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Finally, defendants' choice of law analysis is both simple-minded and legally incorrect. Under section 187 of the Restatement (Second) of Conflicts of Laws, Alaska law, not South Dakota law, applies to this case.

II. ARGUMENT AND AUTHORITIES

A. *Gibson v. NYE Frontier Ford, Inc.* Controls.

There is no dispute that defendants gave themselves the unilateral power to change their adhesion contract with plaintiff.[7] Nor is there any dispute that defendants exercised this unilateral power by adding the at-issue arbitration agreement to that contract.

Under Alaska law, if one party to a contract of adhesion retains a unilateral right to change the material terms of that contract and does, in fact, change those material terms, those new material terms are unenforceable as a matter of law. There is no other reasonable way to read *Gibson v. NYE Frontier Ford, Inc.*[8]

Defendants read *Gibson* differently and claim that *Gibson* "passed on the question of whether the change in terms provision rendered the arbitration agreement

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[7] Defendants nowhere contest the fact that the at-issue contract is an "adhesion contract," nor could they. *See Burgess Constr. Co. v. State*, 614 P.2d 1380, 1383 (Alaska 1980) ("'Adhesion contract' is a handy shorthand descriptive of standard form printed contracts prepared by one party and submitted to the other on a 'take-it-or-leave-it' basis. The law has recognized there is often no true equality of bargaining power in such contracts and has accommodated that reality in construing them.") (citations and quotation omitted).

[8] 205 P.3d 1091 (Alaska 2009).

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unconscionable as a matter of Alaska law."[9] This suggestion is preposterous; the parties before the *Gibson* Court and the *Gibson* Court itself, accepted as an *a fortiori* principle that a unilateral right to change the material provisions of a contract is unconscionable as a matter of law. As noted in *Gibson,* the defendant did not *even take issue* with the rule of law that the unilateral power to change an arbitration agreement would be unconscionable.[10]

Defendants *sub judice* seems to think that *Gibson* "passed" on this critical question because it did not go into a long discussion of this principle; the Court did not go into a long discussion of this principle because it is an *a fortiori* principle, not because the Court was passing on it.

a. *Gibson* is not at odds with *AT&T Mobility, LLC v. Concepcion.*

Defendants argue that *Gibson* disfavors arbitration and, in light of *Concepcion,* any case that disfavors arbitration is bad law and that this Court should now act as if it

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9 Citi's Reply at p.8, lines 9-10.

10 The *Gibson* Court stated:

> Under Alaska law a contract term may be unconscionable where . . . circumstances indicate a vast disparity of bargaining power coupled with terms unreasonably favorable to the stronger party. We agree with Gibson that the employment contract with Nye was a contract of adhesion and that the disparity of bargaining power requirement is satisfied.
>
> ....
>
> Nye does not take issue with the proposition that the unilateral power to change an arbitration agreement would be unconscionable.

Gibson v. NYE Frontier Ford, Inc., 205 P.3d 1091, 1096 (Alaska 2009).

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is not controlled by *Gibson*.[11] But this Court, as a lower court, cannot do as defendants suggest and effectively ignore *Gibson*. To the contrary, and in accord with the reasoning of the U.S. District Court for the Southern District of New York in *Chen-Oster v. Goldman, Sachs & Co.*,[12] until and unless the Alaska Supreme Court overrules *Gibson*, or until *Gibson* is overruled by the U.S. Supreme Court, this Court is bound by and must follow *Gibson*.[13]

Further, and more fundamentally, defendants' argument misunderstands both *Concepcion* and what this case is about. In *Concepcion*, the plaintiff challenged the anti-class-action clause in his arbitration agreement with AT&T.[14] The U.S. Supreme Court held that his challenge was preempted by the FAA because allowing a party to nullify a provision of an arbitration agreement would frustrate the "principal purpose" of the FAA: "ensur[ing] that private arbitration agreements are enforced according to

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11 Citi's Reply at 5-6.

12 Case No. 10-Civ.-6950(LBS)(JCF), 2011 U.S. Dist. LEXIS 73200, *15-16 (S.D.N.Y. July 7, 2011).

13 *Id.* ("[I]t remains the law of the Second Circuit that an arbitration provision which precludes plaintiffs from enforcing their statutory rights is unenforceable. This case law is clear, and I remain obligated to follow it.") (*citing In re Am. Express Merchants' Litig.*, 634 F.3d 187, 199 (2d Cir. 2011); *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 125 (2d Cir. 2010)). *See also D'Antuono v. Service Road Corp.*, No. 3:11-CV-33, 2011 U.S. Dist. LEXIS 57367, 2011 WL 2175932, at *27, *29 (D. Conn. May 25, 2011) ("Unless and until either the Second Circuit or the United States Supreme Court disavows [their holdings], this Court will continue to follow" them).

14 131 S. Ct. at 1745.

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their terms."[15] Defendants rely on *Concepcion* and vigorously argue that the FAA precludes all "state law impediments to enforcing arbitration *agreements according to their terms*".[16]

If plaintiff were challenging *any of the terms* of Citi's arbitration "agreement," defendants' argument might have some merit.[17] But that is not what this case is about — this case involves plaintiff's challenge to Citi's unilateral change to the parties' *original* contract, not any terms of the arbitration agreement itself. *Concepcion* and the FAA are simply inapposite here because neither the challenged unilateral change clause nor any part of the contract in which it exists is an arbitration agreement.[18] The *Concepcion* court did not hold, nor could it, that the FAA applies to all contracts generally, regardless of whether they are arbitration agreements or not.

Section 2 of the FAA "makes arbitration agreements 'valid, irrevocable, and enforceable' as written (subject, of course, to the saving clause)."[19] The saving clause states that the FAA does not alter any grounds that exist at "law or in equity for the

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15 *Id.* at 1748.

16 Citi Reply at 5 (emphasis added).

17 After all, the *Concepcion* court observed that "[t]he 'principal purpose' of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 131 S. Ct. at 1748.

18 *See* 9 U.S.C. § 2 (applying only to agreements to settle controversies by arbitration).

19 *Concepcion*, 131 S. Ct. at 1748.

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revocation of any contract."[20] Thus, the FAA and *Concepcion* both draw a critical distinction between contract defenses that, on one hand, attack the as-written terms of an arbitration agreement and, on the other hand, apply to all contracts generally.

The U.S. Supreme Court's examples in *Concepcion* illustrate this distinction. Justice Scalia posited that each of the following hypothetical rules would violate the FAA:

- A rule that invalidated arbitration agreements that did not provide for judicially monitored discovery;[21]
- A rule that rule that invalidated arbitration agreements that "fail to abide by the Federal Rules of Evidence;"[22] and
- A rule that rule invalidated arbitration agreements that "disallow an ultimate disposition by a jury."[23]

What do these examples all have in common? Each rule seeks to prevent parties from enforcing the specific terms of their arbitration agreement. Nothing in *Concepcion*, however, suggests that defenses that do not attempt to alter the terms of an arbitration agreement, but instead apply to all contracts generally, are in any way affected by *Concepcion* or the FAA.[24]

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20 9 U.S.C. § 2.

21 *Concepcion*, 131 S. Ct. at 1747.

22 *Id.*

23 *Id.*

24 *See id.* at 1748. (holding that "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

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According to Citi's argument, not only does the FAA protect the terms of arbitration agreements, it eviscerates all laws that stand in the way of enforcement of arbitration agreements.[25] Carrying this argument to its logical conclusion, if Citi had obtained plaintiff's assent to its arbitration agreement by forging her signature, or by holding a gun to her head, this Court would be powerless to stop it because enforcement of an arbitration agreement would be at issue. Fortunately for everyone other than Citi, this is not the rule of law. If a contract defense, such as fraud, unconscionabilty, or duress, does not seek to invalidate any specific terms of an agreed-to arbitration clause, it is unaffected by *Concepcion*.[26] Such "content neutral" laws, including Alaska's unconscionablity rule at issue in *Gibson,* remain valid.

Moreover *Concepcion* does *not* stand for the proposition that *all* arbitration agreements, irrespective of their actual terms, always trump all state law concerns; a court must study the actual terms of the at-issue arbitration agreement to insure that it is not designed to effectively simply deter all claims.[27]

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[25] *See* Citi Reply at 5-6.

[26] *See Rent-A-Center, W., Inc. v. Jackson*, ___U.S.___, 130 S. Ct. 2772, 2776 (2010) ("The FAA thereby places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms. Like other contracts, however, they may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'") (citations and quotations omitted).

[27] *Compare AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (U.S. 2011) ("[T]he arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that

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b. Alaska law applies.

The parties' contract contains a choice-of-law provision that selects South Dakota law as the governing law.[31] The parties disagree about whether this choice-of-law provision is effective and, therefore, whether South Dakota or Alaska law applies here. The parties do agree, however, that the question of whether South Dakota or Alaska law applies must be analyzed under Section 187 of the Restatement (Second) of Conflicts of laws.[32]

Section 187 of the Restatement (Second) of Conflicts of laws states in relevant part that

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied ... unless ...
>
> (b) application of the law of the chosen state *would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue* and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.[33]

The Alaska Supreme Court has interpreted this as meaning that Alaska law governs a dispute, regardless of the parties' choice-of-law provision, if the following three conditions are met: "(1) Alaska's law would apply under Restatement § 188 in the absence of an effective choice of law; (2) Alaska has a materially greater interest in the

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31 *See* Walters Affidavit at Exhibit 1.

32 Citi's Reply at 7.

33 *Long v. Holland Am. Line Westours*, 26 P.3d 430, 432 (Alaska 2001) (*quoting* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)).

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issue; and (3) the application of [the other state's] law would offend a fundamental policy of Alaska."[34] As discussed (in reverse order) below, all three conditions are met here.

1. Application of South Dakota law would offend Alaska's fundamental policy that unilateral change clauses are unconscionable and unenforceable.

In *Gibson*, the Alaska Supreme Court joined numerous jurisdictions across the country in holding that contractual clauses that permit one party to make unilateral changes are unconscionable.[35] In its Reply Brief, Citi argues that the Alaska Supreme Court "passed" on this issue in *Gibson* and merely held that the at-issue provision was not subject to the unilateral change clause. As noted above, this self-serving interpretation of *Gibson* is wrong and misses the entire point of the case.

The *Gibson* plaintiff, on one hand, argued that the arbitration provision to a contract was invalid because it was subject to an unconscionable unilateral change clause.[36] The defendant, on the other hand, argued that the unilateral change clause did not cover the arbitration provision, and therefore had no impact on the validity of the arbitration provision itself.[37] The Alaska Supreme Court found both arguments to be reasonable and held that the contract was ambiguous.[38] The Supreme Court ultimately

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34 *Id.*

35 205 P.3d 1091, 1097 (Alaska 2009).

36 *Id.* at 1096.

37 *Id.* at 1096-97.

38 *Id.* at 1097.

concluded that "the arbitration agreement is best seen as not subject to the unilateral change clause" because, *inter alia*, interpreting the unilateral change clause as covering the arbitration agreement would make that part of the contract "unlawful or of no effect."[39] In other words, the Alaska Supreme Court interpreted the parties' contract in a way that avoided application of the unilateral change clause because such clauses are inherently unconscionable and unenforceable under Alaska law.

Citi urges this Court to apply South Dakota law, which permits unilateral change clauses. But this would offend a fundamental policy of Alaska: namely, unilateral change clauses are unconscionable in Alaska. According to the commentary to Restatement § 187, state unconscionability rules such as this are "fundamental policies" because they are rules "designed to protect a person against the oppressive use of superior bargaining power."[40] Case law around the country is in accord.[41]

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[39] *Id.*

[40] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g ("[A] fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power.").

[41] *See, e.g., Omstead v. Dell, Inc.*, 594 F.3d 1081, 1086 (9th Cir. 2010); *Oestreicher v. Alienware Corp.*, 322 Fed. Appx. 489, 491-92 (9th Cir. 2009); *New Eng. Surfaces v. E.I. du Pont de Nemours & Co.*, 546 F.3d 1, 10 (1st Cir. 2008); *Hoffman v. Citibank, N.A.*, 546 F.3d 1078, 1083 (9th Cir. 2008) ("[I]f Citibank's class arbitration waiver is unconscionable under California law, enforcement of the waiver under South Dakota law would be contrary to a fundamental policy of California."); *Stone St. Servs. v. Daniels*, Case No. 00-1904, 2000 U.S. Dist. LEXIS 18904 (E.D. Pa. Dec. 29, 2000) ("The 'diminished capacity' unconscionability provision in the Kansas statute states a fundamental policy of the state of Kansas, particularly in light of the explicit non-waiver provision contained in the law.").

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2. Alaska has a materially greater interest than South Dakota in protecting Alaska consumers from unconscionable contracts.

Citi baldly asserts that the state of South Dakota has a compelling interest in "protecting consumers in all 50 states."[42] It is unclear why Citi believes that South Dakota any sort of obligation to Alaska consumers (Citi's odd position finds no support in the unpublished case Citi cites for this proposition). On-point case law from the Alaska Supreme Court shows that Citi is wrong.[43]

While Citi may be correct that South Dakota has an interest in protecting its corporate residents' contract rights, the Alaska Supreme Court has already determined that such interests, while "not insubstantial," are "decidedly weaker" than Alaska's interests in protecting its own citizens.[44] Numerous other courts are in accord.[45]

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[42] Citi's Reply at 9.

[43] *See Long*, 26 P.3d at 434 (*citing Industrial Indem. Ins. Co. v. U.S.*, 757 F.2d 982, 987 (9th Cir. 1985)).

[44] *Id.*

[45] *See Omstead*, 594 F.3d at 1086 ("California has a materially greater interest than Texas in applying its own law. Accordingly, the validity of the arbitration provision is governed by California law."); *Oestreicher*, 322 Fed. Appx. at 491-492 ("California has a materially greater interest than Florida in determining the enforceability of the class action waiver. Oestreicher seeks to represent a class composed solely of California residents and invokes solely California consumer protection laws. Florida's interest, by contrast, while not inconsequential, is limited to enforcement of contractual provisions made by one of its corporate citizens.") (citations omitted); *Davis v. Chase Bank USA, N.A.*, 299 Fed. Appx. 662, 663 (9th Cir. 2008) ("California has a materially greater interest than Delaware in determining the enforceability of the class action waiver provision given that the relevant transactions took place in California, California residents compose the class, the claims arose under

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In this case, all of the putative class members are Alaskans. Their claims arise under Alaska law. And Alaska has a fundamental interest in protecting its citizens from unconscionable unilateral change clauses. Alaska has a materially greater interest in these issues than does South Dakota.

3. In the absence of an effective choice of law, Alaska law would apply under Restatement § 188.

Under Restatement § 188, this Court must consider Alaska's and South Dakota's respective policies, giving special consideration to the following five contacts: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties."[46] Of these five contacts, the Alaska Supreme Court has made it clear that the place of performance is the most important.[47] "The place of performance has 'so close a relationship to the transaction and the parties that it will often be the state of the

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California state law, and California has an interest in protecting its citizens from unconscionable class action waivers.") (citations omitted).

[46] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971); *Long*, 26 P.3d at 433.

[47] *See Long*, 26 P.3d at 433 (holding that (a) the place of contracting "has little impact on the events at hand"; (b) the place of negotiation "has little impact" where the negotiations were conducted "from separate states by mail and telephone"; and (e) the parties' domicile, residence, place of incorporation, or place of business, "deserves less consideration than the place of contract performance.").

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applicable laws.'"[48] In this case, the place of performance is Alaska.[49] Therefore Alaska law would apply under Restatement § 188 in the absence of an effective choice of law.

B. Defendants' Arbitration Agreement Is Unenforceable Because It Precludes Plaintiff from Exercising Her Statutory Rights Under the UTPA.

Alaska law is clear: a contractual provision that precludes a citizen from enforcing her statutory rights is unenforceable.[50] This case involves plaintiff trying to enforce her statutory rights. To wit, plaintiff, in accord with the express statutory provisions of the UTPA, seeks an injunction under the UTPA whereby defendants will be ordered to cease and desist from their illegal conduct; and will be ordered to file corrected judgments vis-à-vis the hundreds of other injured Alaska consumers; and will be required to disgorge to these consumers any and all illegal attorney's fees.[51] Plaintiff is acting as a private attorney general pursuant to statutory right.[52]

The problem is that defendants' arbitration agreement explicitly prohibits plaintiff from exercising her statutory right to act as a private attorney general. Defendants' arbitration provision states that her claim "must proceed on an individual

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48 *Id.* (*quoting* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. e. (1971)).

49 Needless to say, the defendants' wrongful conduct that is the basis of this lawsuit took place in or before Kenai District Court.

50 *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1100 (Alaska 2009).

51 *See* First Amended Complaint ¶23.

52 *See* Plaintiff's Opening Brief at pages 5 - 7.

(non-class, non-representative) basis."[53] Obviously, the statutory right to act as a private attorney general means, by definition, the right to act in a representative capacity, i.e., to seek and relief obtain relief on behalf of all members of the public.[54]

Defendants now try to tell this Court that their arbitration agreement does not really prohibit plaintiff from exercising her statutory rights[55] and that, even if it does, any contrary rule would run afoul of *Concepcion*.[56]

Both claims are wrong. First, all this Court needs to do is to read the plain language of defendants' arbitration agreement to conclude that defendants' statement that "the arbitration agreement does not limit the types of claims or remedies plaintiff may pursue in arbitration"[57] is simply false. For starters, the arbitration agreement provides that plaintiff's claim "must proceed on an individual (non-class, non-representative) basis."[58] It goes on to say that "the arbitrator will not award relief for ... anyone who is not a party."[59] Finally, defendants' arbitration agreement provides explicitly states that a consumer "cannot pursue the Claim in arbitration ... as a private

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53 *See* Citi's Reply at p.5, lines 7-9.

54 *See* Plaintiff's Opening Brief at pp. 5-7.

55 *See, e.g.*, Citi Reply Br. at 12.

56 *See, e.g.*, Citi Reply Br. at 13 - 14.

57 *See, e.g.*, Citi Reply Br. at 12, lines 11- 12.

58 *See* Citi Opening Br. at 5, lines 17 - 20

59 *Id.*

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attorney general action."[60] It is hard to imagine any clearer language limiting the types of claims or remedies that the plaintiff may pursue in arbitration.

Second, nothing in *Concepcion* holds that arbitration can be forced on a consumer even if it means she will lose her statutory rights. Indeed, the better reasoned cases that have considered this issue post-*Concepcion* issue have sided with plaintiff. *In re Directv Early Cancellation Fee Mktg. & Sales Practices Litig.*,[61] is emblematic. There, the U.S. District Court carefully analyzed *Concepcion* and explained why it did not control on this question:

> [A]rbitration is not the proper forum for vindicating a broad public right. [T]he purpose of arbitration is to voluntarily resolve private disputes in an expeditious and efficient manner. [There are] evident institutional shortcomings of private arbitration in the field of [] public injunctions. For example, a superior court retains jurisdiction over a public injunction, but arbitrators are not bound by earlier decisions of arbitrators in the same case, and this could cause inconsistency. And arbitration awards don't automatically have effect on non-parties, so even a public injunction could be enforceable only by the parties to the original case. If another consumer plaintiff sought to enforce an injunction, he or she would need to re-arbitrate the same claim. Further, judges are accountable to the public in ways that arbitrators are not, so …judges are more suitable for overseeing injunctive remedies designed for public protection.[62]

Defendants claim that *In re Directv* is an "outlier," but fail to provide any cogent analysis of why that case was incorrectly decided. In fact, *In re Directv* is not an

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60 *Id.*

61 No. ML-09-2093 AG (ANx), 2011 U.S. Dist. LEXIS 102027, *37-39 (C.D. Cal. Sept. 6, 2011).

62 *Id.* at 38-39.

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"outlier" but the first of many cases to harmonize *Concepcion's* goal of protecting the right to arbitrate with the holding in *Rent-A-Center, W., Inc. v. Jackson*,[63] that arbitration contracts are subject to the same claims and defenses as any other contract.[64]

The latest case to analyze this precise issue came down squarely on the side of plaintiff. In *Ferguson v. Corinthian Colleges*, 2011 U.S. Dist. LEXIS 119261, 26-29 (C.D. Cal. Oct. 6, 2011), a plaintiff brought a private attorney general action against online for-profit schools. Plaintiff claimed that these schools were engaged in systemic fraud and sought a statewide injunction against defendants. Defendants moved to arbitrate plaintiff's claim. Plaintiff resisted arguing that his private attorney general claim could not be arbitrated. The defendants countered, as do defendants here, that *Concepcion* controlled the issue. The district court considered and rejected this ham-fisted analysis:

> The Court cannot jump to the conclusion that public injunctive relief claims under state law must go to arbitration due to the preemptive effects of the FAA. As an initial matter, it is not clear that Congress intended the FAA to sweep public injunction arbitration within its purview. Accordingly, declining to compel arbitration of these claims does not suggest a conflict with the FAA. Instead, the Court finds the better approach to be applying the test from *Mitsubishi Motors*. 473 U.S. at 628. Having found that the relevant agreements encompass Plaintiffs' statutory injunctive relief claims, the Court next asks "whether legal constraints external to the parties' agreement[s]

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63 ___U.S.___, 130 S. Ct. 2772, 2776 (2010).

64 *See, e.g., Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 298-99 (Fla. App. 2005) (*en banc*) ("[A] contractual provision that defeats the remedial and deterrent provisions of a statute is contrary to public policy and is unenforceable.").

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> foreclose[] the arbitration of those claims." *Id.* Because Plaintiffs' injunctive relief claims seek to enforce a public right, there is an inherent conflict with sending these claims to an arbitrator.
>
> ....
>
> Legal constraints such as the inability of arbitrators to enter an injunction affecting non-parties, as well as the inability to oversee injunctive remedies designed to protect the public as a whole create an inherent conflict and make arbitration unsuitable in this case.
>
> In conclusion, because the statutory purpose of the injunctive relief provisions of the UCL, FAL, and CLRA and the public interest concerns in this case cannot likely be met through arbitration, because there is no apparent conflict with the FAA, and because *Concepcion* does not take a position on the arbitrability of public injunction actions, the Court denies the motion as to the injunctive relief component of these three claims.[65]

C. Defendants Waived Their Right to Arbitrate.

When defendants filed their lawsuit against plaintiff in the Kenai district court, they decided that plaintiff had breached her agreements under the card member agreement and they decided that they wanted to adjudicate that alleged breach in court, not in arbitration. They litigated that case in the Kenai District Court to a final judgment. And then they began using, and are still using, the Alaska court system to collect money from plaintiff on that judgment.[66]

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[65] *Id.* at 26-29. *See also Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 503 (Cal. App. July 12, 2011) (noting that *Concepcion* did not address California's Private Attorney General Act of 2004, and continuing to follow California law).

[66] Defendants tell this Court that their Kenai district court case is "closed." *See* Citi Reply at n. 8. But CourtView shows that, in fact, defendants used the Alaska court system as recently as November 13, 2011 to seize plaintiff's PFD so as to satisfy the judgment that they obtained against her in their Kenai district court case. *See* Docket to *Citibank (South Dakota) NA v. Hudson*, 3KN-10-01139CI (AK Dist. Ct. 2010).

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When plaintiff sued defendants in Anchorage Superior Court claiming that defendants had violated her rights in how they prosecuted the Kenai District Court case, defendants did an about-face; they now claim that any and all disputes between themselves and the plaintiff must be arbitrated, not litigated.

While waiver is not to be found lightly, there is nothing "light" about how defendants conducted themselves; they used (and are using) the full force of the judicial system against plaintiff. It is impossible to see defendants' litigation-to-judgment actions as being anything but "direct, unequivocal conduct that indicated its purpose to abandon [their] right to demand arbitration."[67]

Defendants now argue that no waiver has occurred because plaintiff has suffered no prejudice and, even if she has, the arbitrator should decide whether there has been a waiver. Both of defendants' arguments are wrong.

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[67] *Powers v. United Servs. Auto. Ass'n*, 6 P.3d 294, 299 (Alaska 2000); *see also*, *Otis Hous. Ass'n v. Ha*, 201 P.3d 309, 312 (Wash. 2009) ("Simply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate."); *Nicholas v. KBR, Inc.*, 565 F.3d 904, 908 (5th Cir. 2009); *Cabinetree of Wisconsin v. Kraftmaid Cabinetry*, 50 F.3d 388, 390-91 (7th Cir. 1995); *Worldsource Coil Coating v. McGraw Constr. Co.*, 946 F.2d 473, 476-77 (6th Cir. 1991) (A "party waives its right to compel arbitration where its action in enforcing its claim is so inconsistent with arbitration as to indicate an abandonment of that right. . . . It is not what you say you are doing, it is what you actually do that controls."); *Med. Imaging Network, Inc. v. Med. Resources*, 2005 Ohio 2783, P30 (Ohio App. 2005) ("A plaintiff's filing of a lawsuit constitutes waiver if the plaintiff knew of the right to arbitrate.").

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First, the law is clear: "Prejudice is presumed ... where the party seeking arbitration has filed a lawsuit and prosecuted it to a final judgment."[68]

Second, it is simply false to assert that plaintiff has not suffered any prejudice from defendants having it both ways: using the legal process when it wanted to and now demanding that plaintiff use the arbitration process. The plaintiff now has a judgment entered against her as a result of defendants' litigation conduct. That judicial judgment contains an award of substantial attorney fees in accord with Alaska's "loser pays" rule. Defendants' arbitration agreement provides that no attorney's fees can be awarded unless the "applicable law" so allows.[69] Defendants claim South Dakota law applies. South Dakota does not have a "loser pays" rule. This means that plaintiff has been prejudiced by defendants' use of the legal process against her versus use of the arbitral forum because plaintiff now has a legal judgment against her which contains an award of substantial attorney fees in accord with Alaska's "loser pays" rule, but she would not have had a judgment including fees entered against her if defendants had pursued arbitration against her in the first instance.

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[68] *Schonfeldt v Blue Cross of California*, No. B142085, 2002 Cal. App. Unpub. LEXIS 5223, *13 (Cal. App. Jan. 2, 2002) (*citing* Groom v. Health Net, 82 Cal.App.4th 1189, 1195 ("*Short of a final court judgment*, the party opposing arbitration must demonstrate prejudice.") (emphasis added)).

[69] *See* Walters Affidavit at Exhibit 2, p.2, column 3 ("Each party will bear the expenses of that party's attorneys, experts and witness and other experts, regardless of which party prevails but a party may recover any and all expenses from another party if the arbitrator applying applicable law so determines.").

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Third, defendants are wrong when they tell this Court that the arbitrator should decide whether a waiver has occurred; the vast majority of jurisdictions that have considered this issue have held that courts, not arbitrators, decide whether there has been a waiver through litigation.[70]

Finally, a consideration of the actual language in defendants' arbitration agreement shows that a waiver has, in fact, occurred here. Defendants' arbitration agreement provides: "At any time you or we may ask an appropriate court to compel arbitration of Claims, or to stay the litigation of Claims pending arbitration, even if such Claims are part of a lawsuit, *unless a trial has begun or a final judgment has been entered.*"[71] What this contractual language means is that where one party has already used the judicial process and started trial or obtained a final judgment, the right to compel arbitration has been waived. Defendants have already obtained a judgment

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[70] *See Banc of Am. Secs. LLC v. Independence Tube Corp.*, No. 09 C 7381, 2010 U.S. Dist. LEXIS 43278, *18-19 (N.D. Ill. May 4, 2010) ("[T]he Court joins the vast majority of other courts that have addressed this issue and concludes that courts — not arbitrators — should resolve waiver-through-litigation-conduct issues.") (citations omitted). *See also Zimmer v. Cooperneff Advisors, Inc.*, 523 F.3d 224, 231 (3d Cir. 2008); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed. Appx. 462, 464 (5th Cir. 2004); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393-94 (6th Cir. 2008); *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 551-52 (Ky. 2008); *Good Samaritan Coffee Co. v. LaRue Distrib.*, 275 Neb. 674, 681 (Neb. 2008); *Vega v. Contract Cleaning Maint.*, No. 03 C 9130, 2006 U.S. Dist. LEXIS 35284, 2006 WL 1554383, at *5 (N.D. Ill. June 1, 2006); *Carbajal v. Household Bank, FSB*, No. 00 C 0626, 2003 U.S. Dist. LEXIS 16458, 2003 WL 22159473, at *8 (N.D. Ill. Sept. 18, 2003); *Blanco v. Sterling Jewelers Inc.*, No. 09-cv-01330-CMA-KLM, 2010 U.S. Dist. LEXIS 19782, 2010 WL 466760, at *4 (D. Colo. Feb. 9, 2010); *Apple & Eve, LLC v. Yantai N. Andre Juice Co. Ltd.*, 610 F. Supp. 2d 226, 231 (E.D.N.Y. 2009); *Parler v. KFC Corp.*, 529 F. Supp. 2d 1009, 1014 (D. Minn. 2008).

[71] *See* Walters Affidavit at Exhibit 2 at p.2, column 2 (emphasis added).

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against plaintiff. Thus, in accord with the language of their own adhesion contract, defendants have waived their right to compel arbitration.[72]

D. Defendants Ignore the Fact that the Parties Never Agreed to Arbitrate This Dispute and the Fact That Nothing in the Card Member Agreement Allows Citi to Add An Arbitration Provision.

Defendants' effectively concede that plaintiff never executed any contract with Citi agreeing to arbitrate any disputes with it and that no consideration ever changed hands via-à-vis Citi's two "bill stuffers." This means there was no contract between the parties for arbitration.[73]

The defendants ignore all of the overwhelming cases cited by plaintiff in her opening brief and claim that South Dakota law controls this issue and that South Dakota law allows a contract to be formed by way of a bill stuffer. But, as noted above, South Dakota law does *not* control. And, because plaintiff never executed any

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[72] ALO makes other spurious arguments on waiver. For example, ALO claims that it could not have filed an arbitration action against plaintiff concerning the alleged credit card balance. ALO Br. at 7. No logic or legal analysis is provided for this conclusion.

[73] *See Classified Emples. Ass'n v. Matanuska-Susitna Borough Sch. Dist.*, 204 P.3d 347, 353 (Alaska 2009); *Helenese v. Oracle Corp.*, No. 3:09-cv-351 (CFD), 2010 U.S. Dist. LEXIS 15071 at *8-19 (D. Conn. Feb. 19, 2010) ("Furthermore, the purported agreement to arbitrate lacks consideration. . . . Consideration requires 'a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.' . . . Since the defendants in this case did not make a specific promise to continue employing Helenese in exchange for agreeing to the arbitration provision, or provide another benefit or suffer a detriment, the policy lacks consideration.") (citations omitted).

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contract with Citi agreeing to arbitrate any disputes with it, she has no duty to arbitrate now.[74]

That is not the only issue that defendants try to ignore. While the Card Agreement did have a "Changing this Agreement" section, courts from around the country have interpreted similar provisions as *not* allowing for the wholesale addition of an arbitration clause.[75]

E. In Any Event, ALO Is Not Covered by the Arbitration Provision.

ALO is and was not a party to any contracts between Citi and plaintiff. The record before this Court shows that ALO is simply an independent debt collector, with a bar license, retained to collect debts for Citi.[76] Under such circumstances, ALO cannot avail itself of the contract between Citi and plaintiff.

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[74] *See id.*

[75] *Union Planters Bank, Nat'l Ass'n v. Rogers*, 912 So. 2d 116 (Miss. 2005); *Long v. Fidelity Water Sys.*, No. C-97-20118 RMW, 2000 U.S. Dist. LEXIS 7827, *9 (N.D. Cal. May 24, 2000); *Myers v. MBNA Am. & N. Am. Capitol Corp.*, No. CV 00-163-M-DWM, 2001 U.S. Dist. LEXIS 11900, *13-15 (D. Mont. Mar. 28, 2001); *Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207, 217-18 (N.C. App. 2004); *Badie v. Bank of America*, 67 Cal. App. 4th 779, 803 (Cal. App. 1998); *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 198 (E.D.N.Y. 2004); *Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693, 700-01 (Mont. 2009); *Robertson v. J.C. Penney Co.*, 484 F. Supp. 2d 561, 566-68 (S.D. Miss. 2007).

[76] *Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1025 (Alaska 2009) ("The United States Supreme Court held in *Heintz v. Jenkins* that the federal counterpart to the UTPA applies to attorneys who "regularly" engage in consumer-debt-collection activity, even when that activity consists of litigation.' We are likewise unpersuaded that a debt-collecting attorney should receive a special exemption from UTPA coverage.").

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Mundi v. Union Sec. Life Ins. Co.[77] stands for the unremarkable proposition that a non-signatory to an arbitration agreement *cannot* avail itself of the arbitration provision's protections where, as here, the complained-of conduct is neither "intertwined with the contract providing for arbitration" nor does it "arise out of" or "relate directly to" that contract.[78]

ALO argues that *Mundi* and the many other cases like it are all off-point and/or outliers. ALO is simply wrong. *Mundi* is in accord with cases from around the country and its logic is compelling.

Mundi's analysis was elaborated on in *Brantley v. Republic Mortgage Insurance Co.*[79] There, the plaintiffs entered into an arbitration agreement with their mortgage lender, but their mortgage insurance contract, which was a separate transaction from the mortgage, did not contain an arbitration agreement. The Fourth Circuit affirmed the denial of the non-signatory defendant's motion to compel the plaintiffs to arbitrate their claims against the defendant. The Fourth Circuit held that equitable estoppel did not apply to compel the plaintiffs to arbitrate their Fair Credit Reporting Act claim against the mortgage insurance company because the claim did not arise out of or relate to the contract that contained the arbitration agreement. Rather, the plaintiffs' claim was "wholly separate from any action or remedy for

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77 555 F.3d 1042 (9th Cir. 2009).

78 *Id.* at 1047. *See also* Plaintiff's Opening Brief at 15-16.

79 424 F.3d 392 (4th Cir. 2005).

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breach of the underlying mortgage contract that is governed by the arbitration agreement." *Id.* The court further reasoned that there were no allegations of collusion or misconduct by the mortgage lender to require equitable estoppel, and that the defendant was not a third party beneficiary of the arbitration agreement because the contract did not mention the defendant or the mortgage insurance transaction.[80]

The same is true here: plaintiff's claim against ALO is wholly separate from the Card Agreement and has nothing to do with any of plaintiff's, or Citi's, rights or duties thereunder.

In fact, the conclusion that ALO is not covered by the contract between Citi and plaintiff is clearer when considering fact that Janet Hudson, the signatory to the Citi Card Agreement, filed this lawsuit against ALO, and not vice versa. This signatory-sued-first factor is critical. As the U.S. District Court in *Kingsley Capital Mgmt., LLC v. Sly*, explained:

> As to such signatory-sues-first cases, the Ninth Circuit noted that its precedent had never before permitted a non-signatory to compel arbitration, and in light of the general principle that only those who have agreed to arbitrate are obliged to do so, we see no basis for extending the concept of equitable estoppel of third parties in an

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[80] *Id.* at 396-97. *See also Just Film, Inc. v. Merch. Servs.*, No. C 10-1993 CW, 2011 U.S. Dist. LEXIS 96613, *23 (N.D. Cal. Aug. 29, 2011) (rejecting claims by non-signatories that they had a right to demand arbitration and stating that "none of this establishes that Universal Card, National Payment Processing or Moore have 'some sort of corporate relationship to a signatory party.' ").

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> arbitration context beyond the very narrow confines delineated in [certain previous cases].[81]

There is a final, dispositive reason why ALO's efforts to seek shelter under Citi's arbitration clause must fail. ALO claims that it is entitled to the protection of Citi's arbitration agreement because it is an "employee, agent or representative" of Citi.[82] Actually, ALO appears to be nothing other than a simple debt collector acting as an independent debt collector to collect Citi debts. Certainly, *if* ALO were, in fact, an "employee, agent or representative" of Citi, ALO would have provided to this Court the actual agreement between it and Citi. This Court could have seen for itself, had ALO given this Court that document, whether Citi designated ALO as an "employee, agent or representative." ALO elected not to produce this document to this Court no doubt because the actual agreement between it and Citi says nothing of the sort. This Court should not indulge ALO and presume that it has the legal status as an "employee, agent or representative" when ALO has elected to withhold from this

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[81] No. CV10-02243-PHX-NVW, 2011 U.S. Dist. LEXIS 120555, *22-23 (D. Ariz. Sept. 30, 2011).

[82] ALO Reply at 3.

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Court the actual evidence concerning this precise issue.[83] This is, after all, ALO's burden.[84]

ALO can find only one case in the country supporting the proposition that a debt collector is covered by an arbitration provision in a credit card agreement: *Hodson v. Javith, Block & Rathbone, LLP*.[85] But that decision is off-point for two reasons. First, as the court noted, the arbitration agreement at issue in *Hodson* *expressly covered* all collection matters.[86] The arbitration agreement *sub judice* does not contain this critical language.

Second, the *Hodson* court's analysis was cursory and failed to take into account, much less discuss, the signatory-sues-first distinction and/or whether the debt collecting at issue "was intertwined with the contract providing for arbitration."[87] *Hodson* is simply unpersuasive.

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[83] In response to plaintiff's argument that ALO is simply an independent debt collector collecting debts and sharing the proceeds with Citi, ALO filed an affidavit of its owner, Clayton Walker. Clayton Walker's affidavit is notably silent on the issue of whether ALO is employee, agent or representative of Citi. If ALO is, in fact, simply an independent debt collector collecting debts and sharing the proceeds with Citi, ALO is not employee, agent or representative of Citi.

[84] *Cf., Helenese v. Oracle Corp.*, No. 3:09-cv-351 (CFD), 2010 U.S. Dist. LEXIS 15071, *8 (D. Conn. Feb. 19, 2010) (*quoting Tellium, Inc. v. Corning Inc.*, 2004 U.S. Dist. LEXIS 2289, 2004 WL 307238 at *5 (S.D.N.Y. Feb. 13, 2004)).

[85] 531 F.Supp 2d 827 (N.D. Ohio 2008).

[86] *Id.* at 831 ("[T]he arbitration clause ... expressly includes 'billing and collections matters'").

[87] *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 361 (2d Cir. 2008).

III. CONCLUSION

For the foregoing reasons, plaintiff requests that this Court grant her cross-motion for partial summary judgment.

DATED: 11/21/11

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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing was served via U.S. Mail on:

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Signature Date 11/21/11

APPENDIX A

ALASKA STATE LEGISLATURE

HOUSE JUDICIARY COMMITTEE MEETING (EXCERPT)

FEBRUARY 9, 1998

(RE HB 203)

MIDNIGHT SUN COURT REPORTERS
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CHAIR: House Resource -- House Judiciary Committee -- I apologize.

REPRESENTATIVE: Whichever one.

CHAIR: Whatever for the 9th of February at 1:08. Present are Representatives Bundy, Green, Porter and Croft. We do have a quorum and the first bill on the agenda -- and we are on teleconference. So far we have one off net and one on teleconference and the sponsor of Bill 203 is here. Representative Dyson? Would you identify yourself for the record, sir?

REP. DYSON: Representative Dyson, District 25. What you have before you today is House Bill 203. It was introduced last year and got through labor and commerce and I -- we are dealing with the committee substitute in a -- in the upper right-hand corner, it's O-LSO553/P. Is that what you have?

CHAIR: That's what we have.

REP. DYSON: And it was modified there, I might add. If you like, I can read the sponsor's statement. I believe all you can read is -- probably better than I can or -- and.....

CHAIR: Might kind of give us just the highlights of it, sir.

REP. DYSON: All right. We -- since it's -- at least for the last hundred years, Alaska has had more than its fair share of bunko artists who have come here to rip off our intelligent and sometimes naive citizens of their wealth and

we -- the state, in its wisdom, evolved a fairly elaborate process for treating consumer fraud. In the last eight or nine years, the attorney general's depart -- part of the attorney general's office that dealt with consumer fraud has largely been defunded and I think it's gone down from eight to what, 1-1/2 or so people that deal with this now and one of whom, by the way, hopefully, on line, Daveed Schwartz. Are you on, Daveed?

MS. COSTER: Daveed Schwartz isn't on line. My name is Julia Coster and I also do consumer protection.

REP. DYSON: All right. Well, we will, hopefully, be taking advantage of your perspective here. So what we have done with this bill is to kind of privatize the -- and empower public citizens or citizens to perform many of the functions that were -- that have been heretofore reserved only to the attorney general's office and, specifically, we are trying to eliminate two problems. In the past, only the attorney general's office could get injunctive relief; that is, stop a fraudulent practice that was going forward and this gives -- this bill gives a citizen a chance to go after whoever the bunko artists are and get court to stop them. The bill mandates that before they do that, the person has to write to whoever is allegedly doing the fraudulent behavior asking them to cease and desist and the -- whoever it is has to keep on doing it wilfully -- and it's carefully spelled out here,

wilfully -- and then the -- a private citizen can go into court and appeal for a stop and desist, an injunction to stop the activity.

Without this bill, you -- a citizen can't go after getting the activity to stop until after they've been harmed. You had to have been hurt, you had to have fallen for the scheme, not just recognized it, before you could ask for it to stop. Secondly, if it was a fraud that was going against a neighbor or a disabled -- or a incapacitated person, you couldn't enter -- go to court and ask on their behalf that it be stopped. The existing law says only if you have already been harmed could you go and ask for injunctive relief. So we see this as an opportunity at least to before the harm spreads, go after it. I got particularly interested in this when my mother died and after a brief illness and I found all kinds of really screwy health insurance and burial policies and everything scattered through her drawers, drawers in -- and.....

REPRESENTATIVE: Yes, sir.

REPRESENTATIVE: Dresser.

REP. DYSON: Yes, in a dresser and just realized that in her anxiety about her deteriorating health and financial resources, she was trying to protect the rest of us by buying all these -- and most of them were things, you know, where you pay $1.39 a week and sign up. So -- and I think you will hear

from some senior citizens who feel that, as a segment of our society, they are disproportionally targeted and much of the stuff that we are suffering from this date is telemarketing organizations based outside. At least that's my understanding but the young woman on the teleconference can tell us.

The second thing that this does is we've had a situation where it's been difficult for the victim of a small fraud to be worthwhile to go and get relief. You can go into small claims court and deal -- you know, whether the limit is $200 or something and play that game but if it was more than $200 and you needed help, there was no way for you to recover your attorney fees if you decided you needed help. So this allows you to re -- if you prevail in your action against a fraudulent enterprise, you can get your costs of going after them back. So we've had this deal with small fraudulent activity where it's not worth going after them and, you know, if it's only a few hundred dollars or a couple thousand dollars, most attorneys aren't going to take it. There's nothing in it for them so this cures that.

It also allows for treble damages if you prevail to be a part of the penalty to help convince the bad guys to quit doing this. It does not -- hopefully, I'm -- will not facilitate frivolous lawsuits and if you lose, file a lawsuit and lose, you pay not only your costs but court costs and attorneys' fees. It -- labor and commerce, Representative

Rokeberg, very rightly, I think, worried about people using this as a means of going after a competitor in business and tying him up with injunctions and actions and so on and it provides for -- or minimizes, I think, the possibilities that happen.

I think -- interestingly enough, it's been pointed out to me that this piece of legislation follows a practice that was learned during the civil rights era when most folks realized that state attorney general's offices didn't have the resources and some of them not the inclination for filing the necessary civil rights actions to end discrimination in our country. So they allowed for if you were successful in an action, that you could recover your attorneys' fees and, therefore, the cost of bringing the action. So I think that's all I have to say on this and you'll quickly find out if you ask me questions that, technically, I will exhaust my expertise and, hopefully, rely on the young woman -- or the woman from the attorney general's office.

CHAIR: Thank you. Are there any questions of Representative Dyson? Representative Bundy?

REP. BUNDY: Well, I would observe -- thank you, Mr. Chairman -- that compared to Representative Dyson, I'm sure most women are young women but.....

CHAIR: O-oh, a hostile group here.

REP. BUNDY: I had heard recently from AARP a concern

about telemarketing and telephone soliciting fraud and one of their suggestions was that it would require a company that was going to be involved in telephone soliciting particularly but maybe telemarketing in general in the State of Alaska to post a bond to be -- address fraudulent claims. Would that fall under the purview of your bill? Is this something that would have -- that could be addressed in this bill or you would have a -- an interest in in looking at that?

REP. DYSON: Well, I'm certainly interested in anything that's going to help. It's not something we specifically addressed and I'm not sure if the bill is broad enough. I think the bill is probably broad enough that it could be amended in and I'd have -- want to think about it.

REP. BUNDY: Mr. Chairman, I'll talk with Representative Dyson later but that's something that I wanted to put on the agenda.

CHAIR: Representative Dyson, would you explain for me, you mentioned the small claims court and it's my understanding that it used to be 2,000 and it's now 5,000? 5,000. Where this would come in -- obviously, you're talking about attorneys' compensation but it's my understanding that if somebody feels that they've been done wrong by these hundreds of dollars or up to $5,000, they wouldn't even require an attorney, they'd just go in and present the facts to small claims court. How does this, in your estimation, make it

better for somebody who's been defrauded?

REP. DYSON: Well, I will have to defer to some others on this but the problem has been with the small guy going after Goliath that the large firms who have lots of attorneys on a retainer are prepared to be able to fight them and get the delays and -- you know, and keep it out of court for extended periods of time, draining the consumer's resources and time just to delay any action on it past the time when the fraud has run its course or has ceased to be a valuable marketing tool.

REPRESENTATIVE: So a transaction for a $2,000 car or something could quickly go beyond 5,000 just in eating up time and motions and that sort of thing?

REP. DYSON: Sure, but -- yes, but maybe the person from the attorney general's office would care to comment.

MS. COSTER: Sure.

CHAIR: Would you identify yourself for the record, please?

MS. COSTER: This is Julia Coster and I'm with the attorney general's office and, actually, I think that one way that this bill addresses a particular area that's not currently addressed and Representative Dyson has brought it up, in Section 3 of the bill, it's the private injunctive relief. Right now, a private person cannot go to court, small claims court or otherwise, and enforce a law by getting a

court order prohibiting the business or the person from engaging in the conduct that they're engaging in and that's what Section 3 does. They would go in and get a court order and if the person then violated that injunction, then there would be an opportunity to do some follow-up enforcement. So that is something that currently does not exist that this bill provides for.

CHAIR: Okay. Even though you could go against another person in small claims court, you can't go to enforce a -- what did I miss there?

REP. DYSON: No injunction.

MS. COSTER: Sure, you can -- currently, there's a private right of action to recover damages. In other words, if a person has some sort of a scheme, they've been defrauded and the person has paid $200 for say advertising that was never provided and they can go to small claims court and have that money refunded to them under what is currently in law as AS 45.50.531 but this Section 3 of the bill provides a private injunctive relief and a person or a group.....

CHAIR: Okay.

MS. COSTER: .....would be able to go to court and get a court order requiring the person, the business that is committing the fraud, to no longer engage in that conduct. That's something currently that only the attorney general's office has the power to do.

CHAIR: I see. Thank you very much, Julia. Representative James?

REP. JAMES: Yeah, thank you, Mr. Chairman. I just have a question. We talk about the small claims court, what you can do there, but that injunctive relief wouldn't come from there, would it? It would come from the regular court. And the other question that I have about the small claims court, it seems to me like if you have a cut and -- the small claims courts are for cut and dried sort of things. If there's any dispute, you can't get that settled in the small claims court, is that correct?

MS. COSTER: There's a jurisdictional limit of a certain amount of money and I'm -- I'd have to check and see if there were other limitations but small claims court is generally used for the fairly simple, straightforward cases. You're right about that.

CHAIR: I've just been advised by our attorney that that requires that both parties agree to the action in small claims court. Otherwise then you get into this adversarial thing and -- okay. Sorry I brought it up. Any other questions of the sponsor? How would you do this -- before we get into some people on teleconference and the people here in the audience -- I've gone down and bought a swidget and this swidget is worth $300 and it was a made in Alaska swidget -- or a carving maybe -- and it's -- I'm made to believe and maybe it's even

got it stamped on there that it's made in Alaska and I find out that the guy's been shipping them in from Tucumcari, New Mexico. How do I get ahold of Tucumcari? Is there anything in this that would help me in that pro -- I'm -- and I find I've been had and maybe I bring these things in and I'm going to sell them. Do I -- I guess I follow up how I've gotten them in the first place or maybe I bought it from the local swidget company downtown.

REP. DYSON: Julia, can you answer that?

MS. COSTER: And so you're wondering as a consumer or as a business person?

CHAIR: Well, both. I could see as a business person, I probably have the address in order to order them but if I were a consumer, I guess do I have to go back to the person that sold it to me?

MS. COSTER: Right, there was -- you would probably have to try and find out who the party was that actually committed the fraud. In other words, if the person that you buy it from didn't actually know that it wasn't from Alaska, then they probably would not -- they may not necessarily be the party that committed the fraud and so they would have to find out who the person was.

CHAIR: Thank you. Representative Croft?

REP. CROFT: Yeah, and I think that -- is it a swidget example? Is that what you're talk.....

CHAIR: Yeah.

REP. CROFT: The -- brings out a lot of the difficulties in it and a lot of the difficulties with the current system in applying it to small claims court. There can be complicated discovery finding this person, bringing them in. Often an out-of-state. Fraud itself is a complicated concept that the law requires it to be pled with particularity. It's very different from your standard small claims. You didn't pay me my rent, you didn't pay me the third installment on my couch or you did a fender bender and never paid up. It is an area of statutory law, of some complicated fraud so it's -- it can be complicated factually, it can be complicated in discovery and even if it didn't have those complications, you would want to in that case not just get your money, get it -- get your $200 without charging you 3,000 in attorneys' fees but also tell them to stop.

CHAIR: Mm-hmm. Very good. Thank you. I appreciate that. Any other questions? If not, we have a few people on teleconference. We'll take this off and at first, Julia -- oh, that's -- excuse me. We have Steve Conn in Anchorage.

MR. CONN: Yes, sir.

CHAIR: Steve, did you want to testify on Bill 203?

MR. CONN: Yes, sir, I did for two minutes, sir.

CHAIR: All right.

MR. CONN: I'm Steve Conn, executive director, Alaska

about, really, too because -- and I was just reviewing some of the minutes from our hearing last time and it says that Mr. Schwartz, the attorney general, indicated that he felt that there was a definition of vexatious litigation or frivolous lawsuits under Rule 82 in the court rules now. So we took that as a -- one thing that gave me greater comfort but I agree because there's nothing statutorily in this state that speaks to that type of vexatious litigation or frivolous lawsuits by definition which I'd dearly love to see. However, apparently, it's in Rule 82 and I think this committee really needs to focus on these issues that Representative Porter brings forward because that was -- as the chairman of the prior committee, that was my intent, to look at some of these issues so just to point that out.

CHAIR: Representative Croft?

REP. CROFT: Thank you, Mr. Chairman. The -- answering all -- as many as I could write down of the objections that got brought up but under the general heading of if not this, what, I have a bill that is still, happily, sitting in labor and commerce that provides for adequate resources for the attorney general to do this, for the attorney general to resume its state enforcement of consumer protection laws. That has about a $300,000 fiscal note and is not a complete solution. When we had fewer people -- thank you -- the -- when we had fewer people in this state and, obviously, more

resources, we had it more -- closer to a million. I think that's probably the appropriate level. It's just in our present fiscal situation.....

(Media changed)

REP. CROFT: .....to enforce their own rights. Just going on with some of the issues in reverse order, I guess, we did pass -- there have been a couple of different telecommunications bills. Two things about it, there -- there's the red dot one so you can say don't call me and you get a red dot on your phone and then they're not supposed to call you but what if they do? I mean, you can tell them to stop. Here you can't get damages, you have not suffered an ascertainable loss of money or property. I mean, I had to answer the phone. It's irritating. It's irritating when it happens over and over but it's not a loss of money or property. What can I do? I can refer it to the AG's office who is handling tire frauds and others and will get to it as time permits, the one or the half trying to do it, but I cannot currently get an injunction to make things stop on my own even if I wanted to shell out all the money and if I couldn't afford all that money but just wanted them to stop, I can be pretty confident it's going to be a fairly long legal process before I finally get their attention and stuff. Am I willing to pay that $2,000 in -- to get them to do what is just clearly wrong? I know I'm going to win. Right? I'm

pretty sure -- I keep telling them stop, I have the red dot, I find that I have the red dot, they keep doing it anyway. It's a suit where I can go into an attorney and say I'm pretty sure I'm going to win this one but I don't want it to cost me $2,000 to do it. They right now would say under Rule 82, you get a portion of your fees, about 20 percent in the typical case. So, yeah, he'll pay 500 and you're going to have to pay me 469, whatever. Anyway, it's going to cost you that much just to get them to stop because the AG's office doesn't have time and that's what it costs. This bill solves that in two respects. It allows you to get an injunction and it says that as long as you win, you get your attorneys' fees, that Representative Porter, I think, said it a little off. It is if you win, you get your fees, if you lose, they're not assessed against you. You don't get fees for a losing effort. You -- you'll -- you're not assessed then that 20 percent. You only get them if you win and you are -- it strengthens the reverse strike of the business owner in that, under current Alaska law, frivolous is sort of discretionary with the judge. If it's a frivolous lawsuit, that can be a factor for you awarding full damage -- full attorneys' fees against the plaintiff. Here it says you will.

On the definition of frivolous, because of that aspect of Alaska law that it's a factor and a discretionary rather than the federal law where it is discretionary but it's frivolous

and defined better, there's an enormous amount of case law under federal law on what frivolous means. I mean, we could attempt in this to summarize those in the various factual situations. I just thought it was better to use a term of art that in at least federal law, if not in state law, is defined and if we need to say we mean it how the federal Rule 11 means it, I think we'd consider that. That would be fine too. I didn't want to clog it up with a definition that would fit all purposes but referring to that one would be fine.

The OPAG proposal is a good one for a number of reasons. An energetic group, a volunteer organization, will probably save substantial money but what it'll mainly do is do what the Better Business Bureau does now. They monitor the calls, weed them out and do mediation, very active mediation when they had their own BBB members because they want to see those resolved but they refer others as well. The BBB has been doing, I think, a good job. The concern there has been they're a business themselves who have some members and some non and there's some worry about them being responsible for consumer protection when they're basically a self-promoting business organization. There's an inherent possibility for conflict though I think they've managed it so well that the conflict has not arisen but there is that potential.

So on the definition of frivolous, on the consumers' rights and on the change from what we do now -- I mean, even

with these good laws that we have, Representative Porter said that we couldn't get out-of-state defendants. I think we can. I mean, I think, under this, it's like any other lawsuit. If they have enough contacts to this case -- in particular, if they do business in the State of Alaska, you can reach long arm jurisdiction and bring them into court. So it fills the gaps that are left after we pass good laws like the telecommunications law, the obvious question being who enforces them and, to come back to the summary, if not this, if not private individuals enforcing it, then who?

CHAIR: Representative Berkowitz.

REP. BERKOWITZ: Thank you very much. I'm supportive of this legislation. Frankly, after having gone through protracted discussion of tort reform last year, I'm somewhat amazed that we're even contemplating the possibility that frivolous suits could continue to exist here but it seems to me that this legislation is a responsible follow-through with budget cuts. If we're going to cut budgets to the Department of Law and we're going to disable them, prevent them from having sufficient manpower to do the consumer protection that they had been doing, then we have to have some kind of complement in place and the complement that this bill suggests is that private citizens, as individuals and as businesses, can come forward and enforce the law that otherwise would go unenforced. Now, hypothetically, we have to look at who's

going to use this law because the Department of Law, through the AG's office, isn't pursuing very many of these cases. They've got one and a half attorneys. These are somewhat factually intensive, time-consuming pursuits. They're going to go after the big ticket items. You know, if there's something small and irritating that affects the consumer, an individual consumer, they're going to be able to raise it in the courts. I think that's a good thing when an individual feels that he has access to government that way and has access to redress. It's also going to benefit business because if a business is somehow subjected to unfair practices by a competitor, they would be able to utilize this act even if the AG's office didn't pursue it and I think what that does is give businesses that are pursuing fair practices the opportunity to level the playing field and bring down those that are using the laws or evading responsibility and to me this is a pro-business kind of bill and it allows businesses and individuals to use the law as it was written when the attorney general isn't able to do so.

CHAIR: Thank you. Representative Bundy?

REP. BUNDY: Well, it may have already been answered but I did want Representative Dyson to respond to the concern that I had indica -- alluded to earlier, reaching out of state to someone who rips somebody off for this $1.98 a week policy that you'd mentioned in your opening statement. How do we

extend the long arm of Alaskan justice to impact those people?

CHAIR: Julia, did you hear that question?

MS. COSTER: I think I understood it. You were wondering how persons who are located out of state that do business in Alaska, how we would -- we or someone under the proposed legislation would be able to bring them into court?

REP. BUNDY: Yes, Mis -- through the Chair, if I may, and particularly if it's a relatively small claim. I mean, certainly, if someone creates some huge stock fraud and there's millions of dollars involved, then it -- I could see that the state would pursue that but if it's a small claim of a few thousand dollars or maybe even a few hundred.

MS. COSTER: Sure. What happens though oftentimes is -- and that's why this private injunctive relief is really going to be helpful, I think, is that usually it's not just one person that's being defrauded. If it's someone who's conducting business in Alaska, even if they are located out of state, they're usually defrauding a number of consumers and when you have an organization such as AARP or the Better Business Bureau or AkPIRG or our office when we did receive complaints, that you're going to get a number of these complaints and so while one person may have been harmed to the tune of $200 and it doesn't seem like it's all that important, when you have 10 or 20 or a hundred or thousands that are being harmed, then going after the person who is out of state

becomes much more realistic, much more -- something that a group or a person will want to do because the damages there are a lot higher. So -- and I agree with Representative Croft, we -- you know, in telemarketing or any other businesses where they are located out of state, there's a long line of case law that talks about the jurisdiction, what's necessary in order to bring someone within the state's jurisdiction and, basically, if you are conducting business in Alaska, then we're going to have jurisdiction over you, we meaning someone in Alaska will have -- be able to file a suit against that person and the court can claim jurisdiction over them to address the grievance or whatever the problem is that they're filing the suit over. So on an individual basis, it becomes harder. If you have a number of them, it makes it a lot more reasonable to pursue the claims.

REP. BUNDY: And follow-up.

CHAIR: Follow-up, Representative Bundy?

REP. BUNDY: Thank you. There was some discussion earlier and I -- if -- I don't know if you heard it or not about another proposal that relates to this that would require a bonding of people that wanted to do business in the state. Would the current legislation remove the necessity for that or would the current legislation application be improved by the application of that bonding requirement?

MS. COSTER: Well, if I -- right now, telemarketers are

huh. If you are able to serve the person with the complaint for injunctive relief and they fail to answer, then you can get an injunction by default.

REP. PORTER: Then how do you serve your injunction in Detroit?

MS. COSTER: Well, basically, what would happen, kind of following the scenario, is that if the person ever attempted to engage in the sort of conduct that was the basis for the injunction in the first place in Alaska, then you would have -- they would be in violation of the injunction. So they would have to actually engage in business in Alaska again. There would be no reason to serve it in Minneapolis in the sense that if they're not going to come back to Alaska and engage in the fraudulent conduct, then you'd actually accomplish what you've meant to accomplish which is to keep them from engaging in that particular practice.

REP. PORTER: Well, I guess I'm referring more to telemarketing kinds of operations. There's no one here. What would be the incentive to stop fraudulent telemarketing if there wasn't any means with which to cause this person harm?

MS. COSTER: If you mean you -- if they got the injunction and then they violated it, then the court can enter an order enforcing the injunction and that would be a contempt of court and the court can order fines.

REP. PORTER: Okay.

MS. COSTER: Of course, the person can be jailed in some contempts. I'm not anticipating that that would be the sort of situation here. So fines and then, assuming that those fines can be reduced to judgments and then if a judgment is obtained, then, of course, you can execute on property out of state. So there are various means that injunctions can be enforced if a person ignores them.

CHAIR: Representative James.

REP. JAMES: Thank you, Mr. Chairman.

CHAIR: Oh, I'm sorry.

REP. PORTER: I have a couple of follow-ups if I might.

CHAIR: Excuse me.

REP. PORTER: Well, I guess I don't disagree with that arduous process but most of the folks that we're interested in trying to get with this are judgment proof in the first place, especially the extent that what they might have would not be worth going through the process to get to Detroit to try to find out if they own a car or something. I guess in response to a couple of the things, what do we do if -- and at the OPAG program, what can they do? Well, if we had the telemarketing bill in place, as was mentioned, you can get them through this bond. There is something to attach. There's something right here and making the requirement for the bond is going to cull an awful lot of the flaky folks out in the first place and then those that decide to get flaky do so at the risk of that

APPENDIX B

ALASKA STATE LEGISLATURE

HOUSE JUDICIARY COMMITTEE MEETING (EXCERPT)

APRIL 1, 1998

(RE HB 203)

MIDNIGHT SUN COURT REPORTERS
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Appendix B

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MS. LeBEAU: .....but I have a question.

CHAIR: All right.

MS. LeBEAU: How much more involved then is the lawsuit, that you then have to carry this on that much further to have the big debate over evidence, frivolous and all those things?

REP. BERKOWITZ: I'll let the sponsor deal with that.

CHAIR: Do you -- co-sponsor, do you want to take that on or.....

REP. CROFT: Sure, on that issue or we can go through the order.

CHAIR: Okay. Representative Croft?

REP. CROFT: The purpose, I think, of both the warning and the mediation provision was to get enough notice up front so that you would have the basic underlying facts and if you continue to bring a suit when it's not based on any underlying fact, as the definition clarifies, it's frivolous but I think it does come down to a policy decision on whether it's appropriate for individuals to enforce these rights or solely rely on the state to do it through state attorneys. This is not a unique system or provision. In particular, the Civil Rights Act modeled on it because they just knew there was not going to be enough attorneys general in the nation to enforce this law and they put in this very simple kind of system, that private individuals could do it and the way that that was affected was an attorneys' fee shifting provision like this.

We can either fund a large state bureaucracy to do this. We can fail to fund it and have it not done or we can empower people to do it on their own and we've tried to put very careful side boards on it so that things that go outside of the norm are penalized but it is simply impossible for a person defrauded for a small amount and if the state -- help from the state attorney general is not forthcoming, for them to pursue a lawsuit. They can have -- they can be clearly right and have it not be cost effective to bring the suit. We wanted to take the -- we wanted to have the decision made is there merit to this suit or not. If there's merit, you -- and you win, you'll get your attorneys' fees. If there's so little merit, it's frivolous, you may be in very deep trouble but we wanted it to be based on the merits of the case, not the entrenched costs of bringing it to court. So it does, I guess, come down to a philosophical idea of where we should be doing this, from the state level or trying to empower people to enforce these laws themselves.

CHAIR: Pam?

MS. LeBEAU: Mr. Chairman, is this Rule 82 that we're dealing with? Is that -- I don't -- you know I'm not an attorney and I don't know what but is this Rule 82 that is the one that says that people -- the def -- the plaintiff.....

REP. CROFT: Prevailing -- either prevailing party gets.....

MS. LeBEAU: Prevailing party wins -- or pays the attorneys' fees of the other?

REP. CROFT: Pays a portion of it, usually a pretty small portion.

MS. LeBEAU: Portion, right. All right. I understand that there was a considerable struggle to get Rule 82 adopted and to have that be part of our legal system and so our question is if the philosophy of Rule 82 is good for everything else, why should it be different for -- why should we make an exception? It's either a good philosophy or it's a bad philosophy and we just have a concern that we're making exceptions to laws and right now, it is very difficult for a business -- for instance, we're not considered, quote, unquote, a public interest group although we think we are. I mean, everybody's concerned with business because everybody does business or has some commerce with other business so everyone should be concerned but groups come up against business all the time, all the time and they don't pay a lick of the costs and it -- this is just one more example of the potential for that happening and, as I said, you know, if a -- one of your constituents came to you, to any of you, and said that there was this unfair practice, this unlawful trade practice going on, couldn't that be brought to the attention of the attorney general? Has it ever happened that it's brought to the attention of the what, district attorney or

attorney -- state's attorney and that they say sorry, we're -- you know, we're not going to do it? Then there's something wrong with the law on that end, you know, if something is brought to their attention and they don't want to handle it, any of their state's defendants, the defendant of the people.

CHAIR: I've just been advised that there are a couple of exceptions, at least, to Rule 82. Workers' comp or suits based on violent crime doesn't fit under this so there are some nuances to that. On that point or.....

REP. CROFT: Well, just on that point.....

CHAIR: Yes, Representative Croft.

REP. CROFT: .....it happens to me a fair amount and I think it happens to Representative Dyson and probably every representative here that there are those complaints that are not followed up. There's 1-1/2 attorneys pursuing these matters and they have to prioritize them. So, in answer to your question does it happen, unfortunately, it does and one of the tools you can use is to allow the people to enforce that right themselves.

REP. BERKOWITZ: On that point, Mr. Chair.

CHAIR: Yes, Representative Berkowitz?

REP. BERKOWITZ: The -- there's something else that's part of the policy here which is.....

CHAIR: Yes, we're on that point.

REP. BERKOWITZ: .....we have pursued an agenda of cutting

the state budget which has led to a reduction in the attorney generals available to pursue these types of actions and, as a consequence, we have to develop an alternative. This is an alternative. If you want to increase the state budget and if the state chamber wants to go on record as putting more money into the attorney general's office, I'm sure they'd be happy to take that kind of support.

MS. LeBEAU: Mr. Chairman, Representative Croft -- excuse me.....

CHAIR: It's contagious. They look so much alike.

MS. LeBEAU: I know, I've heard it so many times I'm starting to do it. Pardon me.

REP. CROFT: You should actually apologize to Representative Rokeberg.

MS. LeBEAU: Pardon me though. So what that comes down to is the -- is business pays for it one way or the other. Business is what's providing the taxes that are keeping the state running and business will pay the costs of this if this is adopted and, you know, I'm -- I -- as I said, we don't want to take a lot of your time. We just had to say that we.....

CHAIR: Yeah.

MS. LeBEAU: And we would have worked in the subcommittee -- I'm -- I don't know how I missed when that was happening but I apologize for that but it has been a concern and we just had to state our position on this.

and I got my check back.....

CHAIR: Mm-hmm.

REP. JAMES: .....but that's the only time and I've had lots and lots of people who have pulled little things on me and I've never looked for anyplace to get my money back. Just never have looked for one or been missing one.

CHAIR: Representative Dyson.

REP. DYSON: Yeah, thank you. I'm -- I apologize, this has taken up so much of your time and I realize you have some very valuable things to work on. Response to Representative James, most of the pressure for this has come to us in the senior citizens' community who every senior citizen group I know in the state has really been very enthusiastic about this and, in fact, if you turned around and walked out of the optometrist's office and refused to pay, then you would not be -- have standing under state law to help prevent this to happen -- to -- what's happening now, scores -- probably hundreds of other folks in the state and you'd have to stand there and say wait a minute, I know this is a scam but in order to have standing in court, I got to go into the scam. I got to pay them so that I can demonstrate that I've been injured.

The other thing that this does that was -- not been available before is getting an injunction. Under present state law, even if it is a scam, you cannot get -- enjoin them

to stop their action -- in this case, against quite a few other folks -- until you have gone through the court process and it's been adjudicated and the court has done it. In this situation, you can go to court after warning them, asking them to stop, go to court. If you can make your case, you -- they can be enjoined to stop this action.

Further to Ms. LeBeau's comments earlier, I share the concern that, you know, every business does, particularly those of us who are small, about actions taken against it. My guess is that this is going to have a very salutary effect for legitimate Alaskan businesses because, indeed, the scam artists, the flim-flammers who come here from lots of places including by phone to after us, there's going to be folks out there who are empowered to stop it and to stop the illegitimate ones who are coming here, as they have for several hundred years, to rip off stuff and fly south with it and I think that the net effect is that Alaskan businesses will prosper as the flim-flammers are enjoined and stopped and penalized from it. We'll wait and see how that plays out.

CHAIR: On that point, Representative Porter?

REP. PORTER: Yeah, Mr. Chairman, did either of the sponsors -- or a question to either of the sponsors, did you look at trying to approach it from plugging the hole of requiring the completion of the fraudulent transaction? In other words, it seems to me that it would be just as valid to