No. 29,702

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ANDREA J. FELTS,
on behalf of herself and all others similarly situated,

Plaintiffs-Appellees,

v.

CLK MANAGEMENT, INC. f/k/a BAT SERVICES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE BERNALILLO COUNTY COURT
SECOND JUDICIAL DISTRICT
CASE NO. CV 2008 13084
JUDGE NAN G. NASH

DEFENDANT-APPELLANT CLK MANAGEMENT, INC., f/k/a BAT SERVICES, INC. OPENING BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

CLK Management, Inc. ("CLK") appeals the district court's July 7, 2009 order ("July 7 Order") denying CLK's Motion to Compel Arbitration and Stay Trial Court Proceedings ("Motion to Compel"). CLK's Motion to Compel was based upon an arbitration clause contained in loan agreements that the Plaintiff-Andrea J. Felts (hereinafter "Felts") alleges were entered into between her and CLK.[1] The district court denied CLK's Motion to Compel ruling that: (1) it had jurisdiction to determine the validity of the agreement to arbitrate; and (2) Felts' Complaint set forth "small" consumer claims, and thus, the class action waiver contained in the agreement to arbitrate rendered the entire agreement unenforceable.

As set forth herein, the district court's decision violates the United States Supreme Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006), wherein the Court held that where, as here, a plaintiff's complaint seeks to invalidate an entire contract (instead of specifically attacking the arbitration clause itself), the validity of the arbitration agreement must be determined by the arbitrator, not the court. Because the district court in this matter

[1] Although CLK denies that it has a contractual relationship with Felts, to the extent Felts alleges that CLK is a party to the loan agreements, this entire matter is subject to arbitration.

usurped the arbitrator's authority to make this determination in violation of *Buckeye Check Cashing*, the decision below must be reversed.

The district court also erroneously held that the arbitration clause in the underlying contract is unenforceable on the ground that the class action waiver contained in the arbitration clause is unconscionable, relying on *Fiser v Dell Computer Corp*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215 (2008). In *Fiser*, the court held that, because the plaintiff's damages were small (under $20), depriving the plaintiff of a class action forum would foreclose the plaintiff's ability to bring suit for relief, and therefore the class action waiver clause at issue in that case was unconscionable as a violation of public policy. However, unlike in *Fiser*, where plaintiff's damages were less than $20, Felts' alleged damages in this case are alleged to be at least $3,900—nearly 200 times the amount of the damages at issue in *Fiser*. Moreover, Felts has brought her claims pursuant to a statute that permits her to recover her attorney fees and costs, further undermining the rationale and applicability of *Fiser* to this case. Because Felts' claims are substantial, and because she is eligible to recover her attorney fees and costs by statute, the class action waiver does not deprive Felts of a forum in which to seek relief. Accordingly, the class action waiver at issue in this case does not remotely approach the threshold of unconscionability, and the decision below must be reversed.

SUMMARY OF FACTS AND PROCEEDINGS

Felts filed this action on December 15, 2008 against Defendants CLK, Cash Advance Network, Inc., Paycheck Today, Ameriloan, and MTE Financial Services (collectively "Defendants") seeking certification as a class action. *See* Record Proper (hereinafter "RP") at 1-12. Felts' Amended Class Action Complaint (the "Complaint") alleges violations of the New Mexico Unfair Practices Act, NMSA §§ 57-12-1, *et seq.* (the "UPA"), the New Mexico Small Loans Act, NMSA §§ 58-15-1, *et seq.*, and also seeks equitable relief for unjust enrichment, disgorgement of profits and injunctive relief on behalf of Felts and other New Mexico residents who allegedly borrowed money from defendants. *See* RP 299-310. All of Felts' claims are based solely upon alleged internet loan transactions allegedly entered into with CLK, and no other relationship. *See* loan agreements attached to Plaintiff's Opposition to Defendant CLK Management Inc's Motion to Compel Arbitration and Stay Trial Court Proceedings ("Felts' Opposition") at RP 73-115. In its answer, CLK denied that it originates or services any loans, and specifically denies that it has entered into any contractual agreement with Felts or any other member of the putative class. *See* CLK's Answer at RP 23, ¶¶ 5 and 7; RP 26, ¶ 32.

Felts claims that there are three loans that form the factual basis for her claims. *See* RP at 300-302, ¶¶ 10, 19 and 26. She claims to have paid $650 each on two of the loans and interest in an unspecified amount on the third. *See* RP

301-02, ¶¶ 14, 23 and 27. She demands full recovery of all amounts paid on these loans, plus trebled damages, or statutory damages, trebled, whichever is greater, plus costs and attorney fees. *See* RP 306, ¶ 53. Thus, on the face of her Complaint, Felts demands damages in excess of $3,900, plus injunctive relief.

There is no dispute that the subject loan agreements contained an arbitration clause that requires all claims arising out of the loan agreements to be resolved in a non-class arbitration, including issues regarding the arbitration clause itself. The arbitration clause provides, in relevant part:

> **AGREEMENT TO ARBITRATE ALL DISPUTES:** By signing below and to induce us, MTE Financial Services, Inc. d/b/a Paycheck Today, to process your application for a loan, you and we agree that any and all claims, disputes or controversies that we or our servicers or agents have against you or that you have against us, our servicers, agents, directors, officers, and employees, that arise out of your application for one or more loans, the Loan Agreements that govern your repayment obligations, the loan for which you are applying or any other loan we previously made or later make to you, *this Agreement To Arbitrate All Disputes*, collection of the loan or loans, or alleging fraud or misrepresentation, whether under the common law or pursuant to federal or state statute or regulation, or otherwise, including disputes as to the matters subject to arbitration, shall be resolved by binding individual (and not class) arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed. THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATIONS. This Agreement To Arbitrate All Disputes shall apply no matter by whom or against whom the claim is filed. Rules and forms of the NAF may be obtained and all claims shall be filed at any NAF office, on the World

> Wide Web at www.arb-form.com, or at "National Arbitration Forum, P.O. Box 50191, Minneapolis, Minnesota 55405." If you are unable to pay the costs of arbitration, your arbitration fees may be waived by the NAF. The cost of a participatory hearing, if one is held at your or our request, will be paid for solely by us if the amount of the claim is $15,000 or less. Unless otherwise ordered by the arbitrator, you and we agree to equally share the costs of a participatory hearing if the claim is for more than $15,000 or less than $75,000. Any participatory hearing will take place at a location near your residence. This arbitration agreement is made pursuant to a transaction involving interstate commerce. It shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Judgment upon the award may be entered by any party in any court having jurisdiction. This Agreement To Arbitrate All Disputes is an independent agreement and shall survive the closing, funding, repayment, and/or default of the loan for which you are applying.

(emphasis added.) *See* RP 87.

In the Complaint, Felts does not attack the existence, validity or scope of the arbitration clause or class action waiver quoted above. Instead, Felts' Complaint focuses solely on preventing Defendants from enforcing the loan agreements, enjoining the Defendants from making loans to New Mexico residents, and returning all monies paid to Felts and other alleged class members. *See* RP 309, generally.

CLK moved the district court to stay the judicial proceedings and order the parties to non-class arbitration, pursuant to Section 3 of the Federal Arbitration Act, ("FAA") 9 U.S.C. § 3, and NMSA Section 44-7A-8. *See* RP 56-68. The issue was fully briefed and hearing was held on June 23, 2009 ("June 23rd hearing"). In its Motion to Compel, CLK claimed that the district court lacked jurisdiction to

decide the validity of the arbitration agreement under the United States Supreme Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006) ("*Buckeye*"), because Felts' Complaint constituted an attack against the enforceability of the entire agreement instead of an attack on the arbitration clause. *See* RP 62; RP 172-73. At the hearing, the district court agreed that Felts' Complaint sought to invalidate the entire agreement and did not attack the arbitration clause itself. *See* Tr. at 17:9-15; 25:13-19 ("And I don't think—I know that in the response to the motion plaintiffs do say, 'we attack the validity of the [arbitration agreement],' but I went back and read the complaint, and I agree with [CLK] that they don't."). However, notwithstanding this conclusion, the district court failed to apply *Buckeye* and determined that it had jurisdiction to decide the validity of the arbitration clause. *See* Tr. at 29:22-24; RP 313.

The district court's decision on the validity of the arbitration clause was premised on a single issue: Did Felts' claims constitute "small consumer claims" within the meaning of *Fiser v. Dell Computer Corporation*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215 so as to render the class action waiver (and the entire arbitration clause) unenforceable on grounds of unconscionability? *See* Tr. at 29:18-25; 30:1-6; RP 313.

CLK argued that, given the large amount of money Felts sought in her Complaint (nearly 200 times the amount at issue in *Fiser*), her claim did not

constitute a "small consumer claim." Thus the class action waiver could not be deemed unconscionable, particularly in light of the fact that if successful, Felts can obtain an award of attorney fees pursuant to statute, an issue that was not considered in *Fiser*. *See* RP 175-76; *see* Tr. at 11:6-25; 12:1-13. The district court expressed uncertainty about the scope of the *Fiser* ruling stating, "I think it's very clear from *Fiser* that $10 to $20 is too little. I don't think - - they didn't set a ceiling. I don't know what the ceiling is." *See* Tr. at 8:15-17. The district court nonetheless found the entire arbitration clause unconscionable, relying on *Fiser* as its authority. *See* Tr. at 29:22-25; 30:1-6; *see also* July 7, 2009 Order, RP at 312-14. As set forth herein, the district court's rulings are erroneous as a matter of law and must be reversed by this Court.

STANDARD OF REVIEW

The district court's denial of CLK's Motion to Compel Arbitration is reviewed *de novo*. *Piano v. Premier Distributing Co.*, 2005 NMCA-018, 137 N.M. 57, 60, 107 P.3d 11, 14 (N.M.App. 2005). Additionally, applicability and construction of a contractual provision requiring arbitration is reviewed *de novo*. *Id.*

ARGUMENT

I. THE DISTRICT COURT ERRED IN DETERMINING THAT IT HAD THE POWER TO RULE ON THE VALIDITY OF THE ARBITRATION CLAUSE

The district court incorrectly held that Felts had specifically attacked the arbitration clause, because the Complaint is silent about the arbitration clause, and instead generally attacks the contract as a whole. Having erroneously determined that Felts challenged the arbitration clause, the district court ruled that it had the power to make decisions regarding the validity of the arbitration clause.

A. Felts' Complaint Fails to Specifically Challenge the Arbitration Clause, and Therefore, the Issue of Arbitrability Must be Decided by the Arbitrator

The United States Supreme Court has divided attacks upon arbitration agreements into two categories: (1) a claim that is brought specifically against the arbitration agreement; and (2) a claim that is brought seeking the invalidation of the entire contract containing the arbitration agreement. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). The court in *Buckeye* held that, where the claimant seeks to invalidate the entire contract, the question of the contract's validity, including the validity of the arbitration clause contained therein, must be determined by the arbitrator, not the court. *Id.* The court further held that, in determining whether a challenge constitutes an attack on the arbitration agreement

or a challenge to the entire contract, "the crux of the complaint" is conclusive in determining which type of attack is being made. *Id.*

In *Buckeye*, the plaintiff was a customer of a short term lending business. Plaintiff claimed his loan agreement with the lender was illegal because it contained a usurious interest rate. The loan agreement contained an agreement to arbitrate all disputes, including the scope and validity of the agreement to arbitrate itself. *Buckeye*, 546 U.S. at 442-43. The complaint mounted no attack against the arbitration clause, but instead sought the invalidation of the entire loan agreement. The court wrote that, "The crux of the complaint is that the contract as a whole (including its arbitration provision) is rendered invalid by the usurious finance charge." *Buckeye*, 546 U.S. at 444. The Supreme Court held that the entire matter must be sent to arbitration, stating, "We reaffirm today that, ***regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator***. *Buckeye*, 546 U.S. at 449 (emphasis added).

The similarity between *Buckeye* and the case at bar is striking. As in *Buckeye*, Felts' Complaint does not specifically challenge the arbitration clause.[2]

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[2] In fact, the sole mention of the arbitration clause in the operative Complaint is as follows: "In the Paycheck Today, CAN and Ameriloan agreements, Defendants included an arbitration provision that allows judgment upon the arbitration award to be entered into 'in any court having jurisdiction.'" RP 302-03. Thus, while

In fact, the district court acknowledged this at the June 23, 2009 hearing, stating "I agree with [defense counsel], the complaint doesn't really attack the validity of the [arbitration clause]." *See* Tr. 17:9-15. Instead, the Felts' Complaint sets forth a broad-based attack on the contract(s) as a whole and seeks to invalidate the entire contract(s). RP 306-07, ¶¶ 51, 57, 60 and 63, all alleging the loan contracts to be illegal; 307-08, ¶¶ 67-69, generally, all seeking injunctive relief preventing the Defendants from making further loans like those made to Felts; 309, ¶¶ G and H, all seeking relief preventing Defendants from collecting or retaining money on the loan contracts.

As in *Buckeye*, the arbitration agreement at issue covers all disputes arising out of the lending agreement, including disputes regarding the arbitration agreement itself, stating, "we agree that any and all claims, disputes or controversies that . . . arise out of . . . *this Agreement To Arbitrate All Disputes* . . . shall be resolved by binding individual (and not class) arbitration." *See* RP 87 (emphasis added). Felts' Complaint mounts the very same type of broad attack as the plaintiff in *Buckeye*, seeking a complete invalidation of the entire contract ***while mounting no attack whatsoever on the arbitration agreement.*** Because *Buckeye* is on all fours with the instant case, it is controlling, and the district court's decision must be reversed.

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admitting that Felts entered into an arbitration agreement, Felts alleged not a single word to challenge it.

Felts will undoubtedly argue that her Opposition to CLK's Motion to Compel Arbitration constitutes a "specific" attack on the arbitration agreement for purposes of avoiding the *Buckeye* decision. This sort of *post hoc* rationale is at odds with the plain language of the *Buckeye* decision and is also logically inconsistent with that decision.

The plain language of the *Buckeye* decision is that the "crux of the *complaint*" (emphasis added) determines the nature of the attack. *Buckeye*, 546 U.S. at 444; *see also Nagrampa v. Mailcorps, Inc.*, 469 F.3d 1257 (9th Cir. 2006). In *Nagrampa*, the Ninth Circuit left no doubt that the Supreme Court meant exactly what it wrote, "[The dissenting judge in the *Nagrampa* decision] disregards what the Supreme Court plainly said in *Buckeye* and *Prima Paint* . . . that we must look to the complaint to determine whether the validity of the arbitration provision is in jeopardy." *Nagrampa*, 469 F.3d at 1277. It is thus absolutely certain that it is the *complaint* that determines the type of attack, not a *post hoc* response to a motion to compel arbitration.

Here, because the crux of Felts' Complaint is an attack on the entire contract, her attack is of the second variety set forth in *Buckeye*, and the entire matter must be decided by the arbitrator. *See also Garber v. Buckeye Chrysler-Jeep-Dodge of Shelby, L.L.C.*, No.2007-CA-0121, 2008 WL 2789074 (Ohio App. July 14, 2008) ("We find because appellant's complaint did not challenge the

arbitration clause, appellants have waived any such challenge."); *M.W. Sullivan v. General Steel Domestic Sales*, No.3:07-CV-00604, 2008 WL 2414045 (D.Nev. June 11, 2008) ("[Plaintiff]'s complaint, however, makes no reference to the contract's arbitration clause . . . the court concludes [plaintiff]'s challenge is to the contract as a whole rather than a challenge to the . . . arbitration clause."). Accordingly, the district court's decision should be reversed with directions to order this matter to arbitration.

B. An Amendment to Felts' Complaint Will Not Change the Nature of Her Action or the Requirement that the Issue of the Arbitration Agreement's Validity Be Determined by the Arbitrator

At the hearing on CLK's Motion to Compel, the district court opined that even if CLK were correct in asserting that the Complaint did not mount an attack on the arbitration clause, the court would simply allow Felts to amend her Complaint, which would, in the court's opinion, nullify the issue. *See* Tr. 17:15-24.[3] An amendment to Felts' Complaint will not change the essential nature of her action; it will not alter the "crux" of her Complaint. The *Buckeye* decision cannot be avoided by an artifice of pleading.

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[3] This ruling also appears to be an impermissible advisory opinion, since there was no motion before the Court to amend the Complaint, much less a proposed amended Complaint upon which the Court could legitimately make such a ruling. *Santa Fe Southern Railways, Inc. v. Baucis Limited Liability Co.*, 1998-NMCA-002, ¶ 24, 124 N.M. 430, 436, 952 P.2d 31, 37 (N.M.App. 1997) (ruling that New Mexico courts will not rule on hypothetical situations)

The law is well established that a plaintiff cannot change the true nature of its action by doctoring her complaint. In *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455 (10th Cir. 1987), an Indian tribe attempted to circumvent the jurisdiction of the Indian Claims Compensation Act by asserting that it sought relief not covered by the Act. The Tenth Circuit categorically rejected this attempt and held that the Indian tribe could not create jurisdiction by simply altering its complaint to seek different relief, "It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Navajo Tribe of Indians*, 809 F.2d at 1468. Plaintiffs cannot plead away the essential nature of their action. *Hylton v. Rogozienski, Inc.*, 177 Cal.App.4th 1264, 1272 (2009). In *Hylton*, the plaintiff plead its case in an attempt to avoid the application of a California statute that provided for a special motion to dismiss certain types of actions. The court rejected this attempt opining that it must "examine the principal thrust or gravamen of the plaintiff's cause of action to determine" the nature of the case. *Id.* (internal quotations and citations deleted) *See also American Bird Conservancy v. FCC,* 545 F.3d 1190 (9th Cir. 2008) (holding that plaintiff cannot create jurisdiction where it does not exist by careful pleading); *California Save Our Streams Council v. Yeutter*, 887 F.2d 908 (9th Cir. 1989) (same). Thus, plaintiffs cannot turn their

case into something it is not by attempting to pound their proverbial round complaint into a square hole.

To permit Felts to belatedly amend her complaint so that she can launch a superficial *post hoc* attack on the arbitration clause would be to permit Felts to engage in a sham to escape arbitration. Felts cannot be allowed to avoid *Buckeye* by pretending her case is anything other than a direct attack on the entire contract. Accordingly, the district court's decision should be reversed and remanded with instructions to order this entire case to arbitration.

II. THE DISTRICT COURT'S DETERMINATION THAT THE ARBITRATION CLAUSE IS UNENFORCEABLE CONSTITUTES A MISAPPLICATION OF NEW MEXICO PRECEDENT AND CONFLICTS WITH CONTROLLING FEDERAL LAW

Even if this Court finds that the district court had authority to decide the validity of the arbitration agreement, it should nonetheless reverse the district court's determination that the arbitration clause is unenforceable on grounds of unconscionability. The district court based such determination entirely on the proposition that Felts' claims constituted "small" consumer claims within the meaning of *Fiser v. Dell Computer Corporation*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215. *See* RP 312-14; Tr. 29:18-25; 30: 1-6. Under the *Fiser* ruling, a "small" consumer claim cannot be subject to a class action waiver contained in an arbitration agreement, but instead the class action waiver will be deemed unconscionable, and thus unenforceable. *Fiser*, 2008-NMSC-046, ¶ 2. In *Fiser*,

the plaintiff's damages were less than $20. By contrast, Felts alleges at least $3,900 damages in her Complaint—*nearly two-hundred times* the amount at issue in *Fiser*.

Clearly, $3,900 is not a "scant amount" *Fiser*, 2008-NMSC-046, ¶ 3, and thus the district court's ruling constitutes a vast and unjustified expansion of *Fiser* beyond its intended application. Additionally, the ruling below creates a virtual *per se* ban on class action waivers and the arbitration agreements that contain them, and, as such, the ruling is directly at odds with controlling United States Supreme Court precedent, and must be reversed.

A. Federal Law Sets Forth a Strong Presumption In Favor of Arbitration and is Controlling in State Court Actions

The Federal Arbitration Act (FAA) creates a body of substantive federal law on arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 14-15 (1984). The FAA controls arbitration issues in federal and state court actions. *Preston v. Ferrer*, 552 U.S. 346, 353 (2008). Where state law is in conflict with the FAA, the FAA preempts state law. *Id.* The FAA creates a liberal federal policy favoring arbitration, notwithstanding any state law to the contrary. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Although principles of generally applicable state contract law apply to arbitration agreements, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.* at 24. "[A]ny 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 like defense to arbitrability." *Id.* at 24-25.

In *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, No.08-1198, 2010 WL 1655826 (U.S. April 27, 2010), the Supreme Court reaffirmed the polestar rule of the FAA in the context of class arbitration, "the foundational FAA principle that arbitration is a matter of consent." *Id.* at 13. The court held that an arbitration panel's decision to impose a class action upon a party in absence of that party's specific agreement to class action proceedings was "fundamentally at war" with this basic principle of the FAA. *Id.* The court opined that parties typically choose arbitration as it provides "lower costs, greater efficiency and speed" over traditional litigation and that these benefits do not exist in a class arbitration. *Id.* The court concluded by announcing the rule that "[P]arties cannot be compelled to submit their disputes to class arbitration." *Id.* at 14. It is against this back drop of controlling federal law that this Court must now weigh the district court's refusal to enforce the Parties' unambiguous agreement to send this entire matter to non-class arbitration.

B. Felts' Claims are Not "Small" Consumer Claims Within the Meaning of the Rule Announced in *Fiser v. Dell* and Any Doubt Must Be Resolved In Favor of Arbitration

The district court's decision was based entirely upon the New Mexico Supreme Court's ruling in *Fiser*. In *Fiser,* the plaintiff claimed that a computer company had misled consumers about the memory storage capacity of its computers. *Fiser*, 2008-NMSC-046, ¶ 2. The plaintiff sought to certify a class to collect damages for each person that had purchased a computer. *Id.* The parties had entered into an agreement to arbitrate all claims between them in non-class arbitration. *Fiser*, 2008-NMSC-046, ¶ 4. The defendant moved to compel non-class arbitration and the trial court granted the motion. *Fiser*, 2008-NMSC-046, ¶¶ 4 & 5. The plaintiff appealed. *Id.*, ¶ 5.

The issue before the *Fiser* court was whether, given the small amount of damages at stake, the waiver of the class action forum would effectively deny the claimant a forum to bring his claim. *Fiser*, 2008-NMSC-046, ¶ 3. The plaintiff admitted that the damages for each class member individually would not exceed $20. *Fiser*, 2008-NMSC-046, ¶ 3. The court wrote that "Central to the issue presented is the *scant amount* of damages alleged." (emphasis added). *Id.* The court explained that New Mexico public policy is that even small claims must have a forum for relief. *Fiser*, 2008-NMSC-046, ¶ 9. The facts before the *Fiser* court were such that a waiver of class action would have denied the plaintiff such relief,

"[i]n view of the fact that Plaintiff's alleged damages are just ten to twenty dollars." *Fiser*, 2008-NMSC-046, ¶ 16. The court held that due to the small amount of damages involved, depriving plaintiff of a class action forum would effectively deny plaintiff any relief, because plaintiff would not pursue an individual claim for such a minimal amount, and thus the class action waiver was substantively unconscionable as a violation of public policy. *Fiser*, 2008-NMSC-046, ¶ 22.[4] Further explaining its ruling, the *Fiser* court wrote, "'only a lunatic or a fanatic sues for [ten to twenty dollars.].'" *Fiser*, 2008-NMSC-046, ¶ 17 (internal citations deleted). *Fiser* was expressly limited to the facts before the court. *Fiser*, 2008-NMSC-046, ¶ 16. The district court ignored *Fiser*'s express limitation, and instead blindly thrust the *Fiser* result onto the case at bar—where the amount of damages are nearly two hundred times the amount at issue in *Fiser*.

Like the *Fiser* court, most of the other courts that have ruled a class action ban unenforceable have done so in instances where the claimed damages are substantially less than the damages alleged by Felts. *See e.g., Dale v. Comcast Corporation*, 498 F.3d 1216 (11th Cir. 2007) ($10.00 recovery for plaintiff); *Whitney v. Alltel* Communications, *Inc.*, 173 S.W.3d 300 (Mo.App. 2005) ($25.00 recovery for plaintiff); *Thibodeau v. Comcast, Corp.*, 912 A.2d 874 (Pa.Super.Ct.

[4] The *Fiser* court declined to make any ruling regarding whether the term was procedurally unconscionable. *Fiser*, 2008-NMSC-046 at ¶22. The district court's order under review in this case likewise did not address procedural unconscionability, and Felts did not argue it.

2006) ($9.60 recovery for plaintiff); *State v. Berger*, 567 S.E.2d 265 (W.Va.App. 2002) ($9.00 recovery for plaintiff); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) ($45.00 recovery for plaintiff); *Laster v. AT & T*, 584 F.3d 849 (9th Cir. 2009) ($30.00 is a "small amount"). Moreover, the weight of non-New Mexico authority has found that class action waivers generally are enforceable, even where the amount in controversy was equal to or even considerably less than the amount at issue in this case. *See e.g., Snowden v. CheckPoint Cashing,* 290 F.3d 631, 638 (4th Cir. 2002) (damages of less than $500.00); *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3rd Cir. 2000) (involved a loan of less than $400.00); *Strand v. U.S. Bank National Ass'n ND.* 2005 ND 68 ¶ 21, 693 N.W.2d 918, 926 (2005) ($10.00 in damages); *Fonte v. AT & T Wireless Services, Inc.*, 903 So.2d 1019, 1025-26 (Fla.App.2005) ($175.00 in damages); *Walther v. Sovereign Bank*, 386 Md. 412, 438-42, 872 A.2d 735, 750-53 (2005) ($2,900.00); *Gras v. Associates First Capital Corp.*, 346 N.J.Super. 42, 53, 786 A.2d 886, 892 (2001) (principle damages less than $4,000.00); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 357-63 (Tenn.Ct.App.2001) ("small" claims); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex.App.2003) (less than $100.00 in damages).

Despite the fact that *sine quo non* of the *Fiser* ruling was the "scant amount" of damages at issue, the district court in the present case ignored that Felts was seeking a substantial amount of money—nearly 200 times the amount at issue in

Fiser—and erroneously focused upon Felts' incredible claim that she would not be able to find an attorney as a single claimant. *See. e.g.*, Tr. 12:17-24; 13:19-23. Felts' claim is particularly suspect because attorney fees and costs are fully reimbursable to a prevailing claimant under the UPA, NMSA § 57-12-10(C).

In fact, the UPA's cost and attorney fee provisions are designed specifically to allow claimants to bring claims that would otherwise be too small to bring as stand-alone claims due to prohibitive costs and attorneys fees. Indeed, the New Mexico Supreme Court has held that these UPA provisions effectively remedy the precise problem that the *Fiser* court noted with regard to individual small claims, stating, "This [award of attorney fees] to parties who successfully press their claims, and uphold them on appeal, *makes the private remedy an effective one, especially in view of the sometimes minor nature of the damages claim that the [UPA] specifically contemplates, $100 to $300.*" (emphasis added). *Hale v. Bison Motor Co.*, 110 N.M. 322, 759 P.2d. 1006, 1014 (N.M. 1990). Because ***the New Mexico Supreme Court has held, as a matter of law, that the UPA's award of attorney fees "makes the private remedy an effective one" for claims as little as "$100 to $300,"*** the same surely holds true in the present case, where the damages

sought are at least thirteen times that amount. On this basis alone, the district court's decision is erroneous as a matter of law, and must be reversed.[5]

Similarly, in *Jones v. General Motors Corp.*, 1998 NMCA-020, 124 N.M. 606, 953 P.2d 1104 (N.M.App. 1998), the court further explained the purpose of the attorney fees and cost provisions of the UPA. The *Jones* court noted with approval a decision of the Washington Court of Appeals that provided the purpose of attorney fees and costs provisions in a consumer protection acts is: (1) to allow an injured plaintiff to pursue *his own claim*; and to reimburse the *individual* and his attorney for enforcing the laws on behalf of the public. *Jones*, 1998 NMCA, ¶ 25. The *Jones* court further opined:

> It has been observed that the purpose of awarding attorneys' fees and costs under [consumer protection statutes] is to encourage the maintenance of private actions, and perhaps in recognition of the fact that attorneys are unwilling to handle most consumer claims because the amounts recoverable are often too small.

Id. (internal quotations and citations deleted). The recovering claimant in *Jones* was awarded only nominal damages under the UPA, but was still entitled to full recovery of attorney fees. *Id. See also Aguilera v. Palm Harbor Homes, Inc.*, 2004 NMCA-120, 136 N.M. 422, 99 P.3d 672 (N.M.App. 2004) (explaining the purpose of attorneys' fees and costs award under the UPA is to encourage plaintiffs to pursue justice even where the amount of damages involved are minor). Thus,

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[5] It bears noting that the *Fiser* court did not address the effect of the UPA provisions that award attorney fees and costs to a prevailing plaintiff.

both the legislature and the New Mexico Supreme Court in *Hale* have specifically recognized that the UPA's provisions that allow plaintiffs to recover attorney fees and costs "makes the private remedy an effective" one for consumers with small claims. This forum is not the appropriate place for Felts to challenge the adequacy of that remedy, particularly since Felts' claims for damages are substantial.

In addition, this Court may take judicial notice of the fact that consumers have successfully retained legal counsel for cases involving consumer claims involving practically equivalent or even lesser damages than Felts has alleged. For example, in *Hale v. Bison Motor Co.*, 110 N.M. 314, 759 P.2d 1006 (N.M. 1990) an attorney prosecuted a case for a consumer involving damages of less than $1,000. The defendant was ordered to pay the full attorney fees of over $7,700 pursuant to the UPA provisions. *See also Garcia v. Coffman*, 124 N.M. 12, 22, 946 P.2d 216, 226 (1997) (citing as persuasive authority under the UPA attorney fees provisions a United States Tenth Circuit Court of Appeals case wherein the court awarded $512,000 in attorney fees on a $7,000 damages recovery); *Salazar v. D.W.B.H., Inc.*, 2008 NMSC 054, 144 N.M. 828, 192 P.3d 1205 (N.M. 2008) (New Mexico Supreme Court remanded case to trial court to award attorney fees under the UPA based upon a compensatory recovery of less than $3,000). Thus Felts' claim that she could not find an attorney to represent her for claims in excess of $3,900, *plus* and available award of attorney fees and costs, is belied by the above

real-life examples of plaintiffs finding legal counsel on lesser or comparable claims.

While the *Fiser* ruling placed limits on the use of class action waivers, it did so in a context of a claim that was more than 200 times less than the amount at issue in this case. Moreover, *Fiser* did not address the impact of the attorney fee and cost award provisions of the UPA, particularly in light of the fact that these provisions were specifically enacted by the legislature to remedy the problems that lead the court in *Fiser* to find the class action waiver unconscionable on the limited facts of that case. The availability of attorney fees and costs under the UPA must be considered in evaluating the viability of single action claims. Claims such as Felts' that involve potential recoveries in the thousands of dollars, in addition to the full panoply of attorneys' fees and costs available under the UPA, do not fall within *Fiser*'s proscription. The district court erred in applying *Fiser* to the case at bar.

C. The District Court's Unwarranted Expansion of the *Fiser* Ruling Creates a *De Facto* Categorical Bar to Arbitration Provisions on Consumer Contracts Which Is Contradictory to Controlling Federal Law

As set forth above, federal law favors arbitration as a means to efficiently resolve disputes. Importantly, parties must be free to choose how the arbitration will be conducted. *Volt Information Sciences v. Board Of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 479 (1989) ("parties are free to structure

their arbitration agreements as they see fit . . . so too may they specify by contract the rules under which that arbitration will be conducted"). *Volt*, 489 U.S. at 479. While principles of generally applicable state contract law apply to questions of arbitration, where state law discriminates against arbitration, it is preempted by federal law. *Preston v. Ferrer*, 552 U.S. 346, 352 (2008).

The district court's ruling in this case creates a *de facto* categorical bar on non-class arbitration of an expansive category consumer claims (at least all claims of $3,900 or less without considering the statutory availability of attorney fees). As such, the ruling below denies the parties of their right to, "structure their arbitration agreements as they see fit," *Volt*, 489 U.S. at 479 *and* unlawfully discriminates against arbitration as a means of resolving such disputes, contrary to *Preston,* 552 U.S. 346.

Indeed, the *Fiser* court itself warned against any broad-based invalidation of class action waivers in arbitration agreements. The *Fiser* court examined NMSA § 44-7A-5, which provides that class action waivers in consumer arbitration contracts are unenforceable, and noted that such a broad-based prohibition would most likely be preempted by the FAA. *Fiser*, 2008-NMCA-046, ¶ 13. The *Fiser* court was absolutely correct in its preemption assessment of NMSA ¶ 44-7A-5. The Supreme Court of the United States has spoken directly to this issue, "[S]tate law, whether legislative or judicial in origin, is applicable *if* that law arose to

govern . . . contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the FAA]." *Perry v. Thomas*, 482 U.S. 483, 492, n. 9 (1987). In this case, the district court's ruling, if upheld, represents a state-law principle that applies solely because an arbitration clause is at issue, and, as such is preempted by the FAA. For this additional reason, the district court's decision should be reversed.

D. Should This Court Nonetheless Uphold The District Court's Decision Severance Of The Class Action Waiver Is Required

The district court's decision finding the arbitration agreement unenforceable was based solely upon its determination that the class action waiver was unconscionable. The district court's July 7 Order provides, "[P]rohibitions against class relief of Plaintiff Felts' claims are contrary to New Mexico's fundamental public policy . . . such provisions are unenforceable." *See* RP 313. The district court made no other findings, and Felts made no argument that the arbitration agreement was unenforceable for any other reason.

The FAA requires enforcement of arbitration agreements. State law may only be used to invalidate an arbitration agreement to the extent that the agreement would be unenforceable under generally applicable principles of state contract law. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.,* 460 U.S. at 24. Additionally, it is New Mexico policy that arbitration agreements be enforced to the greatest extent possible to preserve the parties' agreement. *Padilla v. State*

Farm Mutual Automobile Ins. Co., 2003-NMCA-011, ¶ 15, 133 N.M. 661, 667-68, 68 P.3d 901, 907-08 (N.M. 2003). The sole basis for the district court's decision that the arbitration agreement is unenforceable is the existence of the class action waiver. Indeed, Felts claimed no other defect in the arbitration agreement. Thus, should this Court determine that the class action waiver is unenforceable, it must, consistent with the policy of "enforcing arbitration agreements to the greatest extent possible to preserve the parties' agreement," sever the class action waiver and leave the balance of the arbitration agreement intact. [6]

CONCLUSION

By refusing to refer Felts' broad-based attack on the entire contract to arbitration, the district court has violated the United States Supreme Court's decision in *Buckeye.* The district court also improperly applied the *Fiser* result to a case that is factually inapposite, and unjustifiably expanded the principal in *Fiser* to the point of conflict with controlling federal law. CLK thus respectfully requests that this Court reverse the district court's July 7 Order and remand with instructions to order this entire matter to non-class arbitration.

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[6] CLK is in agreement with Co-Appellant Cash Advance Network, Inc.'s argument regarding this issue contained in Section II.D of its opening brief.

STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

Oral Argument will assist the Court as this case involves complex and more importantly *dynamic* issues regarding the relationship between federal law on arbitration and state contract law.

Respectfully submitted this 14th day of May, 2010.

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CERTIFICATE OF SERVICE

I certify that six copies of CLK Management, LLC's Opening Brief was sent on May 14, 2010 via Federal Express Priority Overnight Mail addressed to:

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