Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

IN THE SUPREME COURT OF FLORIDA
Case No. SC09-270

MCKENZIE CHECK ADVANCE OF FLORIDA, LLC, STEVE A. MCKENZIE, and BRENDA G. LAWSON,

Petitioners,

vs.

WENDY BETTS, DONNA REUTER, ETC., ET AL.,

Respondents.

On Petition for Writ of Mandamus from the Fourth District Court of Appeal
Case Nos. 4D08-493 & 4D08-494

RESPONDENTS' BRIEF IN OPPOSITION

E. Clayton Yates
Florida Bar No. 0398720
clay@yatesandmancini.com
YATES & MANCINI, LLC
311 South Second St., Ste. 102
Fort Pierce, Florida 34950
Telephone: (561) 465-7990
Facsimile: (561) 465-1886

Christopher Casper
Florida Bar No. 48320
ccasper@jameshoyer.com
JAMES, HOYER, NEWCOMER & SMILJANICH, P.A.
4830 West Kennedy Boulevard, Suite 550
Tampa, Florida 33609
Phone: 813-286-4100
Fax: 813-286-4174

Diana L. Martin
Florida Bar No. 624489
dmartin@leopoldkuvin.com
Theodore J. Leopold
Florida Bar No. 705608
LEOPOLD~KUVIN, P.A.
2925 PGA Blvd., Ste. 200
Palm Beach Gardens, FL 33410
Telephone: (561) 515-1400
Facsimile: (561) 515-1401

Attorneys for Respondents

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

TABLE OF CONTENTS

TABLE OF CITATIONS 3

STATEMENT OF THE CASE AND FACTS 5

ARGUMENT 10

I. THE FOURTH DISTRICT CORRECTLY DETERMINED THAT IT LACKS JURISDICTION OVER PETITIONERS' APPEAL OF THE TRIAL COURT'S NONFINAL ORDER DECIDING THE ENFORCEABILITY OF A CLASS ACTION BAN CONTAINED WITHIN AN ARBITRATION PROVISION. 10

A. The trial court denied Petitioners' motion to compel arbitration at Petitioners' insistence, not because of any stipulation by the parties that the class action waiver could not be severed as a matter of law…………………………………………...10

B. The Fourth District's distinction between a decision governing the enforceability of a class action ban and a decision determining the entitlement to arbitration is rooted in well established precedent…………14

C. Florida case law does not support Petitioners' position………………..18

D. The substance, as opposed to the form, of the trial court's order controls…………………………………………………………………..19

II. MANDAMUS RELIEF IS INAPPROPRIATE HERE BECAUSE PETITIONERS HAVE AN ADEQUATE REMEDY AT LAW. 20

CONCLUSION 22

CERTIFICATE OF SERVICE 23

CERTIFICATE OF TYPEFACE COMPLIANCE 24

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

TABLE OF CITATIONS

Cases

Bess v. DirecTV, 815 N.E.2d 455 (Ill. App. 2004) 14

Charry's Estate, 359 So. 2d 544 (Fla. 4th DCA 1978) 18

Cooper v. QC Fin. Serv., 503 F. Supp. 2d 1266 (D. Ariz. 2007) 16

Fonte v. AT&T Wireless Serv., Inc., 903 So. 2d 1019 (Fla. 4th DCA 2005) 17

Garcia v. DirecTV, 9 Cal. Rptr. 3d 190 (Cal. App. 2004) 14

Genus Credit Mgmt. v. Jones, 2006 WL 905936 (D. Md. Ap. 6, 2006) 14

Higueras v. Crosby, 924 So. 2d 18 (Fla. 1st DCA 2005) 19

Huffman v. State, 813 So. 2d 10 (Fla. 2000) 19

In re Am. Express Merchants' Litig., No. 06-1871-cv, 2009 WL 214525 (2d Cir. Jan. 30, 2009) 17

In re Wood, 140 S.W.3d 367 (Tex. 2004) 8, 14

Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982) 11, 12

Keefe v. Allied Home Mortg. Corp., 2009 WL 2027244 (Ill. App. 2009) 15

Kinkel v. Cingular Wireless, 857 N.E.2d 250 (Ill. 2006) 16

Kitchen v. State, 917 So. 2d 360 (Fla. 1st DCA 2005) 19

Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A.2d 88 (N.J. 2006) 16

Murray v. Haley, 833 So. 2d 877 (Fla. 1st DCA 2003) 18

Pedcor Mgmt. v. Nat'l Personnel of Texas, 343 F.3d 355 (5th Cir. 2003) 14

Rollins v. Garrett, 2006 WL 1024166 (11th Cir. Apr. 19, 2006) 15

S.D.S. Autos, Inc. v. Chraznowski, 976 So. 2d 600 (Fla. 1st DCA 2007) 8, 17

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

Scott v. Cingular Wireless, 161 P.3d 1000 (Wash. 2007) 16

Shevin ex rel. State v. Public Service Commission, 333 So. 2d 9 (Fla. 1976).........19

State v. Call, 26 So. 1016 (Fla. 1899)..20

State v. S.R., 1 So. 3d 221 (Fla. 3d DCA 2008)...18

Veliz v. Cintas Corp., 2005 WL 1048699 (N.D. Cal. May 4, 2005) 14

Vicorp Restaurants, Inc. v. Aridi, 510 So. 2d 1082 (Fla. 1st DCA)........................19

Other Authorities

Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185 (2006) 16

Matthew Eisler, *Difficult, Duplicative, and Wasteful?: The NASD's Prohibition of Class Action Arbitration in the Post-Bazzle Era*, 28 Cardozo L. Rev. 1891(2007) 15

Nivine Zakhiri, *Is the Class Action Fairness Act of 2005 a Misnomer? The Impact on Class Action Waivers in Consumer ADR Clauses*, 5 J. AM. ARB. 97 (2006) ..16

Rules

Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv).....................................7, 9

Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi)................................. 19, 20

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

STATEMENT OF THE CASE AND FACTS

Wendy Betts and Donna Reuter (collectively, along with subsequently-added Plaintiff Tiffany Kelly) filed a class action complaint ("Complaint") against Defendants-Petitioners McKenzie Check Advance of Florida, LLC, d/b/a National Cash Advance, Steve A. McKenzie, and Brenda G. McKenzie in the Fifteenth Judicial Circuit in Palm Beach County. (App. Tab 2). Plaintiffs alleged that the Defendants operated an illegal lending business in the State of Florida in violation of: 1) Florida's Lending Practices Act, Chapter 687, Florida Statutes; 2) Florida's Consumer Finance Act, Chapter 516, Florida Statutes; 3) Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Chapter 501, Consumer Protection Part II, Florida Statutes; and 4) Florida's Civil Remedies for Criminal Practices Act ("CRCPA"), Chapter 772, Florida Statutes. (App. Tab 2 at ¶¶ 1-4.)

Defendants filed a motion to compel arbitration. (App. Tab 5.) Because Plaintiffs opposed arbitration on the grounds of unconscionability, Judge Elizabeth Maass of the Fifteenth Judicial Circuit Court held a two-day evidentiary hearing. After weighing an extensive body of evidence that was presented at the hearing, Judge Maass made the following factual finding: although "the evidence was disputed, its greater weight supports the proposition that it would have been virtually impossible for [Plaintiff] Kelly to obtain competent individual

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

representation for the claims brought here, particularly in 2000." (App. Tab 1 at 5.)

Applying this factual finding to the law, Judge Maass ruled that "the class action waivers embedded in [McKenzie Check Advance's] arbitration clauses violate public policy and are void: Florida consumers would effectively be denied any remedy for Defendants' alleged breaches of Florida's criminal usury laws if the waivers were enforced." (*Id.* at 1.) Judge Maass noted that, "[t]his is particularly true where, as here, the party seeking to avoid class status has a policy of requiring confidentiality clauses as part of any settlement with an individual consumer." (*Id.* at 9.)[1]

Judge Maass denied the Defendants' motion to compel arbitration instead of ordering the parties to arbitration pursuant to the remaining enforceable terms of the arbitration clause. (*Id.* at 10.) This is because the *Defendants* requested that if Judge Maass were to determine that the class action ban was indeed unenforceable, then she should deny the Defendants' motion.[2]

[1] When asked whether the Defendant would settle with an individual customer, corporate counsel for the Defendants' parent company, Advance America Cash Advance Centers, Inc., Jonathan Monson responded: "It depends on whether I could achieve the amount of the claim, was it a small claim, one that made economic sense to settle, *could I get a settlement agreement that contained a confidentiality provision* . . . ?" (App. Tab 9 at 398:14-24) (emphasis added).

[2] In making this request, defense counsel argued, "We have not agreed to class arbitration." (App. Tab 9 at 307:16-17). Judge Maass expressed surprise at

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

When asked if the Plaintiffs were "willing to go to arbitration" if the Defendants' class action ban was held unenforceable, plaintiffs' counsel responded, "[w]e are." (App. Tab 9 at 307:23-308:1.) Plaintiffs' counsel argued "that the court can strike the class action ban and send the case to arbitration with a ruling from the court that the class action ban has been stricken, and then it's up to the arbitrator to decide [if] the case [can] go forward as a class action or not." (App. Tab 9 at 330:23-331:4.)

After much insistence from defense counsel that the court strike the entire arbitration clause in the event that the court found the class action ban unenforceable, the parties finally agreed to a stipulation to this effect:

> THE COURT: Okay. So as I understand it, the stipulation is as a matter of law and a matter of fact if I find the class action waiver unconscionable, the entire arbitration clause should be stricken.
>
> MS. CALLAWAY: Yes. Arbitration denied.

(App. Tab 9 at 340:10-18.) Thus, because of the parties' stipulation, Judge Maass did not order the parties to arbitration, but instead denied the Defendants' motion to compel arbitration. (App. Tab 1 at 1.)

---

defense counsel's insistence that, without the class action ban, the motion to compel arbitration should be denied: "So I would have thought from your perspective if the class action waiver was stricken and the arbitration clause stayed in effect, you would be sort of happy because the case would march to arbitration with no class action waiver in place." (*Id.* at 324:11-16.) Defense counsel responded, "the only thing we're saying is you can't order class arbitrations." (*Id.* at 324:17-19.)

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

Defendants appealed Judge Maass's order to the Fourth District Court of Appeal as a nonfinal order determining the entitlement to arbitration pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv). (App. Tab 6). After the appeal was fully briefed, the Fourth District issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction because it appeared "notwithstanding its title, the subject order on appeal is from an order determining the invalidity of a class action waiver, which appears to be a non-appealable, non-final order." (App. Tab 7). The court noted, "While it is true that the trial court did deny the motion to compel arbitration, it appears that this was based upon the stipulation of the appellants that it did not wish to compel arbitration if the class action waiver issue was decided adversely to it. Thus, appellant appears to be estopped from arguing the arbitrability issue." (*Id*).

After reviewing the parties' briefs on the issue, the Fourth District ruled:

> Defendants agree that the class action waiver and the arbitration provision were not severable as a matter of law. They assert that this was the only issue to which it stipulated. However, the record belies that contention, as does the law. *See Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A. 2d 88, 103 (N.J. 2006) (holding that class action waivers are severable and once stricken as unconscionable, the remainder of the arbitration agreement is enforceable); *see also Cooper v. QC Fin. Serv., Inc.*, 503 F.Supp. 2d 1266, 1291 (D. Az. 2007).
>
> Plaintiffs correctly point out that the fact that the stricken class action waiver provision is "embedded" in the arbitration provisions does not mean that arbitrability had been decided. They agree that the enforceability of a class action ban has little, if anything, to do with arbitration. Under the AAA rules, arbitration of the claim as a class

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

> action was a fully available option. *See Veliz v. Cintas Corp.*, 2005 WL 1048699 (N.D. Cal. 2005); *Bess v. DirectTV*, 815 N.E. 2d 455 (III. App. 2004); *In re Wood*, 140 S.W. 3d 367, 369 n. 2 (Tex. 2004). The defendants *voluntarily* forewent this option.
>
> The parties at bar could not confer jurisdiction on this court by stipulation. Moreover, the defendants are estopped from asserting the denial of their right to arbitrate, which they stipulated away. The defendants will be able to file an interlocutory appeal if a class is certified, at which time the public policy issue briefed by the parties can appropriately be considered. However, at this juncture, the issue is not ripe for interlocutory review.

(App. Tab 7).

Defendants then filed the instant petition for writ of mandamus. Defendants are also seeking to have the Court take discretionary review of the Fourth District's opinion on the ground that it creates an express and direct conflict with *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600 (Fla. 1st DCA 2007). Both sides have filed their briefs on jurisdiction in case SC09-208.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

ARGUMENT

I. THE FOURTH DISTRICT CORRECTLY DETERMINED THAT IT LACKS JURISDICTION OVER PETITIONERS' APPEAL OF THE TRIAL COURT'S NONFINAL ORDER DECIDING THE ENFORCEABILITY OF A CLASS ACTION BAN CONTAINED WITHIN AN ARBITRATION PROVISION.

A. The trial court denied Petitioners' motion to compel arbitration at Petitioners' insistence, not because of any stipulation by the parties that the class action waiver could not be severed as a matter of law.

Petitioners argue that "the Parties agreed, as required by controlling precedent and the clear language of the agreements," that its class action ban *and* arbitration clause were required by law to be stricken if the trial court found the class action ban unenforceable. (Petition, p. 12). Petitioners are incorrect. At no time did Plaintiffs ever stipulate that "controlling precedent" or the "language of the agreements" required the trial court to strike the entire arbitration clause. Rather, Plaintiffs argued that the *class action ban* (not its arbitration clause) was unenforceable and that Defendants *could choose* to have the entire arbitration clause stricken if it wanted. Defendants chose to have the court strike its entire arbitration clause. Thus, the trial court's ruling did not determine Defendants' entitlement to arbitration, and it was not, therefore, reviewable as a nonfinal order under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv).

Defendants' *sole* support for their assertion that the parties stipulated that "controlling precedent" required the trial court to strike its arbitration clause is a

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

single statement from Plaintiffs' counsel. Paul Bland stated that it would be "totally appropriate for the Court to go ahead and strike the entire arbitration provision." (App. Tab 9 at 339:10-12). This statement is a far cry from Plaintiffs agreeing that "controlling precedent" *required* the arbitration clause to be stricken.

Other statements from the hearing below refute Defendants' position. In Plaintiffs' opening statement, Mr. Bland clarified the issue before the court: "Is the class action ban exculpatory here under the facts of this case if you go back to the period of 1999 to 2001?" (App. Tab 9 at 22:15-18.) Plaintiffs later submitted into evidence rules from the American Arbitration Association that govern class actions, "to show that absent enforceable class action ban that class action mechanism is available in arbitration." (App. Tab 9 at 302:20-303:2.) It is clear from this submission that Plaintiffs were prepared to arbitrate their claims if the court held the class action ban unenforceable.

The trial court later asked counsel from both sides whether or not the court should compel arbitration of Plaintiffs' claims absent the class action ban:

> MS. CALLAWAY: We have not agreed to class arbitration. If this Court were to hold that this contract was unconscionable, the arbitration agreement was unconscionable –
>
> THE COURT: Arbitration – I thought you were only challenging the class action.
>
> MR. BLAND: That's right.
>
> THE COURT: But you're willing to go to arbitration.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

MR. BLAND: We are.

(App. Tab 9 at 307:10-308:1.)

In an attempt to reach an agreement as to what the court should do with the arbitration clause, the following exchange ensued:

> THE COURT: Well, let me ask you both the same question. Is there agreement between counsel if the class action waiver is stricken where that case goes?
>
> MR. BLAND: My understanding is that the Court can strike the class action ban and send the case to arbitration with a ruling from the Court that the class action ban has been stricken, and then it's up to the arbitrator to decide can the case go forward as a class action or not. The arbitrator gets to decide that once it goes to arbitration.
>
> * * *
>
> THE COURT: Do you agree that if a class action waiver is stricken, the entire arbitration clause needs to be stricken?
>
> MR. BLAND: It's not a yes or no. It will just take me a couple of sentences. We believe that if the class action ban is stricken there are courts on both sides. There are courts that have sent the case to arbitration, let the arbitrator decide whether to go forward under class action and there are courts that have done what Ms. Callaway is referring to and have struck the whole arbitration provision. We believe that the best answer among these varying courts have gone in different directions, and case law is divided, comes from a decision from the California Supreme Court which said – it's the Southland versus Keating case, it was reversed on other grounds, but this part of the decision was not reversed, but all they said was that because of the risk that a defendant may have not unreasonably anticipated that they could be in arbitration on a class action basis that **they would let the defendant who drafted the contract decide whether to go to court on a putative class action with class certification to be decided or to go to arbitration with the class action being stricken with the arbitrator to decide, and**

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

> **they left it up to the defendant and we're happy to do it that way.**

(App. Tab 9 at 330:19-331:5; 335:4-336:9.)[3]

These exchanges reveal that Plaintiffs *never* stipulated that "controlling precedent" *required* the trial court to strike the entire arbitration clause instead of just its class action ban. Rather, Mr. Bland stated that "our belief is that the best case law says this is their call, but if they are – say they think it should go forward in court that we are happy to embrace that." (App. Tab 9 at 340:5-9.) Defendants *chose* to have the court strike its entire arbitration clause – not because of "controlling precedent" or the "language of the agreement," but because Plaintiffs stipulated that Defendants had the option of doing so. Defendants cannot now argue that the trial court made a determination regarding its "entitlement to arbitration" when it was Defendants who opted to have the entire arbitration clause stricken. As such, this Fourth District was correct in determining that it lacked jurisdiction over Defendants' appeal.

[3] The "Southland versus Keating case" referenced by Mr. Bland is *Keating v. Superior Court*, 645 P.2d 1192, 1209-1210 (Cal. 1982), *rev'd on other grounds Southland Corp. v. Keating*, 465 U.S. 1 (1984). There, the California Supreme Court stated that when a class action ban is held unenforceable, the party that drafted the agreement "should be given the option of remaining in court rather than submitting to classwide arbitration." *Id.*

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

B. The Fourth District's distinction between a decision governing the enforceability of a class action ban and a decision determining the entitlement to arbitration is rooted in well established precedent.

Petitioners also argue that the trial court "was required by controlling precedent" to strike its arbitration clause upon a finding that its class action ban was unenforceable. However, the purported "controlling" precedent Petitioners cite is either outdated, or does not speak to the issue decided by the trial court.

The crux of Defendants' argument is that "class arbitration cannot be ordered where it is not provided for in an arbitration agreement," (Petition, p. 13) and so the fact that the trial court held the class action ban unenforceable determined Defendants' "entitlement . . . to arbitration." Defendants' position is wrong, as it has been five years since the U.S. Supreme Court rejected this same argument and instead recognized that the arbitral forum is amenable to class actions in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

In *Bazzle*, the Chamber of Commerce made the same argument that Defendants advanced here – that class actions and arbitration were inherently inconsistent, and that permitting class actions in arbitration would cause corporations to abandon arbitration entirely, and thus hurt the economy. Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Petitioner, *Green Tree Corp. v. Bazzle*, 2003 WL 721691 at *1, *12. The Chamber, like the defendant in that case, argued that the Supreme Court should

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

hold that the relationship between arbitrations and class actions was entirely an issue of federal law.

The U.S. Supreme Court rejected the arguments made by the Chamber and the defendant, and held that the question of whether an arbitrator may proceed on a class action basis where the arbitration clause is silent on the issue is "a matter of state law." *Bazzle*, 539 U.S. at 447.[4] Subsequently, numerous courts have held that arbitrators now have the power to decide if a case should be handled on a class action basis. *See, e.g., Pedcor Mgmt. v. Nat'l Personnel of Texas*, 343 F.3d 355 (5th Cir. 2003); *Genus Credit Mgmt. v. Jones*, 2006 WL 905936 (D. Md. Ap. 6, 2006); *Veliz v. Cintas Corp.*, 2005 WL 1048699 at *5 (N.D. Cal. May 2005); *In re Wood*, 140 S.W.3d 367 (Tex. 2004); *Bess v. DirecTV*, 815 N.E.2d 455, 460 (Ill. App2004); *Garcia v. DirecTV*, 9 Cal. Rptr. 3d 190, 195-96 (Cal. App. 2004). Before *Bazzle*, some courts had assumed – as Defendants argued vigorously in the

[4] In the wake of *Bazzle*, two of the largest arbitration companies promulgated rules to handle class actions in arbitration. One of those companies, JAMS, utilizes its *Class Action Procedures* "whenever a court refers a matter pleaded as a class action to JAMS for administration." *JAMS Class Action Procedures* (Feb. 2005), *available at* http://www.jamsadr.com/ rules/class_action.asp. Likewise, the American Arbitration Association ("AAA") adopted the *Supplementary Rules for Class Arbitrations* (Oct. 2003), *available at* http://www.adr.org/sp.asp?id=21936, which apply "whenever a court refers a matter pleaded as a class action to the AAA for administration." *Id.* *See* Matthew Eisler, *Difficult, Duplicative, and Wasteful?: The NASD's Prohibition of Class Action Arbitration in the Post-Bazzle Era*, 28 Cardozo L. Rev. 1891, 1920 (2007) ("[C]lass action arbitration has been successfully employed by the AAA and this fact alone renders obsolete any notion that class action arbitration is too difficult to manage.").

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

lower court – that class actions were inconsistent with arbitration, and that class actions in arbitration were not possible without express statements in the contract permitting class actions in arbitration. Simply put, those cases are no longer good law.[5]

The post-*Bazzle* line of cases applies with particular strength in Florida. The Eleventh Circuit stated that "[u]nder Florida law, a consumer contract that prohibits class arbitration is unconscionable because it preclude[s] the possibility that a group of its customers might join together to seek relief that would be impractical for any of them to obtain alone." *Rollins v. Garrett*, 2006 WL 1024166, at *1 (11th Cir. Apr. 19, 2006) (citation omitted). As a result, the Eleventh Circuit held that an arbitrator who permitted a case to proceed on a class action basis in arbitration had not abused its discretion. *Id*.

It is now commonplace for courts to strike *only* the class action ban and enforce the arbitration clause according to its remaining terms. *See, e.g., Keefe v. Allied Home Mortg. Corp.,* 2009 WL 2027244, at *8 (Ill. App. 2009) (holding

---

[5] *See generally* Nivine Zakhiri, *Is the Class Action Fairness Act of 2005 a Misnomer? The Impact on Class Action Waivers in Consumer ADR Clauses*, 5 J. AM. ARB. 97 (2006) ("**up until *Bazzle***, many of the federal appellate courts and district courts had abided by the Seventh Circuit's *Champ* decision, requiring explicit consent to class arbitration claims within the contract terms.") (emphasis added); Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 192 (2006) ("**until the *Bazzle* decision**, the majority of courts deemed [class actions] inappropriate for arbitration.") (emphasis added).

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

"unenforceable prohibition on class arbitration provision is not 'so closely connected' with the remainder of the contract that to enforce the valid provisions of the contract without it 'would be tantamount to rewriting the [a]greement'" and noting that the main goal of arbitration clause—choosing an arbitral forum over a judicial forum—can be met without class arbitration waiver); *Cooper v. QC Fin. Serv.*, 503 F. Supp. 2d 1266, 1291 (D. Ariz. 2007) ("Once these unconscionable paragraphs are severed, the case can proceed to arbitration . . . ."); *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88, 103 (N.J. 2006) ("Once the waivers are removed, the remainder of the arbitration agreement is enforceable."); *Kinkel v. Cingular Wireless*, 857 N.E.2d 250, 276-77 (Ill. 2006) (severing exculpatory class action ban and enforcing arbitration clause). It is clear that, post-*Bazzle*, a court's finding that a class action ban is unenforceable *does not* determine a party's "entitlement to arbitration," because the arbitration may proceed on a class action basis according to the remaining terms of the arbitration clause. *See generally Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (Wash. 2007) ("Class action waivers have very little to do with arbitration."). Indeed, federal courts have increasingly recognized that it is class action bans themselves that violate the Federal Arbitration Act, indicating that Defendants' argument is simply backwards. *E.g., In re Am. Express Merchants' Litig.*, 554 F.3d 300, 312

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

(2d Cir. 2009) (exculpatory class action ban held "incompatible with the federal substantive law of arbitration").

Thus, the Fourth District Court of Appeal was correct in its holding that the trial court below, in holding the class action ban unenforceable, did not determine Defendants' "entitlement to arbitration" because the two issues are independent. But for Defendants' insistence that the court strike its entire arbitration clause, the case could have gone to arbitration.

C. Florida case law does not support Petitioners' position.

Petitioners argue that this case is analaogous to *S.D.S. Autos, Inc. v. Chraznowski*, 976 So. 2d 600, 602 (Fla. 1st DCA 2007), and *Fonte v. AT&T Wireless Serv., Inc*., 903 So. 2d 1019, 1021 (Fla. 4th DCA 2005). Petitioners are incorrect. In *S.D.S. Autos*, the lower court held that the defendant's arbitration clause *as a whole*, and not just its class action ban, was unenforceable because it was "unconscionable, contrary to Florida's public policy, and unsupported by mutual assent and consideration." 976 So. 2d at 603. *S.D.S. Autos* was thus a case where the party's entitlement to arbitration was at issue, because the court invalidated the defendant's *entire* arbitration clause as a matter of law. Likewise, in *Fonte*, the trial court granted the defendant's motion to compel arbitration – again, a determination of a party's entitlement to arbitration that created jurisdiction in the Court of Appeal. 903 So. 2d at 1023. In the present case,

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

however, the court below *did not* determine Defendants' entitlement to arbitration: it held only that the class action ban was unenforceable (an issue that does not affect the parties' ability to arbitrate), and struck the entire arbitration clause because of the parties' stipulation.

D. The substance, as opposed to the form, of the trial court's order controls.

Petitioners ask the Court to look to the form of the trial court's order instead of the reasoning behind the order when determining whether the order determined their entitlement to arbitration. To ignore the rationale of the trial court would be to exalt form over substance, which Florida courts have consistently refused to do as a matter of policy. *See*, *e.g.*, *State v. S.R.*, 1 So. 3d 221, 221 (Fla. 3d DCA 2008) ("More than 150 years ago, the Florida Supreme Court recognized that a trial court abuses its discretion when it elevates form over substance."); *Murray v. Haley*, 833 So. 2d 877, 879 (Fla. 1st DCA 2003) (refusing to reach conclusion that would "elevate form over substance"); *In re Charry's Estate*, 359 So. 2d 544, 545 (Fla. 4th DCA 1978) (declining to follow "Texas view [because it] places form above substance"). Because the trial court did not in substance determine Defendants' entitlement to arbitration, but only determined the class action ban within the arbitration clause is unenforceable, its order is not subject to appellate review on nonfinal appeal.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

II. MANDAMUS RELIEF IS INAPPROPRIATE HERE BECAUSE PETITIONERS HAVE AN ADEQUATE REMEDY AT LAW.

"[R]elief by mandamus is unavailable unless 'no other adequate remedy exists.'" *Shevin ex rel. State v. Public Service Commission*, 333 So. 2d 9, 12 (Fla. 1976), *abrogated on other grounds by In re Emergency Amendments to Rules of Appellate Procedure*, 381 So. 2d 1370, 1381 (Fla. 1980). As stated by the Fourth District, Petitioners can seek review of the trial court's order upon the certification of a class. (App. Tab 8); Fla. R. App. P. 9.130(a)(3)(C)(vi)(permitting appeals of nonfinal orders determining that "a class should be certified"). They are not, therefore, entitled to mandamus relief.

It is well-established in Florida law that mandamus is not available where relief can be obtained by appeal. *See Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000) (stating "petitioner must have no other adequate remedy available" to be entitled to mandamus relief); *Kitchen v. State*, 917 So. 2d 360, 361 (Fla. 1st DCA 2005) (denying petition for writ of mandamus where issues raised could be addressed on direct appeal); *Higueras v. Crosby*, 924 So. 2d 18, 19 (Fla. 1st DCA 2005) (dismissing petition for writ of mandamus because petitioner had "an adequate remedy by raising th[e] issue on appeal from a final order in the circuit court case"); *Vicorp Restaurants, Inc. v. Aridi*, 510 So. 2d 1082, 1083 (Fla. 1st DCA), *rev. denied* 519 So. 2d 988 (Fla. 1987) (denying petition for writ of mandamus, *inter alia*, seeking review of nonfinal order because "petitioners will

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

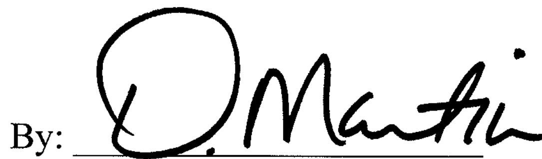
have a complete and adequate remedy on plenary appeal should claimant prevail in the lower tribunal"); *State v. Call*, 26 So. 1016, 1018 (Fla. 1899) (noting that allowing mandamus relief where remedy by appeal is available would "speedily absorb the entire time of appellate tribunals in revising and superintending the proceedings of inferior courts; and the embarrassments and delays of litigation would soon become insupportable"). "[M]andamus is an extraordinary remedy, not intended as a substitute for other remedies, but rather to afford relief in cases where other remedies do not exist or are inadequate; and even in such cases it does not always lie." *Call*, 26 So. at 1018. Petitioners have an adequate alternative remedy to mandamus relief in this case—they can appeal any order by the trial court certifying a class. *See* Fla. R. App. P. 9.130(a)(3)(C)(vi) (permitting appeals of nonfinal orders determining that "a class should be certified"). They are not, therefore, entitled to the extraordinary remedy of mandamus relief.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

CONCLUSION

The Court should deny the petition for writ of mandamus because the Fourth District correctly determined that it lacks jurisdiction over Petitioners' appeal of the trial court's nonfinal order deciding the enforceability of a class action ban contained within an arbitration provision and because Petitioners have an adequate remedy available at law.

Dated: August 19, 2009

By: 

Diana L. Martin, Esq.
Florida Bar No. 624489
Theodore J. Leopold, Esq.
Florida Bar No. 705608
LEOPOLD~KUVIN, P.A.
2925 PGA Blvd., Suite 200
Palm Beach Gardens, FL 33410
Telephone: 561-515-1400
Facsimile: 561-515-1401
dmartin@leopoldkuvin.com
tleopold@leopoldkuvin.com

Christopher Casper
Florida Bar No. 48320
JAMES, HOYER, NEWCOMER
& SMILJANICH, P.A.
4830 West Kennedy Boulevard
Suite 550
Tampa, Florida 33609
Phone: 813-286-4100
Fax: 813-286-4174
ccasper@jameshoyer.com

E. Clayton Yates
Florida Bar No. 0398720
YATES & MANCINI, LLC
328 South Second Street
Fort Pierce, Florida 34950
Phone: 561-465-7990
Fax: 561-465-1886
clay@yatesandmancini.com

Attorneys for Respondents

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Respondents' Brief in Opposition were served by US Mail, postage prepaid, this 19th day of August, 2009, upon:

Claudia Callaway
Christopher T. Koegel
MANATT, PHELPS & PHILLIPS
700 12st Street, NW, Suite 1100
Washington, DC 20005
Tel: 202-585-6500
Fax: 202-585-6600

Virginia B. Townes, Esq.
Akerman Senterfitt
Post Office Box 231
420 South Orange Ave, Suite 1200
Orlando, FL 32802-0231
Tel: 407-423-4000
Fax: 407-843-6610

Lawrence P. Rochefort, Esq.
Akerman Senterfitt
Esperante Building - 4th Floor
222 Lakeview Avenue, Suite 400
West Palm Beach, Florida 33401
Tel: 561-653-5000
Fax: 561-659-6313

LEOPOLD~KUVIN, P.A.
2925 PGA Blvd., Suite 200
Palm Beach Gardens, FL 33410
Telephone: 561-515-1400
Facsimile: 561-515-1401

By:
Diana L. Martin, Esq.
Florida Bar No. 624489

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=ae63a5c4-b4be-4759-9e86-25c958eff7d6

CERTIFICATE OF TYPEFACE COMPLIANCE

The undersigned hereby certifies that Respondent's Brief In Opposition has been prepared and printed in 14-point Times New Roman font and complies with Florida Rule of Appellate Procedure 9.100(l).

By:

Diana L. Martin, Esq.
Florida Bar No. 624489