

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 MATTHEW C. KILGORE, *et al.*,

5 Plaintiffs,

6 v.

7 KEYBANK, NATIONAL  
8 ASSOCIATION, *et al.*,

9 Defendants.

NO. C08-2958 TEH

ORDER FOR SUPPLEMENTAL  
BRIEFING ON DEFENDANTS'  
MOTION TO DISMISS

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11 The Court is in receipt of Defendants' Motion to Dismiss Plaintiffs' Third Amended  
12 Complaint and all subsequent briefing on the motion, which is noticed for hearing on  
13 March 29, 2010. Defendants urge the Court to dismiss this action based on a forum selection  
14 clause that requires any suit to be venued in Ohio and governed by Ohio law. The parties  
15 agree that enforcement of the forum selection clause is governed by *M/S Bremen v. Zapata*  
16 *Off-Shore Co.*, in which the Supreme Court concluded that a "contractual choice-of-forum  
17 clause should be held unenforceable if enforcement would contravene a strong public policy  
18 of the forum in which suit is brought, whether declared by statute or by judicial decision."  
19 407 U.S. 1, 15 (1972). Plaintiffs argue that California's policy barring arbitration of  
20 injunctive relief claims in consumer class actions meets that standard, a conclusion they  
21 claim this Court already reached in its Order Denying Motion to Compel Arbitration  
22 (Doc. 81).

23 Defendants' appeal of that order is currently pending before the Ninth Circuit. As a  
24 general rule, "the filing of a notice of appeal divests the district court of jurisdiction and  
25 transfers jurisdiction to the appellate court." *Britton v. Co-op Banking Group*, 916 F.2d  
26 1405, 1412 (9th Cir. 1990). However, "an appeal seeking review of collateral orders does  
27 not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of  
28 an interlocutory order does not ordinarily deprive the district court of jurisdiction except with

1 regard to the matters that are the subject of the appeal.” *Id.* Where “the issue of arbitrability  
2 [is] the only substantive issue presented in [an] appeal, the district court [is] not divested of  
3 jurisdiction to proceed with the case on the merits.” *Id.*

4 Defendants’ appeal in this case questions whether this Court erred “in holding that  
5 California law barred the arbitration of a private contractual dispute where injunctive relief is  
6 sought.” Appellants’ Opening Br. at 1. This appears to be identical to one of Plaintiffs’  
7 central arguments in opposition to the motion to dismiss – that California has a strong public  
8 policy barring arbitration of injunctive relief claims in consumer class actions. Although the  
9 parties have not questioned this Court’s jurisdiction over the pending motion, the Court  
10 raises this question *sua sponte* in light of the apparent identity of issues.

11 Therefore, with good cause appearing, IT IS HEREBY ORDERED that Plaintiffs and  
12 Defendants shall each file supplemental briefs, on or before **March 15, 2010**, addressing  
13 whether this Court can and should rule on Defendants’ motion to dismiss before the Ninth  
14 Circuit decides Defendants’ pending appeal. Each brief shall not exceed five pages. The  
15 parties shall be prepared to address the jurisdictional question, in addition to all other  
16 arguments related to Defendants’ motion to dismiss, at the March 29, 2010 hearing.

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18 **IT IS SO ORDERED.**

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20 Dated: 3/9/10



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22 THELTON E. HENDERSON, JUDGE  
23 UNITED STATES DISTRICT COURT  
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