IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 05-1384

KEVIN BARNHILL, et al.,

Petitioners,

v.

IN RE: FLORIDA MICROSOFT ANTI-TRUST LITIGATION,

Respondent.

RESPONDENT MICROSOFT CORPORATION'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS..... ii

STATEMENT OF THE CASE AND FACTS..... 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT..... 3

CONCLUSION..... 5

CERTIFICATE OF SERVICE..... 6

CERTIFICATE OF COMPLIANCE..... 7

TABLE OF CITATIONS

Page

Cases

Corvette Shop & Supplies, Inc. v. Coggins
779 So. 2d 529 (Fla. 2d DCA 2001),
review denied, 794 So. 2d 604 (Fla. 2001).....2, 3, 4, 5

Schick v. Department of Agric. & Consumer Servs.
599 So. 2d 641 (Fla. 1992) 3, 4

Standard Guar. Ins. Co. v. Quanstrom
555 So. 2d 828 (Fla. 1990) 3, 4

Stewart Select Cars, Inc. v. Moore
619 So. 2d 1037 (Fla. 4th DCA 1993),
review denied, 632 So. 2d 1027 (Fla. 1994).....2, 3, 4, 5

STATEMENT OF THE CASE AND FACTS

Microsoft Corporation (Microsoft) and a class comprising indirect purchasers of certain Microsoft software settled a class action, which alleged violations of the Florida Deceptive and Unfair Trade Practice Act (FDUTPA). (A:2-3). The settlement agreement provides that class members who file valid claims may obtain vouchers, which can be used to purchase computer hardware or software. (A:8-9). To the extent that class members do not make claims, "[h]alf of the money allocated which is not redeemed … will be donated to Florida schools in the form of vouchers which may be used to purchase computer hardware, software, training, and support." (A:9). The settlement agreement also provided for an award of attorney's fees to class counsel in an amount to be determined "after a settlement had been reached." (A:3, 10).

The trial court preliminarily approved the settlement agreement subject to the right of any class member to challenge the agreement's fairness, reasonableness or adequacy. (A:3). Petitioners Kevin Barnhill, Ramona Torres, D. Wilson, William McWhorter and Eugenia Fiala (collectively, petitioners) objected to the settlement agreement. (A:3-4).

The trial court held a fairness hearing, in which petitioners participated, and thereafter entered its order approving the settlement agreement as fair, reasonable and adequate. (A:3-4). The settling parties later resolved a dispute over attorney's fees, with Microsoft agreeing not to oppose class counsel's request for $15.5 million, less than half of the amount originally sought, purportedly representing a

lodestar enhanced by a 1.77 contingency risk multiplier. (A:3, 9-10). The trial court awarded class counsel the agreed-upon fees, which were to be paid by Microsoft and "in no way diminished the amount of the [settlement] benefits to the class." (A:3, 9, 11).

Petitioners' motion to intervene, for the purpose of challenging the trial court's orders, was denied. (A:3, 10). They appealed to the Third District, challenging the settlement and the intervention ruling, and "claim[ing] that the … application of a multiplier in awarding attorneys' fees is prohibited in FDUTPA cases." (A:3).

The Third District reversed the order denying intervention, but affirmed the order approving the settlement agreement as fair, reasonable and adequate. (A:7-9). With respect to the fee award, the court rejected petitioners' contention that "the inclusion of the 1.77 multiplier was error as multipliers are prohibited in FDUTPA claims." (A:10). The court recognized this rule announced in *Corvette Shop & Supplies, Inc. v. Coggins,* 779 So. 2d 529, 531 (Fla. 2d DCA 2000), *review denied*, 794 So. 2d 604 (Fla. 2001), and in *Stewart Select Cars, Inc. v. Moore,* 619 So. 2d 1037, 1038 (Fla. 4th DCA 1993), *review denied*, 632 So. 2d 1027 (Fla. 1994), but held that these cases, in which "the fees were awarded after a jury verdict and judgment," are inapplicable here "where the attorneys' fees issue was resolved by agreement of the parties." (A:10). The court thus approved the fee award as "fair, reasonable, and adequate." (A:11).

SUMMARY OF ARGUMENT

There is no decisional conflict to warrant the Court's discretionary review. The attorney's fee award was not made pursuant to the FDUTPA's prevailing-party attorney's fee provision. Rather, the parties agreed to the amount of the attorney's fee award *after* settling the FDUTPA class action – and after having submitted that settlement to the trial court for final approval. Thus, the rule that a contingency risk multiplier is impermissible under the FDUTPA has no applicability here, and there is no express and direct decisional conflict.

ARGUMENT

Petitioners assert that the Third District's decision conflicts with decisions of this Court and other district courts of appeal, holding that a contingency risk multiplier is impermissible under FDUTPA's prevailing-party attorney's fee provision. Petitioners' Brief at 5-7. *See Schick v. Department of Agric. & Consumer Servs.*, 599 So. 2d 641, 643 (Fla. 1992); *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 833-34 (Fla. 1990); *Corvette Shop & Supplies, Inc. v. Coggins*, 779 So. 2d 529, 531 (Fla. 2d DCA 2000), *review denied*, 794 So. 2d 604 (Fla. 2001); *Stewart Select Cars, Inc. v. Moore*, 619 So. 2d 1037, 1038 (Fla. 4th DCA 1993), *review denied*, 632 So. 2d 1027 (Fla. 1994). But the attorney's fees in this case were not awarded under FDUTPA's prevailing-party attorney's fee provision. Indeed, the decision is in harmony with the rule that a contingency risk multiplier is impermissible under FDUTPA's attorney's fee provision, and there is no express and direct decisional conflict. See A:10-11.

In *Stewart*, the Fourth District reversed an award of attorney's fees enhanced by a multiplier that had been entered under FDUTPA's prevailing-party attorney's fee provision, holding that a multiplier is impermissible. 619 So. 2d at 1037-38. The court explained that the FDUTPA "provides a reasonable attorney fee for the prevailing party 'for the hours actually spent on the case,'" and the trial court is "bound to use only enumerated criteria." *Id.* (citing *Schick*, 599 So. 2d at 643). In *Corvette*, the Second District followed *Stewart* and similarly reversed a FDUTPA attorney's fee award enhanced by a multiplier. 779 So. 2d at 531.

In neither *Quanstrom* nor *Schick* did this Court address directly the question whether a contingency risk multiplier is applicable to a FDUTPA attorney's fee award. This Court recognized in *Quanstrom* that, in the context of a "public policy enforcement" case, such as a FDUTPA action, prevailing party's fees should be computed "as is traditional with attorneys compensated by a fee-paying client." 555 So. 2d at 833-34. To the same effect is *Schick*, in which this Court reaffirmed *Quanstrom*, holding that a multiplier is inapplicable to an attorney's fee award under a statutory fee-shifting provision. *Schick*, 599 So. 2d at 642-43. The Court explained that, "where the legislature has set forth specific criteria for determining reasonable attorney's fees to be awarded pursuant to a fee-authorizing statute, the trial judge is bound to use only the enumerated criteria." *Id.* at 643. Neither *Quanstrom* nor *Schick* considered an agreed-upon attorney's fee.

The Third District's decision adheres to the general principle set forth in *Schick* and *Quanstrom*, and applied to FDUTPA prevailing-party attorney's fee awards in *Stewart* and *Corvette*. (A:10). Indeed, the Third District recognized that

a multiplier is impermissible where a fee is awarded under the FDUTPA, and left that rule of law untouched. (A:10). But the fee awarded here was not determined under FDUTPA's prevailing-party attorney's fee provision. The parties agreed to the amount of the fees *after* settling the FDUTPA class action — without any diminution in the class benefits. These circumstances, as the Third District recognize, render *Stewart* and *Corvette* inapplicable.

There is no direct and express decisional conflict, and no basis upon which to invoke this Court's discretionary jurisdiction.

CONCLUSION

Microsoft respectfully requests the Court to deny discretionary review.

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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