 U.S. at 19. Nor was it entirely clear that the apparently unexamined claims were ultimately arbitrable. *See id*. at 22. The question swung on whether the claims were derivative, in which case they were arbitrable, or direct. The Florida courts decided two were direct and denied arbitration. The problem was that the Fourth DCA gave no sign that it even considered the arbitrability of the other two claims. This Court concluded the Fourth DCA's "apparent refusal to compel arbitration on any of the four claims based solely on a finding that two of them … were nonarbitrable" constituted a patent violation of the FAA's "emphatic federal policy in favor of arbitral dispute resolution." *Id*. at 21 (citations omitted). The Fourth DCA could not ignore any potential arbitrable claim. *Id.* at 19 (holding courts "must examine with care the complaints" to assess each claim for arbitrability). Nor could it keep its reasons secret, presuming it even had reasons beyond the traditional hostility of Florida courts to arbitration. *See Buckeye*, 546 U.S. at 443–44. It had to decide each claim's arbitrability as § 2 mandates. The Fourth DCA's failure to do so made its decision "subject to immediate review." *Cocchi*, 565 U.S. at 22 (citing *Southland,* 465 U.S. at 6–7).

This case presents an even stronger argument that neither the trial court nor the Fourth DCA gave any consideration to the arbitrability of the new and materially different claims and theories Kimmel

raised in his amended complaint. The trial court's limited discussion of Delaware choice-of-law and *Saldukas*'s rejection of prejudice, App., *infra*, 3a, had nothing to do with Kimmel's new claims. Prejudice or no prejudice, the only litigation conduct Morgenthau engaged in after the amended complaint was to retain new counsel and move to compel arbitration. That would not qualify as a waiver under any state's law, or at least any law not repugnant to the FAA. The FAA required the courts below to assess the new theories and claims for arbitrability. *Cocchi*, 565 U.S. at 22. Had they done so, denying the motion to compel arbitration would have been extremely difficult.

Morgenthau relied on Eleventh Circuit and other federal court decisions holding that substantially new claims will revive a right to arbitrate that had allegedly been previously waived. *See, e.g.*, *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1202–03 (11th Cir. 2011) (collecting cases and holding, "courts will permit the defendant to rescind his earlier waiver, and revive his right to compel arbitration" where "the amended complaint unexpectedly changes the scope or theory of the plaintiff's claims."); *Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir. 1997) (holding "only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate," and even an "explicit waiver of its right to arbitrate certain claims would not necessarily waive arbitration of other claims raised in an amended complaint filed after … this waiver."). These and related decisions reject the possibility that an alleged original waiver irreversibly destroys the right to arbitrate no matter what new and different theories the plaintiff injects into the case. *See Collado v. J. & G. Transp., Inc.*, 820 F.3d 1256, 1260 (11th Cir. 2016) (holding the

defendant "did not waive the right to arbitrate the state law claims raised in the second amended complaint because those claims were not in the case when it waived by litigation the right to arbitrate the FLSA claim"); *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638, 640 (7th Cir. 1981) (holding the defendant did not waive the right to compel arbitration of state law claims alleged in an amended complaint that were alluded to, but not clearly stated, in the original complaint); *see also Gingiss Int'l, Inc. v. Bormet,* 58 F.3d 328, 330–332 (7th Cir.1995) (holding that a franchisor who brought an unlawful detainer action against its franchisee had not waived its right to arbitrate other claims brought by the franchisee where the two suits "involved different issues.").

The parties in this case debated just how radically different Kimmel's new breach of fiduciary duty and conflicted-Limited-Partner-Board theories were. They were extremely different, as Kimmel strained to morph his original claim of a lapsed dissolution date into one that could survive the fact that the dissolution date had not actually occurred. Allegations of a tainted Limited Partner Board and a purportedly null and void extension materially changed the case. Kimmel denied this. But whatever the merits of his (frankly dubious) argument that the changes to his case were not all that substantial, the trial court and Fourth DCA had to address the issue—just as the Fourth DCA had to address whether two counts were direct or derivative in *Cocchi*.[2] To offer no

[2] It comes as no surprise that on remand in *Cocchi*, the Fourth DCA, forced to examine all the claims for arbitrability, decided that "KPMG is correct in its assertion that these are derivative claims subject to arbitration." *See KPMG LLP v. Cocchi*, 88 So. 3d 327, 331 (Fla. 4th DCA 2012).

word at all on Kimmel's new claims and Morgenthau's revival theory violates the FAA and this Court's decision in *Cocchi* to the core.

The threat to the FAA this Court perceived in *Cocchi*'s "blanket order" is critical. If courts hostile to arbitration could deny motions to compel by simply saying nothing, they would do it all the time. The "immediate" review *Cocchi* requires would be virtually impossible. *See Cocchi*, 565 U.S. at 22. It would be too easy to assume the blanket orders and one-word denials rejecting arbitration must have been backed by some good reasons consistent with the FAA, and too burdensome to prove otherwise. The final result in *Cocchi*, a reversal with instructions to compel arbitration, *see Cocchi*, 88 So. 3d at 331, illustrates exactly that. This Court understood in *Cocchi* that the mandate and strong presumptions embodied by § 2 of the FAA would be useless if courts did not have to articulate their analysis. Indeed, silent orders denying arbitration are as much a threat to the FAA, if not a graver threat, as the hostile court-created rules this Court has explicitly invalidated for decades.

The Fourth DCA's repeated and inexplicable failure to abide by this Court's instructions on the FAA therefore requires review. It must be made unmistakable that arbitration cannot be denied in the dark. *Cocchi* and *Dean Witter* are critical components of this Court's FAA precedent, establishing that courts cannot ignore any potential arbitrable claim and must, after careful review, compel the ones deemed arbitrable to arbitration. If the case changes and a party then moves to compel arbitration, it follows that courts must examine the new claims for arbitrability just as they would the original claims.

Because the Fourth DCA failed to say anything about Kimmel's new claims or Morgenthau's revival

argument, the Court should grant the petition and vacate the Fourth DCA's decision as a clear-cut violation of this Court's FAA precedent. *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (granting certiorari and summarily vacating where "the Supreme Court of Appeals of West Virginia, by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law"); *Cocchi*, 565 U.S. at 22 (granting the petition for certiorari and vacating the Fourth DCA's judgment for "fail[ing] to give effect to the plain meaning of the Act and to the holding of *Dean Witter*"); *see also Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (reversing the Kentucky supreme court "when it flouted the FAA's command to place [arbitration] agreements on an equal footing with all other contracts."); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (noting, in reversing a California court that circumvented *Concepcion*, "[t]he Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.").

II. The Circuits are in conflict, as are the States, over whether the FAA requires a showing of prejudice to prove waiver.

The 10-2 split among the Circuits has led to vastly disparate treatment of waiver defenses raised in opposition to motions to compel arbitration. The division is even more pronounced than it appears. The Circuits that require prejudice take vastly different approaches. And States, bound as they are to enforce the FAA, have adopted the waiver requirements they like rather than the ones that promote the FAA's objectives.

The majority view is correct. Arbitration agreements are far easier to enforce when prejudice is required to prove waiver than when it is not required. This Court should grant the Petition to decide the Circuit split and finally create national uniformity in how State and federal courts decide waiver defenses under the FAA.

A. The Circuits have splintered over the requirements for waiver.

Ten Circuits require some level of prejudice, but they do not agree on how to apply the requirement to waiver defenses. There is wide disparity in the level of prejudice required and the burden required to prove it. The Fifth Circuit employs a strong presumption against waiver of arbitration. *See, e.g., Cargill,* 325 F.3d at 700 (stating "[w]aiver of arbitration is not a favored finding and there is a presumption against it"). The Ninth and Fourth Circuits similarly place a "heavy burden" on the party seeking to establish waiver of a right to arbitrate. *Sovak*, 280 F.3d at 1270 (explaining "Sovak bears a 'heavy burden of proof' in showing" the elements of waiver); *MicroStrategy, Inc. v. Lauricia,* 268 F.3d 244, 249-50 (4th Cir. 2001) (same, and finding "the circumstances giving rise to a statutory default are limited and, in light of the federal policy favoring arbitration, are not to be lightly inferred").

The Second Circuit similarly holds that "waiver of the right to arbitration is not to be lightly inferred," and proof of prejudice is mandatory. *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 104–05 (2d Cir. 2002). The Second Circuit recognizes two types of prejudice—"substantive prejudice . . . such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or" prejudice due to

excessive cost and time delay, "when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense." *See id*.

The Third Circuit has taken it a step further, crafting a six-part test to determine the presence of prejudice. *See Ehleiter v. Grapetree Shores, Inc.,* 482 F.3d 207, 223 (3d Cir. 2007) (compiling a "nonexclusive list of factors" that include, "[1] the timeliness or lack thereof of a motion to arbitrate; [2] the degree to which the party seeking to compel arbitration has contested the merits of its opponent's claims; [3] whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the district court proceedings; [4] the extent of its non-merits motion practice; [5] its assent to the [trial] court's pretrial orders; and [6] the extent to which both parties have engaged in discovery.").

In contrast to the heavy-burden approach of the Second, Fourth, Fifth, and Ninth Circuits, the First Circuit requires only a "modicum of prejudice." *Rankin v. Allstate Insurance Co.,* 336 F.3d 8, 12 (1st Cir. 2003). The Eleventh Circuit requires that when a party acts "inconsistently with the arbitration right," the actions must have "in some way prejudiced the other party." *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315–16 (11th Cir. 2002).

On the other hand, the Eleventh Circuit also holds that even filing a lawsuit against a defendant will not by itself waive arbitration. *See Grigsby & Associates, Inc. v. M Sec. Inv.*, 635 Fed. Appx. 728, 733 (11th Cir. 2015) (finding "no case in which we have held that a party waived its right to arbitrate solely by delay in initiating the proceeding or based on the amount of time that elapsed."); *Ivax*, 286 F.3d at 1317

(holding a party "had not waived its right to arbitrate by earlier filing a suit against a third party.").

Nor does mere delay, fees and costs, or engaging in discovery qualify as prejudice in the Eleventh, Fourth, Fifth, and Tenth Circuits. *See Grigsby*, 635 Fed. Appx. at 734 ("incurring minimal fees in responding to lawsuits is insufficient to establish prejudice supporting a finding of waiver."); *Hill,* 603 F.3d at 775–76 (finding no "substantial prejudice from Ricoh's delay in seeking arbitration," and no evidence that "he has been burdened by discovery significantly more than he would have been if the dispute had gone to arbitration at the outset"); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.,* 380 F.3d 200, 206–07 (4th Cir. 2004) (recognizing that the "minimal nature of the discovery" was "insufficient to establish prejudice"); *Walker v. J.C. Bradford & Co.,* 938 F.2d 575, 578 (5th Cir.1991) (holding "minimal discovery" in litigation was not prejudice).

The two Circuits that do not require prejudice, the Seventh and D.C. Circuits, have a decidedly broader view of waiver. The Seventh Circuit reviews waiver decisions for "clear error only," making waiver findings extremely hard to reverse. Waiver "can be implied as well as express." In deciding waiver, "the court is not to place its thumb on the scales," as "the federal policy favoring arbitration is … merely a policy of treating such clauses" and "a party need not show that it would be prejudiced if the stay were granted and arbitration ensued." *Cabinetree*, 50 F.3d at 390. Courts can consider prejudice in the D.C. and Seventh Circuits, but they need not. *See Disco*, 969 F.2d at 590; *A.G. Edwards*, 821 F.2d at 777 (holding "[t]his circuit has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration.").

Virtually any litigation conduct will waive the right to arbitrate. *See Cabinetree*, 50 F.3d at 390 ("invoking judicial process is *presumptive* waiver") (emphasis added); *A.G. Edwards*, 821 F.2d at 775 (defining "conduct inconsistent with the right to arbitrate" as "active participation in a lawsuit").

That is the view embraced in Florida, as well, where the mere filing of an answer, or minimal engagement in discovery, suffices to waive arbitration. *See, e.g., O'Flarity v. Trend Star Dev., Inc.*, 689 So. 2d 1297, 1297 (Fla. 4th DCA 1997) (holding "[t]he filing of an answer is an act inconsistent with a subsequent demand to arbitrate") (collecting cases). The trial court made exactly this finding against Morgenthau in this case with respect to the initial complaint. App., *infra*, 3a. Morgenthau had answered and responded to some preliminary discovery requests. Not a single hearing or deposition had taken place. Yet, the trial court determined that was enough to waive arbitration, since no showing of prejudice was necessary. *Id.*

There is a dire need for uniformity in how courts treat prejudice in deciding waiver claims. To be sure, waiver will virtually always depend on the facts of a case. But it is also clear that waiver is so much easier to prove, and nearly impossible to reverse, in those Circuits and States that do not require prejudice. *See Cabinetree*, 50 F.3d at 390; *A.G. Edwards*, 821 F.2d at 775. Making prejudice mandatory necessarily requires a more substantial showing of not just actions inconsistent with arbitration but resulting harm. Without prejudice, almost anything will do. *See id.*

This disparity makes arbitration agreements more difficult to enforce. Forum shopping is available. Plaintiffs can better their chances of avoiding

arbitration by suing in a no-prejudice Circuit or State. Even the D.C. and Seventh Circuits implicitly recognize their waiver standard is substantially easier to meet. That is why they felt the need to distinguish, as this Court has not so finely done, the FAA policy favoring the enforcement of arbitration agreements from a policy favoring arbitration itself. *See Disco*, 969 F.2d at 590; *A.G. Edwards*, 821 F.2d at 774.

This case is an ideal vehicle to settle the split. The decision below turned entirely on whether the FAA requires prejudice. If so, Kimmel's waiver claim could not prevail. He could hardly claim the simple filing of an answer and the receipt of discovery to requests he himself had served prejudiced him. Indeed, Morgenthau's minimal participation in litigation led Kimmel to revise his claims and theories of recovery entirely, and coincidentally revive Morgenthau's right to arbitration. *See Krinsk*, 654 F.3d at 1202–03. In any event, the lower court made no determination of prejudice, deciding simply that it did not have to.

Accordingly, this Court should grant the Petition and settle the question of whether the FAA requires prejudice to prove waiver.

B. The decision below is wrong, as not requiring prejudice conflicts with the FAA's goals.

This Court's "cases place it beyond dispute that the FAA was designed to promote arbitration." *Concepcion*, 563 U.S. at 345; *see, e.g.*, *Cocchi*, 565 U.S. at 21 (stating the FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution.") (citation, internal quotes omitted); *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (finding the FAA "establishes

a national policy favoring arbitration when the parties contract for that mode of dispute resolution") (citing *Southland,* 465 U.S. at 16). The courts have recognized "a body of federal substantive law of arbitrability" to achieve this purpose. *Moses H. Cone*, 460 U.S. at 24. State law plays a role under § 2's savings clause. But while "the interpretation of an arbitration agreement is generally a matter of state law," it is also true that "the FAA imposes certain rules of fundamental importance," which take precedence. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (citations omitted).

This Court's admonition that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself *or an allegation of waiver*, delay, or *a like defense to arbitrability*," is one such fundamental rule. *Moses H. Cone*, 460 U.S. at 24–25 (emphasis added). This language makes explicit that waiver defenses are no exception to the emphatic FAA policy promoting arbitration.

On the occasion this Court has reviewed questions of FAA waiver, it has held true to this policy. In the context of contractual waivers, for example—i.e., disputes over conditions precedent, or limitations periods in incorporated forum rules—this Court has held the question is presumptively for the arbitrator to decide. *See Howsam*, 537 U.S. at 84-85.

Also relevant is this Court's decision in *Concepcion*, which struck down a California court-made rule deeming class action waivers presumptively unconscionable. Though unconscionability is a contract defense "normally thought to be generally applicable," this Court still found the FAA preempted it, as California courts had

applied it "in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341, 352.

In this case, Florida and the two federal Circuits that reject prejudice requirements for FAA waiver defenses have adopted a rule that clearly disfavors arbitration. Not requiring prejudice makes it far easier to avoid valid arbitration agreements. The inquiry begins and ends with litigation conduct, no matter how slight. In Florida, the mere filing of an answer immediately waives the right to arbitrate. *See, e.g., O'Flarity*, 689 So. 2d at 1297. One false move in Florida state court erases the entire "body of federal substantive law of arbitrability" this Court has spent decades reinforcing. *Moses H. Cone*, 460 U.S. at 24. Such an expansive view of waiver defeats the FAA's clear intent to promote the enforcement of arbitration agreements. *See Concepcion*, 563 U.S. at 345; *Moses H. Cone*, 460 U.S. at 24-25.

The Seventh and D.C. Circuit decisions rejecting a prejudice requirement are furthermore not good law. The Seventh Circuit stakes much of its reasoning on the FAA's goal of placing arbitration agreements on equal footing with other contracts. *See Disco*, 969 F.2d at 590 (citation omitted). The court explains that "we should treat a waiver of the right to arbitrate the same as we would treat the waiver of any other contract right." *Id.*

In fact, that policy has always been used to *promote* the enforcement of arbitration agreements and to strike down laws and rulings that single out contractual arbitration agreements for suspect treatment. *See, e.g., Concepcion*, 563 U.S. at 339; *Doctor's Associates,* 517 U.S. at 683 (striking down a Montana law making arbitration clauses unenforceable unless "[n]otice that [the] contract is subject to arbitration" was "typed in underlined

capital letters on the first page of the contract."). In *Buckeye*, for example, this Court reversed a Florida supreme court decision that invalidated an arbitration agreement contained in a contract that was allegedly illegal under Florida's usury statute. Because of the usury violation, the Florida court declared the entire contract void under "Florida public policy and contract law," a ruling this Court later held violated *Prima Paint's* rule of severability that challenges to the agreement as a whole must go to the arbitrator. The Florida supreme court's reliance on distinctions between void and voidable contracts and State public policy proved to be irrelevant, as this Court traced the *Prima Paint* rule back to "the FAA's substantive command that arbitration agreements be treated like all other contracts." The rule of severability, this Court explained, "establishes how this equal-footing guarantee for 'a written [arbitration] provision' is to be implemented." *Buckeye*, 546 U.S. at 447. Under *Buckeye*, the equal-footing guarantee is about protecting FAA rules like the severability doctrine that promote arbitration, not about policies and state rules of contract that defeat it.

This Court came to much the same conclusion in its decision in *Imburgia*. There, a California appeals court struck a class action waiver clause under state law despite *Concepcion*'s express preemption of precisely that law. The California court justified its ruling based on a contract provision that incorporated the "law of your state," i.e., California law. *Imburgia*, 136 S. Ct. at 468. Despite the state court's attempt to pit FAA principles against each other—i.e. the FAA rule that parties may agree to any law or procedure they wish versus *Concepcion*'s preemption of state laws barring class-action waivers—this Court

reversed. The California court had violated the equal-footing guarantee, this Court held, as it could find no other instance where a choice of law clause was found to have incorporated invalid laws. *See id*. at 470-71. Because the state court decision had not given "due regard . . . to the federal policy favoring arbitration," this Court held it was "pre-empted by the Federal Arbitration Act." *Id*. at 471 (emphasis added).

In both *Buckeye* and *Imburgia*, the equal-footing guarantee precluded attempts to make valid arbitration agreements unenforceable, in opposition to established FAA law. Using the guarantee here to make arbitration agreements *less* enforceable, and much easier to waive, directly undermines the purpose of both the equal-footing guarantee and the FAA's core mandate. *See also Concepcion*, 563 U.S. 343 (rejecting the use of § 2's savings clause to invalidate an agreement to individual arbitration as "the act cannot be held to destroy itself.") (citation omitted).

Judge Posner, in explaining the Seventh Circuit's FAA waiver law, found prejudice naturally present in any demand for arbitration after a lawsuit is filed: "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." *Cabinetree*, 50 F.3d at 390.

Concepcion discredits this view, as courts may not use the characteristics of arbitration to defeat the right. *See Concepcion*, 563 U.S. at 341 (finding, "[w]e said that a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the

state legislature cannot."). Just as arbitration agreements cannot be invalidated for, *e.g.*, "fail[ing] to provide for judicially monitored discovery," *Concepcion*, 563 U.S. at 342, prejudice cannot be presumed from the fact that a party simply moved to compel arbitration after a lawsuit was filed.

The D.C. Circuit attempted to distinguish waiver defenses from *Moses H. Cone*'s command to resolve doubts about arbitrability in favor of arbitration. *See A.G. Edwards*, 821 F.2d at 774–75. The *A.G. Edwards* decision reasoned that no question of arbitrability "arises here; the only issue is whether there has been waiver." *Id.* at 775. That ignores the fact that *Moses H. Cone* specifically includes waiver among the defenses subject to the presumption in favor of arbitration. *See Moses H. Cone*, 460 U.S. at 24–25 (defining the "the scope of arbitrable issues" to include "the contract language itself *or an allegation of waiver*").

There is no reason to carve out waiver from the presumption anyway. Courts clearly may not pick apart arguable contract language as a way of excluding disputes from arbitration. *See id.* They should not be permitted to penalize harmless or insignificant litigation conduct to avoid arbitration agreements, either.

The D.C. Circuit further justified its rejection of a prejudice requirement on a supposed distinction between a policy favoring enforcement of arbitration *agreements* and a policy favoring *arbitration*. *See A.G. Edwards*, 821 F.2d at 774 (stating 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.") (citing *Dean Witter,* 470 U.S.

at 218–24). But this is a false distinction, as *Concepcion*, *Cocchi*, and *Ferrer* make clear. *See Cocchi*, 565 U.S. at 21 (acknowledging the "emphatic federal policy in favor of arbitral dispute resolution."); *Concepcion*, 563 U.S. at 345 (stating "our cases place it beyond dispute that the FAA was designed to promote arbitration."); *Ferrer*, 552 U.S. at 349.

For one, waiver defenses are about the enforcement of valid arbitration agreements—specifically, whether a party has the ability to enforce them after engaging in some litigation conduct. As *Moses H. Cone* instructs, this defense is subject to the same pro-arbitration presumptions as other defenses to enforcement. *See Moses H. Cone*, 460 U.S. at 24–25.

Moreover, nothing in this Court's decision in *Dean Witter* supports the distinction the D.C. Circuit tried to draw, notwithstanding the *A.G. Edwards* court's unexplained citation to the case. To be sure, *Dean Witter* defines the FAA's basic purpose as "ensur[ing] judicial enforcement of privately made agreements to arbitrate." *Dean Witter,* 470 U.S. at 219-220. But the issue there was whether that strong federal policy should give way to a countervailing policy against piecemeal litigation when the case presents arbitrable and non-arbitrable claims. This Court definitively ruled in favor of arbitration, holding "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Id*. at 221. This concern for rigorous enforcement, even in the face of inefficient delays and piecemeal litigation, precludes the kind of expansive waiver standards the Florida supreme court and the D.C. and Seventh Circuit's adopted.

The FAA is designed to make enforcement of arbitration agreements mandatory, prompt, and easy. It does this, as countless decisions illustrate, with § 2's mandate, a raft of rules and procedures heavily favoring swift enforcement, and strong preemption rules that eliminate state laws or regulations and judge-made impediments to arbitration. *See, e.g.*, *Concepcion*, 563 U.S. at 339-52; *Ferrer*, 552 U.S. at 357–58; *Moses H. Cone*, 460 U.S. at 24–25. That the statute requires an agreement to arbitrate by the parties, and does not normally force non-parties to the contract into arbitration, does not diminish the clear preference for arbitration. *See Stolt-Nielsen*, 559 U.S. at 683–84. Having a waiver rule decidedly hostile to arbitration is inconsistent with every other rule and procedure this Court has recognized and enforced. Indeed, the scales have to be weighed in favor of arbitration to overcome the traditional hostility many States and courts, to this day, still harbor against it. *See Kindred*, 137 S. Ct. at 1429; *Cocchi*, 565 U.S. at 22; *Marmet*, 565 U.S. at 531.

Accordingly, this Court should grant review to ensure valid arbitration agreements are enforced consistent with the FAA's objectives, and not invalidated on waiver grounds without any showing of prejudice.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Attorneys for Petitioners

March 4, 2019

Appendices

APPENDIX A—Fourth District Court of Appeal Opinion (September 27, 2018)

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

MORGENTHAU VENTURE PARTNERS, L.L.C., a Delaware limited liability company and MORGENTHAU ACCELERATOR FUND, L.P., a Delaware limited partnership,
Appellants,

v.

ROBERT A. KIMMEL, as trustee of the Robert A. Kimmel Revocable Trust, and as trustee of the Kimmel Partnership Trust,
Appellee.

No. 4D18-895

[September 27, 2018]

Appeal of non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carol-Lisa Phillips, Judge; L.T. Case No. CACE-16-006830 (25).

Christopher J. King, Yaniv Adar and Peter W. Homer of Homer Bonner Jacobs, Miami, for appellants.

H. Eugene Lindsey, III and John R. Squiteto of Katz Barron, Miami, for appellee.

PER CURIAM.

Affirmed.

GROSS, TAYLOR and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

APPENDIX B—Trial court Order denying arbitration (March 2, 2018)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 16-6830-25

ROBERT KIMMEL
Plaintiff,

vs.

MORGENTHAU VENTURE PARTNERS, et al.,
Defendant.
_____)

ORDER ON
_____
_____

THIS CAUSE was considered by the Court on the following Motion(s) To Compel Arbitration and For Dismissal or Stay Pending Arbitration.

HEARING was held on February 26, 2018.

THE COURT having considered the grounds for the Motion, taken testimony, heard argument and considered the applicable law, it is,

ORDERED as follows:

Denied. A Delaware Court has interpreted the governing law to a contract to mean that it shall apply within arbitration proceedings and to the terms of the contract, not the waiver of arbitration issue, *Unifirst Corp v. Holloway's Trading*. Also, see *Raymond James v. Saldukas*—prejudice not required, but participating or taking action inconsistent with that right, which is what has occurred in this case.

DONE AND ORDERED ON March 2, 2018 in Fort Lauderdale, Broward County, Florida.

/s/

CIRCUIT JUDGE

APPENDIX C— Fourth District Court of Appeal Order Denying Motion for Rehearing and Rehearing En Banc (November 2, 2018)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

November 02, 2018

CASE NO.: 4D18-0895
L.T. No.: CACE16-006830 (25)

MORGENTHAU VENTURE PARTNERS, LLC, et al.

Appellant / Petitioner(s)

v.

. ROBERT A. KIMMEL, as trustee of the Robert A. Kimmel Revocable Trust, etc.

Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that the appellants' October 12, 2018 motion for rehearing and motion for rehearing en banc is denied.

Served:

cc: Peter Winslow Homer	Harold Eugene Lindsey	Christopher J. King
Yaniv Adar	Clerk Broward	

dl

/s/
LONN WEISSBLUM, Clerk
Fourth District Court of Appeal