

No. 18A___

IN THE SUPREME COURT OF THE UNITED STATES

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

Applicants,

v.

ROBERT A. KIMMEL,

Respondent.

**UNOPPOSED APPLICATION FOR EXTENSION OF
TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA FOURTH DISTRICT COURT OF APPEAL**

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for Florida:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicants Morgenthau Venture Partners, L.L.C., and Morgenthau Accelerator Fund, L.P., (“Morgenthau”) respectfully request a 30-day extension of time, up to and including Monday, March 4, 2019, to file a petition for a writ of certiorari.¹ The Florida Fourth District Court of Appeal per curiam affirmed without opinion an

¹ Morgenthau is not aware of any parent corporation or any publicly held company that owns 10% or more of Morgenthau Venture Partners, L.L.C., or Morgenthau Accelerator Fund, L.P, stock.

order denying arbitration on September 27, 2018. App. A hereto. The appellate court denied Morgenthau's motion for rehearing and motion for rehearing en banc on November 2, 2018. *See* App. B hereto. 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* Fla. Const, art. 5, § 3(b); *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967). Absent an extension, a petition for a writ of certiorari would be due on January 31, 2019. Counsel for Respondent Robert Kimmel does not oppose this application.

1. This case represents the second time Florida's Fourth District Court of Appeal ("Fourth DCA") has violated this Court's unambiguous rejection of "blanket refusal[s] to compel arbitration" under the Federal Arbitration Act ("FAA"). *See KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011). In *Cocchi*, this Court Per Curiam vacated a Fourth DCA decision upholding an order denying arbitration "after determining that two of the four claims in a complaint were nonarbitrable." 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 the claims for arbitrability. *Id.* at 20–21.

2. *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 Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)) (internal quotes omitted). 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).

3. The Fourth DCA repeated the violation here. The Plaintiff, Kimmel, filed a Complaint alleging breach of contract and seeking an accounting for an alleged failure to pay a contractual return-on-investment under a Limited Partnership Agreement. Morgenthau answered and produced discovery showing Morgenthau’s Limited Partner Board had extended its dissolution date and, therefore, the payout date. Kimmel filed an Amended Complaint alleging a new theory, that Morgenthau’s Limited Partner Board had conflicts of interest and that the extension was “null and void.” Kimmel altered his breach of contract claim to reflect this theory and added a new breach of fiduciary duty claim. Morgenthau moved to compel arbitration under the FAA.

4. The trial court denied arbitration on a single basis—that Morgenthau had supposedly waived arbitration by litigation conduct, a ruling pertinent only to the original Complaint and not the new breach of fiduciary duty claim and conflict of interest theory from the Amended Complaint. Like *Cocchi*, the ruling revealed “nothing to suggest” the trial court considered the arbitrability of those new claims. Also like *Cocchi*, the Fourth DCA refused to address the arbitrability of the new

claims. The appellate court instead per curiam affirmed the trial court's blanket denial of the motion to compel arbitration.

5. Morgenthau is left with an order denying arbitration that contains not one word about the arbitrability of the new claim and theories in the Amended Complaint. Because the decision below is in direct and flagrant conflict with *Cocchi*, *Dean Witter*, and the FAA, Morgenthau will file a petition for certiorari and seek summary vacatur of the Fourth DCA's ruling. 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 those [attorney-in-fact arbitration] agreements on an equal footing with all other contracts.").

6. This Court 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).

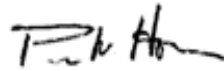
7. Morgenthau recently engaged the undersigned counsel, who represented them in the lower court proceedings and appeal, to file a petition for certiorari. Good cause exists for extending the deadline. In addition to the holidays that intervened since the November 2 order denying rehearing, other obligations

have taken up undersigned counsel's time during the relevant period, including drafting a Petition for Certiorari in *Southern Trust Metals v. CFTC*, No. 18A703, due in this Court February 15; and attending numerous hearings and depositions in the Florida state court matter styled *Flexible Business Systems, Inc. v. Seacor Island Lines, LLC, et al.*, case No. 15-006350-CACE (13) (Fla. 17th Jud Cir.). Accordingly, undersigned counsel requires additional time.

8. Kimmel does not oppose the requested extension and an extension would not result in unfair prejudice to the CFTC.

9. For the foregoing reasons, Defendants respectfully request that the time for filing a petition for a writ of certiorari in this case be extended to and including March 4, 2019.

Respectfully submitted:



PETER W. HOMER
Counsel of record
CHRISTOPHER KING
HOMER BONNER JACOBS
1200 Four Seasons Tower
1441 Brickell Avenue
Miami, Florida 33131
(305) 350-5192
phomer@homerbonner.com

January 17, 2019

APPENDIX A

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

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, v. ROBERT A. KIMMEL, as trustee of the
LLC, et al. Robert A. Kimmel Revocable Trust, etc.

Appellant / Petitioner(s)

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
Yaniv Adar

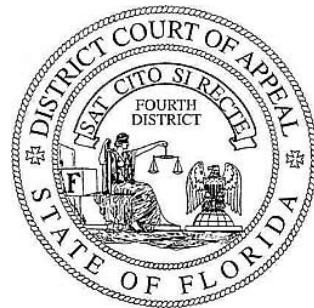
Harold Eugene Lindsey
Clerk Broward

Christopher J King

dl



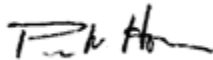
LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by first-class U.S. Mail on January 17, 2019 on all counsel or parties of record on the Service List below.

John R. Squitiero, Esq.
H. Eugene Lindsey III, Esq.
Katz Barron Squitiero Faust
901 Ponce de Leon Blvd., 10th Floor
Coral Gables, Florida 33134
Telephone: (305) 856-2444
Fax: (305) 385-9227
jrs@katzbarron.com
hel@katzbarron.com
gmp@katzbarron.com
miaefile@katzbarron.com



Peter W. Homer