No. 10-1521

In The

Supreme Court of the United States

KPMG LLP,

Petitioner,

v.

ROBERT COCCHI *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Fourth District Court Of Appeal Of The State Of Florida

BRIEF FOR RESPONDENTS ROBERT COCCHI, ET AL. IN OPPOSITION

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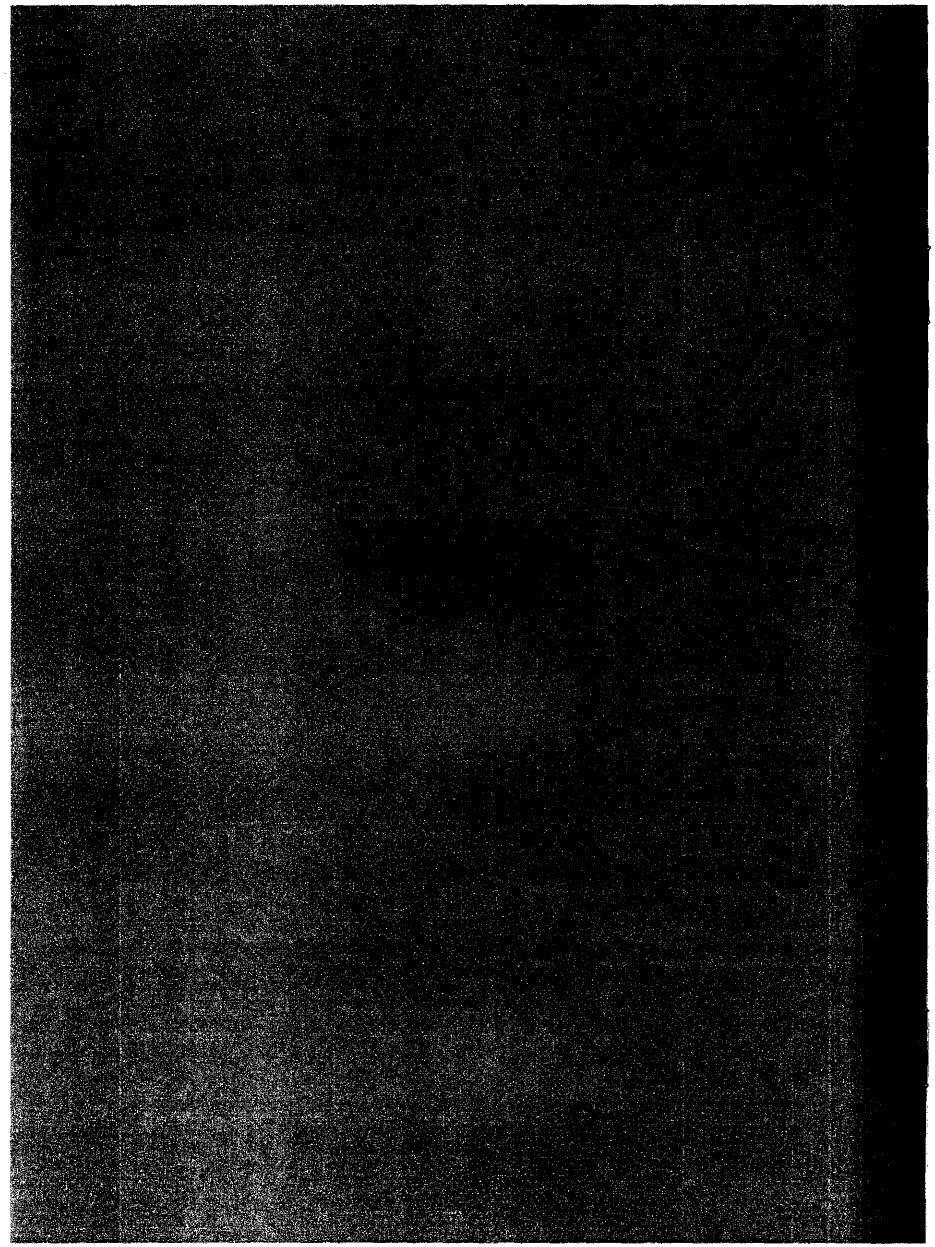

QUESTION PRESENTED

Whether the Florida court of appeal's failure to expressly address the derivative status under Delaware state law of each of respondents' state-law claims presents a question for review by this Court.

PARTIES TO THE PROCEEDINGS

Respondents represented in this opposition are Robert Cocchi, Penni Ellen Fromm, PEF Associates, Inc., Brian Gaines, John Johnson, Dr. David Schwartzwald, Rand Schwartzwald, Dr. Herbert Silverberg, John Silverberg, Dr. Jerry Weiss, Donna Weiss, The Norman Shulevitz Foundation, Inc., RM Management, LLC, Sande Wische, Carol Wische, Paula Zitrin, Dr. Jaron Zitrin, Rachel Zitrin, and Dr. Roger Zitrin.

When this opposition refers to "respondents," it is referring to the parties listed in this section. Other respondents are represented by separate counsel.

RULE 29.6 STATEMENT

Respondents PEF Associates, Inc., the Norman Shulevitz Foundation, Inc., and RM Management, LLC are the only corporate respondents. None of them has a parent corporation nor do any publicly held corporations own 10 percent or more of respondent corporations' stock.

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INTRODUCTION

The Florida court of appeal's decision denying KPMG's motion to compel arbitration turned, not on a disputed question of federal law under the Federal Arbitration Act ("FAA"), but on the Delaware state-law question whether respondents' claims against petitioner KPMG are direct or derivative. The court's state-law basis for decision eliminates any conflict with this Court's decisions and makes summary reversal inappropriate. It may also present a jurisdictional bar to review in this Court under 28 U.S.C. § 1257(a).

At issue in the court below was whether respondents' four state-law claims against KPMG arising out of the Madoff fraud are subject to arbitration. As KPMG admits, *see* Pet. 21, this issue turns on a question of Delaware state law. If respondents' claims are derivative under Delaware law, they are subject to arbitration; but if they are direct, they are not. Neither party disputes this point.

In the Florida court of appeal, respondents argued that their claims are direct under Delaware law, and the court agreed. It denied KPMG's motion to compel arbitration "because the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs." Pet. App. 24a-25a. The court expressly explained why two of respondents' claims were direct, but it did not expressly discuss the other two. *Id.*

KPMG argues that the court's silence as to the direct status of two of respondents' claims must mean that the court found them to be derivative and then decided to flout this Court's settled precedent under the FAA, 9 U.S.C. §§ 1 *et seq.* But that is not remotely plausible. Respondents did not ask the court to abandon federal law and refuse to compel arbitration of derivative claims; they argued only that their claims were direct as a matter of Delaware state law. The Florida court of appeal has also repeatedly enforced the very decisions of this Court that KPMG now accuses it of flouting and has itself consistently espoused the "strong federal policy in favor of enforcing arbitration agreements." *E.g.*, *Green Tree Serv., LLC v. McLeod*, 15 So. 3d 682, 687 (Fl. Dist. Ct. App. 2009) (citing *Dean Witter Reynolds Inv. v. Byrd*, 470 U.S. 213, 218 (1985)).

KPMG's fabricated conflict, based on its speculation about what the Florida court of appeal might have done, does not remotely support its request for summary reversal. Summary reversal is an extreme remedy that requires a clear conflict with this Court's established precedent. There is no clear conflict here; indeed, there is no conflict at all. The Florida court of appeal did not dispute that all arbitrable claims must be sent to arbitration even if other claims in the case are not arbitrable. It also did not dispute that nonsignatories to arbitration agreements may sometimes be bound by those agreements under state law. The court did not commit any error, let alone an error "so apparent as to warrant the bitter medicine of

summary reversal." *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting).

Moreover, the Florida court of appeal's reliance on a state-law basis for decision may even present a jurisdictional bar to review. "[J]urisdiction cannot be founded upon surmise." *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). And "[w]here the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." *Id.* at 54-55. The fact that the decision below turned on the Florida court's determination whether all of respondents' claims were direct as a matter of Delaware state law precludes review in this Court.

Finally, as even KPMG tacitly concedes, there is no basis here for granting plenary review. The Florida court of appeal's decision does not implicate a circuit split or otherwise raise an important and recurring question of federal law. It is an interlocutory decision making a factbound application of Delaware state law. KPMG is not entitled to present its failing arguments to yet another court. Respondents respectfully request the Court to deny review.

STATEMENT OF THE CASE

KPMG's claimed "irreconcilable conflict" with this Court's decisions in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), and *Arthur Andersen LLP, et al. v. Carlisle, et al.*, 129 S. Ct. 1896 (2009), and hostility toward the federal policy in favor of enforcing arbitration agreements is entirely fabricated. The court of appeal's decision is based on the state-law conclusion that respondents' claims against KPMG are direct under Delaware law, and it is wholly consistent with this Court's precedent.

I. Respondents' Claims Against KPMG.

Respondents are nineteen individuals and entities who own limited partnership interests in one or more of three funds, collectively known as the Rye Funds. The Rye Funds, which KPMG audited, fed respondents' money to Bernard L. Madoff Investment Securities, LLC. After Madoff's now-infamous Ponzi scheme was uncovered, respondents lost millions of dollars. These losses were the direct result of KPMG's failure to perform its duties.

In May 2009, respondents filed suit against KPMG asserting claims for negligent misrepresentation, violation of the Florida Deceptive and Unfair Trade Practices Act, professional malpractice, and aiding and abetting a breach of fiduciary duty. Shortly after, KPMG filed a motion to compel arbitration under the arbitration agreement between KPMG and

the Rye Funds. Respondents were not a party to that arbitration agreement.

II. The Proceedings Below On KPMG's Motion To Compel Arbitration.

The issue in this case with respect to the arbitrability of respondents' claims always has been and continues to be one of Delaware state law – whether respondents' claims are direct or derivative of claims the Rye Funds could bring. KPMG agrees that this is true. *See* Pet. 21 ("[B]oth parties agreed that the dispositive question was whether plaintiffs' claims are derivative or direct under Delaware law.").

In its memorandum in support of its June 2009 Motion to Compel Arbitration, KPMG argued, based on state law, that respondents were bound by the arbitration provision in the Engagement Agreement between the Rye Funds and KPMG "because their claims against KPMG LLP are derivative." *See* KPMG LLP's Mem. in Support of Its Mot. to Compel Arbitration and to Stay the Action Against It, at 3-8. In response, respondents maintained that their claims against KPMG were direct as a matter of Delaware state law and therefore fell outside the Engagement Agreement. *See* Plaintiffs' Opposition to KPMG's Mot. to Compel Arbitration and to Stay the Action Against KPMG LLP, at 3, 7-9. On November 2, 2009, the trial court denied KPMG's motion without comment. *See* Pet. App. 59a-60a.

KPMG then appealed, and the argument again focused on the key disputed issue – whether respondents' claims are direct or derivative under Delaware law. KPMG argued that "[a]lthough [respondents] are not signatories to the arbitration agreement, they are nevertheless bound by it because the claims they assert are derivative." *See* Initial Brief of Appellant KPMG LLP, at 13; *see also id.*, at 14-29 ("Delaware law determines whether [respondents'] claims are derivative."). In response, respondents again argued, based on Delaware state law, that their claims are direct and therefore not subject to the arbitration agreement. *See generally*, Answer Brief of Plaintiffs/Appellees. At no point did respondents argue that, even if their claims were derivative, the court should refuse to compel arbitration.

The Florida court of appeal affirmed the trial court's order, finding that the arbitration agreement "would not apply to the direct claims made by the individual plaintiffs." Pet. App. 25a. At no time did the court of appeal conclude or otherwise indicate that any of respondents' claims were derivative, that the existence of some nonarbitrable claims renders all claims nonarbitrable, or that nonsignatories to arbitration agreements are categorically not bound by those agreements. KPMG petitioned the Florida court of appeal for rehearing and rehearing *en banc*, which

was denied without comment. Pet. App. 61a.[1] KPMG's petition to this Court followed.

REASONS FOR DENYING THE PETITION

I. The Decision Below Turns On A Question Of State Law And Does Not Address Any Disputed Issue Of Federal Law.

KPMG asks for the extraordinary remedy of summary reversal based on a supposed conflict between the decision below and this Court's settled precedent under the FAA. The conflict, however, is fabricated. The Florida court of appeal's decision turns on a question of Delaware state law and does not address any disputed issue of federal law.

[1] KPMG makes a number of references to trial court orders that are immaterial to this Petition. First, the trial court's order on February 5, 2010, while appeal was pending, finding that three of respondents' claims were derivative is immaterial because the court of appeal was made aware of it, *see* Pet. 11 n.3, and, based on its opinion, disagreed with the trial court. KPMG also faults the trial court for its January 25, 2011 order "summarily refus[ing] to compel arbitration, even though it had held that three of plaintiffs' four claims were derivative." Pet. 24. Because the trial court entered this order after the court of appeal denied KPMG's motion to compel arbitration, it is similarly immaterial. The trial court can hardly be faulted for heeding the order of a higher court, and, in any event, it is the court of appeal's decision, not the trial court's, that is the subject of this Petition.

Summary reversal is "bitter medicine," *Spears*, 555 U.S. at 268 (Roberts, C.J., dissenting), that the Court reserves for the "exceptional" situation "in which the applicable law is settled and stable, the facts are not disputed, and the decision below is clearly in error," *Wyrick v. Fields*, 459 U.S. 42, 50 (1982) (Marshall, J., dissenting). It is an "extraordinary remedy" not to be used lightly. *See Brosseau v. Haugen*, 543 U.S. 194, 207 (2004) (Stevens, J., dissenting).

A. KPMG's petition manufactures the alleged conflict with this Court's *Dean Witter* decision.

The decision below does not justify the "extraordinary remedy" of summary reversal because the conflict that KPMG alleges does not exist. KPMG argues that the court of appeal's decision is "irreconcilable" with this Court's decision in *Dean Witter* because the Florida court held that "the presence of two claims it deemed not subject to arbitration authorized the denial as to all claims against KPMG." Pet. 16. This is pure speculation, unsupported by anything in the decision below. Based on the parties' briefs, the precedent of the Florida court, and the court's own opinion, the court denied KPMG's motion to compel arbitration because it found all of respondents' claims to be direct and "because the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs."

Pet. App. 24a-25a. There is no conflict with this Court's decisions.

KPMG bases its speculative argument of a conflict, not on anything the Florida court of appeal wrote, but on what it did not write. The court of appeal expressly discussed why it found two of respondents' claims to be direct but did not expressly discuss the other two. KPMG argues that this silence *must* mean that the court: (a) concluded that the other two claims were derivative and thus subject to arbitration; yet (b) decided that it would nonetheless refuse to compel arbitration in direct contradiction of this Court's precedent. KPMG's argument about what the court must have done is not remotely plausible, let alone a certainty.

Respondents at no point argued that the court of appeal should refuse to compel arbitration of their claims, even if they were derivative.[2] Instead, they argued simply that their claims are direct as a matter of Delaware law, as Delaware law provides. *See, e.g., Feldman v. Cutaia*, 951 A.2d 727, 732 (Del. 2008); *see also Arthur Andersen*, 129 S. Ct. at 1902 ("state law . . . is applicable to determine which contracts are binding under § 2."); Pet. 9 n.2 (acknowledging that "general principles of Delaware state law" govern

[2] KPMG's citation to the position taken by plaintiff investors in other cases in other states with respect to the arbitrability of claims under different states' laws, *see* Pet. 8, is irrelevant to this Petition.

whether respondents' claims are direct or derivative); *id.* at 20-21 (same). It is unlikely, to say the least, that the court would refuse to compel arbitration of respondents' claims even if it found them derivative, when respondents never requested that relief.

It is all the more unlikely because the Florida court of appeal has consistently and faithfully applied the arbitration precedent that KPMG claims it disregarded. Citing this Court's decision in *Dean Witter*, the Florida court of appeal has repeatedly acknowledged the "strong federal policy in favor of enforcing arbitration agreements," *Green Tree Serv., LLC v. McLeod*, 15 So. 3d 682, 687 (Fl. Dist. Ct. App. 2009), and noted that arbitration agreements must be "rigorously enforce[d]." *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600, 605 (Fl. Dist. Ct. App. 2007). Indeed, citing *Dean Witter*, the court has specifically held that courts must "compel arbitration of pendent arbitrable claims . . . *even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.*" *Finn v. Prudential-Bache Sec.*, 523 So. 2d 617, 619 (Fl. Dist. Ct. App. 1988) (emphasis added); *see also Seretta Constr., Inc. v. Great Am. Ins. Co.*, 869 So. 2d 676, 680 (Fl. Dist. Ct. App. 2004) ("Indeed, the United States Supreme Court in numerous interpretations of the Federal Arbitration Act . . . has concluded that the Federal Arbitration Act was intended only to assure the enforcement of privately negotiated arbitration agreements, *despite the possible inefficiencies created by such enforcement.*") (emphasis added). Moreover, both before and after this

Court's decision in *Arthur Andersen*, the Florida court of appeal has also acknowledged that a non-signatory can be bound to arbitrate. *See Liberty Commc'ns, Inc. v. MCI Telecomms. Corp.*, 733 So. 2d 571, 573 (Fl. Dist. Ct. App. 1999) (before); *Gencom Group v. Garcia Stromberg, LLC*, 34 So. 3d 170, 171 (Fl. Dist. Ct. App. 2010) (after).[3]

The speculative nature of KPMG's argument is revealed even in its own Petition, where it cannot identify with any certainty what the conflict is but is forced to argue that this Court should spend its limited resources to address an error "to the extent" one occurred. *See* Pet. 19 ("*To the extent* the Florida court of appeal . . . refused to compel arbitration because plaintiffs had not signed the KPMG arbitration agreement. . . .") (emphasis added); *id.*, at 22 ("*To the extent* the court declined to compel arbitration . . . even though it concluded that they were derivative. . . .") (emphasis added).

The decision below does not present any substantial question of federal law for this Court's review. It applies the settled arbitration precedent of this Court and the Florida court of appeal to a factbound ruling on the Delaware state-law question

[3] Against this consistent precedent, KPMG relies on one comment by one of the three panel judges on the court of appeal to support its speculation of hostility toward arbitration. This Court does not sit to review comments at oral argument.

whether respondents' claims are direct or derivative. For this reason, the Petition should be denied.

B. The Court may lack jurisdiction to grant review.

This Court possesses jurisdiction to review a decision of a state court only if that decision represents a "final judgment[ ] or decree" on a substantial federal question. 28 U.S.C. § 1257(a). In cases "[w]here the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." *Lynch*, 293 U.S. at 54-55.

Here, the very most that KPMG can argue is that the Florida court of appeal *may* have decided the case on a federal ground that respondents did not argue. That is not enough to support jurisdiction because "jurisdiction cannot be founded upon surmise." *Id.* at 54. This is another reason to deny review.

II. The Interlocutory Nature Of The Issue Further Compels Denial Of The Petition.

The interlocutory posture of the decision below is a further reason to deny review. This Court has long held that it does "not issue a writ of certiorari to review a decree . . . from an interlocutory order, unless it is necessary to prevent *extraordinary*

inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (stating that the lack of finality in the judgment below may "of itself alone" provide "sufficient ground for denial of the application."). Certiorari is only granted from interlocutory orders in "extraordinary cases" of "peculiar gravity and general importance" where the lower court has clearly erred. *See Hamilton-Brown*, 240 U.S. at 258; *cf. Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997).

The order sought to be reviewed in this case is interlocutory and the case, despite having been filed over two years ago, is still in its infancy. KPMG has not raised any argument that it is suffering the kind of "extraordinary inconvenience" this Court has required to grant the writ at this interlocutory stage. That KPMG may be arbitrating in other suits arising out of similar claims by other plaintiffs in other states does not meet this burden and is frequently undertaken by litigants across the country in suits of all kinds. Finally, as stated, the court's decision was neither clearly erroneous, nor does it raise a conflict of "peculiar gravity" warranting intervention at this stage in the litigation.

III. The Florida Court Of Appeal's Decision Does Not Warrant Plenary Review.

KPMG does not seriously contend that plenary review is appropriate in this case, nor could it. The

Florida court of appeal's decision rests solely on a question of state law and does not conflict with the decisions of this Court or the federal circuit courts. If review were granted in this Court, the parties would not dispute the settled principles of law under the FAA; instead, they would continue to dispute the Delaware state-law question whether respondents' claims are derivative or direct. Moreover, the nature of the Florida court of appeal's decision and the settled precedent upon which this Petition is based makes it unlikely that any issue will be recurring or that a decision by this Court will have any lasting impact. Plenary review is therefore not proper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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