IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2161

JOHN A. CARDEGNA, et al.,

Petitioners,

vs.

BUCKEYE CHECK CASHING, INC.,

Respondent.

AMICUS CURIAE BRIEF OF THE CHECK CASHING STORE, INC. IN SUPPORT OF POSITION OF RESPONDENT (FILED BY LEAVE OF COURT)

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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INTRODUCTION

Cardegna's thesis is that because he has alleged that his check-cashing agreement with Buckeye is usurious, that agreement and the arbitration agreement it contains must be treated as though they never existed. But this thesis flies in the face of controlling federal arbitration law and controlling state law distinguishing between a contract never formed and one unenforceable because of alleged illegality. *FastFunding The Company, Inc. v. Betts*, 758 So. 2d 1143 (Fla. 5th DCA 2000), and the case it blindly followed, *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. 5th DCA 2000), misapprehended federal arbitration law and overlooked state contract law. This Court should approve the decision of the Fourth District below and disapprove *Fastfunding* and *Party Yards* to the extent they conflict with the Fourth District's decision.

INTEREST OF AMICUS CURIAE THE CHECK CASHING STORE, INC.

Cardegna brought a class action against The Check Cashing Store, Inc. (CCS) much like its action against Buckeye Check Cashing, Inc. here, claiming that check-cashing transactions were usurious loans. Cardegna's agreement with CCS, like his agreement with Buckeye, contained an arbitration clause. The trial court granted CCS's motion to compel arbitration, Cardegna appealed, and the Fourth District affirmed in a one-sentence decision. *Cardegna v. The Check Cashing Store, Inc.*,

813 So. 2d 1056 (Fla. 2002). Cardegna asked this Court to review the decision, but this Court correctly declined. 833 So. 2d 773 (Fla. 2002). In the case under review here the trial court denied arbitration and the Fourth District reversed. *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228 (Fla. 4th DCA 2002). Thus these two cases – although arising from disparate trial court rulings – ultimately resulted in appellate rulings enforcing the arbitration agreements. Although Cardegna's suit against CCS has been finally resolved in favor of arbitration, CCS has a direct interest in this case, because its outcome will affect the viability of the arbitration clauses in other of its check-cashing agreements.

SUMMARY OF ARGUMENT

Because Cardegna's challenge is to the contract in general, not to the arbitration clause, under federal arbitration law, governing here, Cardegna must arbitrate his claim that the contract is illegal. But Cardegna says that because he alleges the contract is usurious, it is void *ab initio* and must be treated as though it never existed. Cardegna's position ignores the distinction between no contract at all and a contract that is unenforceable – a distinction made clear in federal arbitration cases and Florida contract cases – and Cardegna cannot make a contract he fully assented to, and its arbitration clause, just go away. The Florida decisions Cardegna relies on, *FastFunding The Company, Inc. v. Betts*, 758 So. 2d 1143 (Fla. 5th DCA 2000), and

Party Yards, Inc. v. Templeton, 751 So. 2d 121 (Fla. 5th DCA 2000), are simply wrong. This Court should approve the Fourth District's decision.

ARGUMENT

I.

CARDEGNA CHALLENGED THE LEGALITY OF THE CONTRACT IN GENERAL, AND UNDER *PRIMA PAINT* MUST ARBITRATE HIS CLAIM OF ILLEGALITY

Cardegna argues that because he alleged his contract with Buckeye was usurious, it therefore was illegal, it therefore was "void *ab initio*," and it therefore, with respect to every clause within it, including the arbitration clause, was non-existent. But Cardegna's illegality attack is on the contract in general, not the arbitration clause, and federal cases and Florida cases applying the Federal Arbitration Act (FAA)[1] tell us that when, as here, "fraud (or some other ground for avoidance) is alleged as to the entire agreement rather than specifically as to the agreement to arbitrate, the entire matter should be resolved by arbitration." *Manning v. Interfuture Trading, Inc.*, 578 So.

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[1] The FAA applies here. When that is the case, state courts are bound to follow it, and it supersedes inconsistent state law. *Southland Corp. v. Keating*, 465 U.S. 1, 11-17 (1984); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683-88 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995); *Shearson/Lehman Bros., Inc. v. Ordonez*, 497 So. 2d 703, 704 (Fla. 4th DCA 1986); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed*, 453 So. 2d 858, 862 (Fla. 4th DCA 1984) and 405 So. 2d 790, 791-93 (Fla. 4th DCA 1981). *See Pierce v. J.W. Charles-Bush Sec., Inc.*, 603 So. 2d 625, 628 (Fla. 4th DCA 1992) (the FAA "withdrew any power of the states to require a judicial forum for the resolution of claims that the contracting parties had agreed to resolve by arbitration").

2d 842, 843, 844 (Fla. 4th DCA 1991) (noting adherence to "majority view" in order to promote policy favoring arbitration). This proposition was established in 1967 by the United States Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and has been the law ever since.

In *Prima Paint* the court considered whether a claim of fraud in the inducement of a contract was to be resolved by the court or referred to arbitration:

> Under [section 4 of the FAA] . . . the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration . . . is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself--***an issue which goes to the 'making' of the agreement to arbitrate***--the federal court may proceed to adjudicate it. ***But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally***.

Id. at 403-04 (emphasis added).

As *Prima Paint* and cases following it show, this rule applies even where, as here, the contract is alleged to be "illegal." *Prima Paint*, 388 U.S. at 400-07 (fraud in inducement of a consulting agreement); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479-84 (1989) (agreement to arbitrate claims under Securities Act enforceable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-28 (1985) (antitrust dispute subject to arbitration); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 549-51 (7th Cir. 2000) (claim of violation of Commodity Exchange Act arbitrable); *Hill v. Gateway*, 105 F.3d 1147, 1150-51 (7th Cir. 1997) (RICO claims arbitrable); *Sweet Dreams Unlimited, Inc. v. Dial-A-*

Mattress Int'l, Ltd., 1 F.3d 639, 640-43 (7th Cir. 1993) (claim under Franchise Fraud Act subject to arbitration); *Adrian v. Smith Barney, Harris, Upham & Co.*, 841 F.2d 1059, 1060-62 (11th Cir. 1988) (arbitration agreement enforceable as to claims for federal securities fraud and RICO); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1161-62 (5th Cir. 1987) (arbitration agreement enforceable notwithstanding claim of violation of Texas Accountancy Act). *See also Ronbeck Constr. Co., Inc. v. Savanna Club Corp.*, 592 So. 2d 344, 345-47 (Fla. 4th DCA 1992) (reversing denial of arbitration of fraud, conversion, conspiracy and civil theft claims); *Sabates v. International Med. Centers, Inc.*, 450 So. 2d 514, 518 (Fla. 3d DCA 1984) (approving arbitration of civil theft claims); *Manning v. Interfuture Trading, Inc.*, 578 So. 2d at 843-45 (investors' claims of fraud in inducement to be arbitrated); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed*, 453 So. 2d 858, 860-61 (Fla. 4th DCA 1984) (claims for securities fraud subject to arbitration), *approved*, 476 So. 2d 140 (Fla. 1985).

II.

CARDEGNA'S CLAIM THAT THE CHECK-CASHING CONTRACT IS ILLEGAL TO THE POINT OF NONEXISTENCE IGNORES THE DISTINCTION BETWEEN NO CONTRACT AT ALL AND A CONTRACT THAT IS UNENFORCEABLE

Cardegna's challenge is to the contract in general, not the arbitration clause, and thus is controlled by *Prima Paint*. As the Fourth District pointed out, Cardegna never

said he did not agree to the arbitration clause: "[A]ppellees did not argue that they did not enter into the arbitration agreement . . . ." 824 So. 2d at 232. To get around *Prima Paint*, then, Cardegna has carefully constructed this fiction: because his check-cashing contract with Buckeye is usurious, he says, it's as though the contract – and its arbitration clause – never existed. He incants that "[a] void contract never comes into existence and no part of a void contract may ever be enforced by a court, and thus no arbitration clause ever comes into existence." Initial Brief at 24. But no incantation can make the contract disappear.

A line of federal cases, beginning with *Three Valleys Municipal Water District v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991), distinguished themselves from *Prima Paint* because, unlike *Prima Paint*, they involved agreements never properly formed or assented to.[2] Cardegna relies, among other things, on these cases, and the Fifth District in *Party Yards* did so as well. But they are of no help to Cardegna.

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[2] The most commonly cited of these cases are: *Sphere Drake Insurance Ltd. v. All American Insurance Co.*, 256 F.3d 587, 590-91 (7th Cir. 2001) (determining whether signatory had power to bind company); *Sandvik AB v. Advent International Corp.*, 220 F.3d 99, 110 (3d Cir. 2000) (same); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992) (determining whether signatory had power to bind family member); *Three Valleys Municipal Water District v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (examining whether signatory had power to bind principals); *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986) (determining whether assignee of signatory had power to enforce arbitration agreement). For additional similar cases, see *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 489-90 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002).

In *Three Valleys,* three governmental entities sued an investment company, Shearson (formerly E.F. Hutton), alleging that Shearson had wrongfully caused them to lose over $8 million. Shearson moved to compel arbitration and the plaintiffs opposed arbitration on the ground that the individual who signed the client agreements with Shearson had no authority to bind the plaintiffs. The *Three Valleys* court explained:

> Despite the broad dicta in . . . cases suggesting that *Prima Paint* extends to "all challenges to the making of a contract," we read *Prima Paint* as limited to challenges seeking to ***avoid*** or ***rescind*** a contract--***not to challenges going to the very existence of a contract that a party claims never to have agreed to***. A contrary rule would lead to untenable results.
>
> . . . .
>
> [B]ecause an arbitrator's jurisdiction is rooted in the agreement of the parties, a party who contests ***the making of a contract*** containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the ***existence*** of an agreement to arbitrate.

Id. at 1140, 1140-41 (emphasis added; citations and internal quotation marks omitted).

In *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992), Susan Chastain sued Robinson-Humphrey Co. for securities fraud, alleging that Robinson-Humphrey illegally opened an account for her, illegally churned the account and fraudulently induced her to pay on the account. Robinson-Humphrey asked the district court to compel arbitration based on arbitration clauses in the customer

agreements. Importantly, Chastain claimed that she had ***never signed the agreements***, and Robinson-Humphrey admitted this was true.

> Under normal circumstances, an arbitration provision within a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration.
>
> . . . .
>
> The calculus changes when it is undisputed that the party seeking to avoid arbitration ***has not signed any contract*** requiring arbitration. In such a case, that party is challenging the very existence of any agreement, including the existence of an agreement to arbitrate. Under these circumstances, there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration pursuant to the Act.

Id. at 854 (emphasis added). The court explained further, relying on *Three Valleys*:

> *Prima Paint* has never been extended to require arbitrators to adjudicate a party's contention . . . that a contract never existed at all. Here [the purported contract] indisputably lacks the formalities necessary to signal Chastain's ex ante assent to the agreement as a whole. Clearly, the trigger of the court's power to compel arbitration in cases like *Prima Paint* . . . --the existence of a presumptively valid arbitration agreement contained within a contract ***signed by the parties***--is extremely absent in this case.

Id. at 855 (citation omitted; emphasis added). Thus, the district court and the Eleventh Circuit did not deny arbitration because Robinson-Humphrey's activities were alleged to be illegal, but because Chastain never signed the agreements, so there was never any agreement to arbitrate.

The distinction between lack of assent to the contract and illegality of the

contract was dispositive for the Eleventh Circuit in *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002), which, on facts like those here, distinguished *Chastain*:

> Likening his void *ab initio* allegations to the contentions in *Chastain* that no contract ever existed, Colburn [the plaintiff] argues that, as in *Chastain*, the court must determine the legality of the deferred payment transactions before deciding whether to compel arbitration. But the focus of the court's decision in *Chastain* . . . was on the question of assent, i.e., whether the parties mutually had agreed to the contracts. By contrast, Colburn urges that the transactions in this case are void, not because he failed to assent to the essential terms of the contracts, but because those terms allegedly render the contracts illegal under Alabama law. At bottom, Colburn challenges the ***content*** of the contracts, not their ***existence***. Indeed, unlike the contracts in *Chastain*, both the arbitration agreement and the deferred payment contracts were signed by Colburn, and there is no question about Colburn's assent to those contracts. Thus, this case falls within the "normal circumstances" described in *Chastain*, where the parties have signed a presumptively valid agreement to arbitrate any disputes, including those about the validity of the underlying transaction. Therefore, the issue raised by Colburn--whether the deferred payment transactions are void as illegal--is one for the arbitrator, not the court.

Id. at 1305-06 (emphasis added).

The Sixth Circuit, in *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001), also explored this distinction. In *Burden*, as here, the plaintiffs alleged that check-cashing agreements violated consumer protection statutes and usury laws. The trial court denied arbitration, concluding, mistakenly, under *Three Valleys*, that the plaintiffs' allegations that the loan agreements containing the arbitration clauses were void *ab initio* must be determined by a court instead of an arbitrator. The Sixth

Circuit reversed, holding that the district court was wrong to rely on *Three Valleys*:

> [T]he district court erred when construing Plaintiffs' allegations under § 288.991 and § 288.420 -- that any loan contract made in violation of § 288.991 shall be void, and that Defendants were not licensed to enter into the loan agreements -- as allegations of void *ab initio* contracts under the *Three Valleys* line of cases.
>
> [C]ourts have addressed questions of void *ab initio* contracts as questions of signatory power, not contract content.
>
> . . . .
>
> [U]nlike the *Three Valleys* line of cases, Plaintiffs' allegations under § 288.991 do not concern their failure to assent to the loan agreements, and do not concern signatory power. Accordingly, because Plaintiffs' allegations under § 288.991 challenge the substance, rather than the existence, of the loan agreements, we vacate the district court's application of *Three Valleys* to those allegations.

Id. at 489, 490 (citations omitted). The Fourth Circuit in *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir.), *cert. denied*, 123 S. Ct. 695 (2002), similarly focused on this distinction:

> Snowden first attacks the validity of the . . . Agreement on the ground that the deferred deposit transaction memorialized by that agreement is void *ab initio* under Maryland law for imposition of a usurious rate of interest.
>
> Notably, the severability doctrine [of *Prima Paint*] has been held not to apply when the party seeking to avoid arbitration contends that it never assented in the first place to the contract containing the arbitration provision. The federal appellate courts reaching these holdings logically reasoned that if a party never assented to the overall contract containing the arbitration provision, then the party never assented to the arbitration provision.

> Here, Snowden's allegations of usurious rates of interest and non-licensure do not relate to the Arbitration Agreement.
>
> Neither do they underlie a claim that Snowden failed to assent to the terms of the . . . Agreement. Therefore, they cannot serve as a basis to uphold the district court's denial of [the motion to compel arbitration].

Id. at 636-37 (citations omitted).

We submit that promiscuously assigned labels such as "void," "voidable" and "void *ab initio*" – often used interchangeably and just as often used incorrectly – are not helpful to the Court: they are just words, and do not get to the heart of the matter. For example, Cardegna says that the contract here – clearly entered into by the parties – is "void" because it is usurious. Cardegna would like this to be "void" in the sense that the contract was never made, but that obviously isn't so. Rather he calls it "void" because he alleges it is illegal and thus cannot be enforced. Labels aside, what is presented here is "[t]he distinction between no contract at all and one that is unenforceable" which "makes all the difference . . . ." *Katz v. Van Der Noord*, 546 So. 2d 1047, 1049 (Fla. 1989) (quoting *Leitman v. Boone*, 439 So. 2d 318, 320 (Fla. 3d DCA 1983)) (further discussed below).

Whether an ordinary contract is void or voidable, it is equally unenforceable. However, when it comes to the question of the arbitration of a contract, the distinction between void and voidable becomes important. In this context, it is the ***court's***

function to decide if a contract including the arbitration clause ever came into being, and it is the ***court's*** function where the arbitration clause is separately assailed as being fraudulently induced to declare that void or not. But if the contention is that the contract (not just the arbitration clause) was fraudulently induced, or the contract is unenforceable because illegal, then it is the ***arbitrators'*** function to decide whether that is so.

III.

FASTFUNDING AND *PARTY YARDS* ARE WRONG

In *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. 5th DCA 2000), the Fifth District departed from the well-established rule of *Prima Paint*, and held that a claim that a contract is illegal cannot be determined by arbitrators. Because *FastFunding The Co., Inc. v. Betts*, 758 So. 2d 1143 (Fla. 5th DCA 2000) blindly followed *Party Yards*, this Court must look closely at *Party Yards* to properly evaluate the viability of *FastFunding*.

In *Party Yards* the plaintiff, Party Yards, Inc., borrowed money from Templeton under a contract Party Yards later alleged to be usurious. The contract contained an arbitration clause and the FAA applied. There is no indication in the decision that Party Yards made a separate attack on the arbitration clause. The Fifth District labeled the issue before it "one of first impression . . . whether a contract that violates state law and is criminal in nature, can be referred to arbitration." 751 So. 2d

at 123. It then declared that "[a] claim that a contract is illegal and, as in this case, criminal in nature, is not a matter which can be determined by an arbitrator." *Id.* at 123. This, of course, is contrary to the cases following the *Prima Paint* rule of arbitrability even where illegal conduct is alleged.

The Fifth District in *Party Yards* misread *Chastain* as holding: "Where the facts alleged by the plaintiff are sufficient to put the making of a ***lawful*** agreement at issue, the trial court must determine the validity of the agreement before compelling a party to submit to arbitration." *Party Yards*, 751 So. 2d at 124 (emphasis added). But *Chastain* was about "the ***making*** of the arbitration agreement," not "the making of a ***lawful*** agreement" as the Fifth District wrongly put it. *Chastain* was not about the illegality of the subject matter of the agreement, but about the fact that the agreement was never signed. There was no signed agreement, and thus no agreement to arbitrate. And that makes all the difference.[3, 4]

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[3] As Buckeye sets forth more fully in its brief, because *Party Yards* is wrongly decided, completely at odds with established law, other courts have rejected it and followed *Prima Paint*. *See Furgason v. McKenzie Check Advance of Ind., Inc.*, No. IP00-121-C H/G, 2001 WL 238129, at *11 (S.D. Ind. Jan. 3, 2001); *Arnold v. Goldstar Fin. Sys., Inc.*, No. 01 C 7694, 2002 WL 1941546, at *8 (N.D. Ill. Aug. 20, 2002); *Harrington v. The Check Cashing Store, Inc.*, No. 00-8685-Civ-Ryskamp/Vitunac, at 9-10 (S.D. Fla. Aug. 27, 2001) (included in attached appendix at tab 2). *See also Cardegna v. The Check Cashing Store, Inc.*, 813 So. 2d 1056 (Fla. 4th DCA) (affirming, without opinion, order compelling arbitration, where Cardegna, as here, urged court to instead follow *Party Yards* and *FastFunding*), *review denied*, 833 So. 2d 773 (Fla. 2002).

[4] The court in *Alabama Catalog Sales v. Harris*, 794 So. 2d 312 (Ala. 2000), relied on by Cardegna, made the same mistake as the court in *Party Yards*, equating illegality with nonexistence. It relied on *Three Valleys* and an Alabama case relying on *Three Valleys*, *Shearson Lehman Bros., Inc. v. Crisp*, 646 So. 2d 613, 616 (Ala. 1994). (continued...)

IV.

ALL OF THIS IS CONSISTENT WITH FLORIDA LAW, WHICH RECOGNIZES THE DISTINCTION BETWEEN A CONTRACT NEVER FORMED AND ONE FORMED BUT UNENFORCEABLE

The crucial distinction between a contract never formed and a contract properly formed but unenforceable for another reason, and the ramifications of the distinction, have been thoroughly explored and settled in Florida in the context of attorneys' fee provisions in contracts. In *Leitman v. Boone*, 439 So. 2d 318 (Fla. 3d DCA 1983), the plaintiffs sued for specific performance of a contract. The trial court denied relief finding that because the defendants had never accepted the plaintiffs' offer, no contract existed. But the trial court nevertheless awarded fees to the defendants based on a provision ***in the contract*** providing for fees to the prevailing party. The Third District reversed, holding that the entitlement to fees "rested solely on a 'contract' which . . . was never formed," *id.* at 319, and "no legal obligations whatsoever were created between the parties." *Id.*

> The trial court's finding . . . was that the offer made by the plaintiffs was not accepted, that is, no contract was ever formed. It was not . . . that

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(...continued)
Two justices dissented, correctly pointing this out. "[T]his case is unlike *Shearson Lehman Bros.* and *Three Valleys* because Harris admits that she signed the arbitration agreements." *Id.* at 318 (See, J. dissenting). "Harris's contention that the contract is invalid is not grounded on a claim of want of assent, but rather on a claim of unenforceability notwithstanding assent. Such a claim of invalidity must be determined by the arbitrator, not the court." *Id.* at 320 (Lyons, J. dissenting).

> an agreement had been formed, but such agreement was not ***enforceable*** . . . .
>
> . . . .
>
> The distinction between no contract at all and a contract that is unenforceable makes all the difference here. One simply cannot be entitled to fees "arising out of this contract" when no contract ever existed; one may arguably be entitled to fees "arising out of this contract" where a contract exists, but its enforcement is prevented . . . .

Id. at 320, 320-21. *Leitman* mirrored the holding of *Prima Paint*: "[T]he enforcement of a contract may be prevented by equitable considerations, such as that the contract was fraudulently induced. In such a case, since a contract exists, even though later declared to be void or voidable, certain of its provisions may be operative." *Leitman*, 439 So. 2d at 320-21.

This Court in *Gibson v. Courtois*, 539 So. 2d 459 (Fla. 1989) held, in accordance with Leitman, that where an offer to purchase a home was revoked ***before acceptance*** there was no contract and the attorney's fee provision in the contract could not be enforced. "In *Leitman*, as in this case, the entitlement to fees is predicated solely on a contract provision which was part of a contract that was never formed." *Id.* at 460. *See also David v. Richman*, 568 So. 2d 922, 924 (Fla. 1990) (no attorneys' fees where contract was never formed because there was no mutual assent as to essential terms of contract).

In *Katz v. Van Der Noord*, 546 So. 2d 1047 (Fla. 1989), this Court expressly

approved the reasoning of *Leitman* in a case where, as here, it was claimed that a contract never existed. In *Katz*, a suit arising out of a contract for the purchase of a mobile home park, the trial court awarded the buyer attorneys' fees based on a provision in the contract providing for fees to the prevailing party. The Fifth District reversed. It held, in words uncannily like Cardegna's here, that "by repudiating the agreement, the buyer extinguished and annihilated it as effectually ***as if it had never existed*** . . . . " *Van der Noord v. Katz*, 526 So. 2d 940, 941 (Fla. 5th DCA 1988) (emphasis added). This Court "disapprove[d] the rationale of the district court of appeal," 546 So. 2d at 1050, and adopted the reasoning of *Leitman*:

> [In *Leitman*] the district court of appeal . . . explain[ed] the difference between a situation in which a contract has never been formed and one where a contract has been formed which is not enforceable. The court suggested that a contractual provision for prevailing party attorney's fees could be enforced in the latter instance.
>
> . . . .
>
> We agree with *Leitman* that "[t]he distinction between no contract at all and one that is unenforceable makes all the difference . . . ." We hold that . . . attorneys' fees may be recovered under a prevailing-party attorney's fee provision contained therein even though the contract is rescinded or held to be unenforceable. The legal fictions which accompany a judgment of rescission ***do not change the fact that a contract did exist*** . . . .
>
> This analysis does no violence to our recent opinion in *Gibson v. Courtois* in which we held that the prevailing party is not entitled to collect attorney's fees under a provision in the document which would

> have formed the contract where the court finds that the contract ***never*** existed.
>
> ***In the instant case, it is undisputed that the parties entered into a contract.***

Id. at 1049-50 (citation omitted; emphasis added). *See also Giltex Corp. v. Diehl*, 544 So. 2d 302, 304 (Fla. 1st DCA 1989) (reversing denial of attorneys' fees where, unlike *Leitman*, contract "did come into existence, notwithstanding that its central agreement . . . became unenforceable because . . . a contingency to which [the parties] had agreed did not occur . . . .").

Neither federal nor Florida law, then, allows Cardegna, by simply saying his contract is illegal, to make the contract and its binding arbitration agreement disappear.

CONCLUSION

For all of these reasons, and under the authorities cited, we ask this Court to approve the decision of the Fourth District Court of Appeal in *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228 (Fla. 4th DCA 2002), and disapprove *FastFunding The Co., Inc. v. Betts*, 758 So. 2d 1143 (Fla. 5th DCA 2000), and

Party Yards, Inc. v. Templeton, 751 So. 2d 121 (Fla. 5th DCA 2000), to the extent they conflict with the Fourth District's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

We certify that this brief complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure. We have used 14-point Times New Roman type.

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Lenore C. Smith