IN THE SUPREME COURT OF THE STATE OF ALASKA

JANET HUDSON, ON BEHALF OF HERSELF AND ALL OTHERS, *Petitioners*, v. CITIBANK (SOUTH DAKOTA) NA, ALASKA LAW OFFICES, INC. AND CLAYTON WALKER, *Respondents.*	Supreme Court No. S-14740 Trial Court Case No. 3AN-11-09196CI
Consolidated with	
CYNTHIA STEWART, ON BEHALF OF HERSELF AND ALL OTHERS WHO ARE SIMILARLY SITUATED, *Petitioners*, v. MIDLAND FUNDING LLC, ALASKA LAW OFFICES, INC. AND CLAYTON WALKER, *Respondents.*	Supreme Court No. S-14826 Trial Court Case No. 3AN-11-12054CI

ON PETITION FOR REVIEW FROM SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE FRANK A. PFIFFNER, PRESIDING

PETITIONERS' EXCERPT OF RECORD
VOLUME 2 OF 2

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TABLE OF CONTENTS

VOLUME 1 OF 2

Excerpts of Record in *Hudson v. Citibank (South Dakota) NA, et al.*, No. S-14740

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JANET HUDSON, on behalf of herself And all others similarly situated, Plaintiffs, vs. CITIBANK (South Dakota) NA, ALASKA LAW OFFICES, INC., and CLAYTON WALKER, Defendants.	Case No. 3AN-11-9196CI

ORDER

I. INTRODUCTION

Before the court is Citibank, N.A.'s ("Citi") Motion to Compel Arbitration and to Stay Action and Janet Hudson's Cross-Motion for Partial Summary Judgment. The court grants the Motion to Compel Arbitration and denies the Cross-Motion for Summary Judgment. The court grants Citi's motion because Citi and Hudson formed a valid Arbitration Agreement under South Dakota law and the Agreement is largely enforceable under Alaska law. Also before the court is Alaska Law Office and Clayton Walker's ("ALO") motion to join Citi's motion. The court grants ALO's motion and stays the action against ALO while Hudson arbitrates her claims against Citi and ALO in a joint arbitration.

The court first addresses the parties' arguments regarding choice of law and the Arbitration Agreement's enforceability. For reasons explained below, the court applies South Dakota law to the question of whether the Arbitration Agreement's formation was valid and Alaska law to the question of whether and to what extent Citi may compel Hudson to arbitrate her current Unfair Trade Practices Act (UTPA) claims. The court finds that Hudson must arbitrate her claims and stays the action accordingly. It also finds that the Agreement's class action waiver is valid and that Hudson must proceed individually. However, the court finds the Arbitration Agreement unenforceable to the extent that it attempts to extinguish Hudson's non-waivable right under Alaska law to pursue public injunctive relief. The court also addresses in the alternative the question of whether the Federal Arbitration Act (FAA) would preempt a UTPA provision that guaranteed Hudson a right to litigate her UTPA claims, rather than a right to pursue public injunctive relief, and finds that the FAA *would* preempt such a right.

The court then addresses the question of whether the FAA and the U.S. Supreme Court cases interpreting it apply in state court. The most recent Supreme Court decision on this issue answers this affirmatively. The court next addresses whether Citi waived its right to arbitrate Hudson's pending claim and finds that it did not. Finally, the court grants ALO's motion to join in arbitration with Citi and

Hudson and stays Hudson's claims against ALO because, under the Arbitration Agreement, ALO is Citi's representative.

II. FACTS

A. Plaintiff's Putative Class Action Claim.

On behalf of herself and all others similarly situated, plaintiff Janet Hudson argues that Citi seeks excessive attorney fees in debt collection cases against defaulted consumers in violation of the Alaska Rules of Civil Procedure (ARCP) and the UTPA.[1] Defendants are Citi and its debt collection counsel, ALO.

In February, 2010, Citi sued Hudson in Kenai District Court to recover a credit card debt of $24,170.20. Hudson did not respond and Citi moved for default. Citi requested attorney fees in an Affidavit of Actual Attorney Fees (Affidavit) and averred fees of $4,834.05. The ARCP limits attorney fee awards to a maximum of 10% of the default judgment amount, $2,417.02 in Hudson's case. Because Citi averred fees greater than the ARCP limit, the court awarded Citi the lower amount of $2,417.00.

Hudson claims that Citi's practice exploited her and others financially, and continues to exploit many Alaska cardholders. The ARCP allow a plaintiff to recover the lower of 10% or the "reasonable actual fees which were necessarily

[1] Compl. ¶ 1; *see* AS 45.50.471 *et seq.*

incurred."[2] Citi and ALO operated under a contingency fee agreement. Plaintiff argues that this is not a proper measure of "reasonable actual fees" and instead reasonable fees are the hours worked multiplied by the attorney's hourly rate. She argues that defendants based their Affidavit on a wrongfully inflated number in order to receive 10% of the default judgment amount instead of the more appropriate, much lower fee award that would represent the hours ALO actually worked – approximately $250.[3] Plaintiff asserts that defendants have similarly overcharged hundreds of other Alaska consumers and that they have violated the UTPA by seeking and collecting attorney's fees in excess of the amount permitted by law.[4]

On behalf of herself and a putative class, Hudson seeks class certification, damages, an injunction ordering defendants to stop overcharging for attorney fees, and the issuance of corrected judgments.

B. The Citi Card Agreement and Arbitration Provision.

Hudson's original card agreement with Citi did not include an arbitration provision. It did include a provision that Citi could change the terms of the

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[2] Alaska R. Civ. P. 82(b)(4).

[3] Compl. ¶ 14.

[4] Compl. ¶ 16.

agreement.[5] The card agreement states that South Dakota law governs disputes that arise thereunder. South Dakota law expressly allows a credit card issuer to change the terms of a card agreement under a general change-of-terms provision.[6]

In October, 2001, Citi mailed to Hudson at her Missouri address a notice that it was adding a binding arbitration agreement to her account (the "Arbitration Agreement" or the "Agreement").[7] It gave her the option to opt out of the arbitration agreement. If Hudson opted out, she could have used her card until the later of the end of the membership year or the card expiration date. Citi would then cancel the card. Citi amended the arbitration agreement in 2005 and sent to Hudson at her Missouri address a notice that it was doing so.[8] Hudson continued to use the card throughout this time and did not opt out.

III. STANDARD OF REVIEW

In this decision, the court addresses both a motion to compel arbitration and to stay action and a motion for partial summary judgment.

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[5] Cathleen Walters Aff., Exhibit 1, p 8 [hereafter Walters Aff.]. Cathleen Walters' affidavit is attached to Citi's Memo. in Support of Mot. of Citi to Compel Arbitration and to Stay Action (Aug. 24, 2011) (hereafter Citi's Memo.). The attachments to Walters' affidavit include a copy of Hudson's initial card agreement (Exhibit 1) and of the arbitration agreement (Exhibit 2).

[6] S.D. CODIFIED LAWS § 54-11-10.

[7] Walters Aff., Exhibits 3, 5.

[8] *Id.*, Exhibit 7.

A. The Federal Arbitration Act and Preemption of State Laws.

The court, rather than an arbitrator, decides whether a dispute is arbitrable.[9] Under the Federal Arbitration Act (FAA), arbitration agreements are "valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract."[10] Courts refer to the latter part of this sentence as the "§ 2 savings clause" or simply the "savings clause." Courts interpret the FAA broadly to favor arbitration and ensure "streamlined proceedings."[11] Courts often favor arbitration because it is flexible, can be tailored to the parties' situation, and is more informal and less expensive than litigation.[12] As with all contracts, courts interpret arbitration agreements to give effect to intent of the parties.[13]

"[W]here state law comes into conflict with federal law, the Supremacy Clause of the United States Constitution dictates that state law must always yield."[14] The FAA preempts state law when the law directly "conflicts with the

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[9] *Lexington Mktg. Group, Inc. v. Goldbelt Eagle, LLC*, 157 P.3d 470, 473 (Alaska 2007) (citations omitted).

[10] 9 U.S.C. § 2.

[11] *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1748 (2011).

[12] *Id.* at 1749.

[13] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774–75 (2010).

[14] *Allen v. State, Dept. of Health & Social Services, Div. of Public Assistance*, 203 P.3d 1155, 1161 (Alaska 2009).

FAA or stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA."[15]

Courts must compel arbitration when an arbitration agreement is valid and encompasses a party's claim. When reviewing a motion to compel arbitration, "the court may not review the merits of the dispute but must limit its inquiry to (1) whether the contract containing the arbitration agreement . . . involv[es] interstate commerce, (2) whether there exists a valid agreement to arbitrate, and (3) whether the dispute(s) fall within the scope of the agreement to arbitrate"[16]

B. Summary Judgment Standard of Review.

The court will grant a motion for summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."[17] The party moving for summary judgment must establish, through admissible evidence, the absence of genuine

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[15] Citi's Supp. Brief in Support of Mot. to Compel Arbitration and to Stay Action, at 2 (March 16, 2012) (hereafter Citi's Supp.), *citing Concepcion*, 131 S.Ct. at 1745–48.

[16] *E.g., Estrella v. Freedom Financial*, 2011 WL 2633643, *3 (N.D. Cal. July 5, 2011).

[17] Alaska R. Civ. P. 56(c).

factual disputes and entitlement to judgment.[18] Once the moving party has made a prima facie case for the absence of genuine issues of material fact, the adverse party may avoid summary judgment by demonstrating with admissible evidence that a genuine issue of material fact remains to be litigated.[19]

IV. DISCUSSION

A. Supreme Court Precedent: The *Concepcion* and *Marmet* Decisions.

In *AT&T Mobility, LLC v. Concepcion,* the Supreme Court held that the FAA preempted a California decisional rule under which many class action waivers in arbitration agreements were unenforceable as unconscionable.[20] The California rule (known as the *Discover Bank* rule) required parties to these agreements that contained class action waivers to either litigate their disputes or to allow classwide arbitration. In *Concepcion*, the Supreme Court found that the *Discover Bank* rule frustrated the FAA's "overarching purpose" to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate

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[18] *Shade v. Co & Anglo Alaska Serv. Corp.*, 901 P.2d 434, 437 (Alaska 1995).

[19] *French v. Jadon, Inc.*, 911 P.2d 20, 23–24 (Alaska 1996).

[20] *Concepcion*, 131 S.Ct. at 1744.

streamlined proceedings."[21] Restricting the flexibility of these agreements, it found, "interferes with fundamental attributes of arbitration."[22]

The Court explained that the analysis of FAA preemption would vary depending on the challenged state law:

> When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. . . . . But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. . . . [T]he FAA's preemptive effect might extend even to grounds traditionally thought to exist "'at law or in equity for the revocation of any contract.'" [A] court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot."[23]

Around the country, parties moving for arbitration have seized on this language to argue that the Court meant to effectively foreclose most challenges to arbitration provisions. That said, the § 2 savings clause remains and while arbitration agreements are not subject to "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," they remain subject to "generally

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[21] *Id.* at 1748.

[22] *Id.*

[23] *Id.* at 1747 (quotations and citations omitted).

applicable contract defenses."[24] Recent cases provide a developing sense of the types of state rules that "stand as an obstacle" to the FAA's purpose. But *Concepcion*'s guidance is general: The invalidated *Discover Bank* rule "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA."[25]

Subsequently, in *Marmet Health Care Center, Inc. v. Brown*, the Supreme Court found that the Supreme Court of Appeals of West Virginia had "misread[] and disregard[ed]" the Court's precedent by too narrowly interpreting *Concepcion*.[26] The West Virginia court had upheld a rule that as a matter of state public policy arbitration agreements could not preclude a negligence claim alleging personal injury or wrongful death against a nursing home.[27] The West Virginia court found that the FAA did *not* preempt this rule, particularly because the rule protected judicial claims regarding "a service that is a practical necessity for members of the public."[28] The Supreme Court disagreed and reiterated that the only exception to the enforceability of arbitration agreements is the § 2 savings

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[24] *Id.* at 1748.

[25] *Id.*

[26] 132 S.Ct. 1201 (2012).

[27] *Id.* at 1203.

[28] *Id.*

clause, which includes "no exception for personal-injury or wrongful-death claims."[29] The Court vacated and remanded West Virginia's decision and reminded the court that public policy considerations underlying a state law are irrelevant to the determination of whether the FAA preempts the law *and* that a state court cannot use the "general public policy" behind a state law to support a finding that an arbitration agreement is unconscionable under the savings clause.

The Alaska Supreme Court has not yet addressed *Concepcion* or *Marmet*.

B. Citi's Motion to Compel Arbitration.

Under the FAA, Citi moves to stay the action and compel Hudson to arbitrate her claims on an individual basis per the parties' arbitration agreement.[30]

The FAA requires a court to stay judicial proceedings pending arbitration[31] and preempts state laws that create obstacles to enforcing arbitration agreements.[32] Citi argues that South Dakota law governs disputes arising under the parties' card agreement (such as the Arbitration Agreement's disputed enforceability) and that the Agreement is valid and enforceable under South Dakota law. It then argues

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[29] *Id.*

[30] Citi's Memo., at 1; *see also* 9 U.S.C. §§ 1–3.

[31] 9 U.S.C. § 3.

[32] *Concepcion*, 131 S.Ct at 1752–53.

that the Agreement encompasses Hudson's UTPA claims and that she must pursue her claims on an individual basis in an arbitral forum.

The court disagrees with some of Citi's arguments but grants the motion to stay the action and compel arbitration. As explained in section IVE, the court applies Alaska law to the question of the Arbitration Agreement's effect on Hudson's UTPA claims and as explained in section IVF, it finds the Agreement unenforceable to the extent that it extinguishes Hudson's non-waivable right under the UTPA to pursue public injunctive relief in the arbitral forum.

C. Hudson's Motion for Partial Summary Judgment.

Hudson cross-moves for partial summary judgment that the Arbitration Agreement is unenforceable. She argues that Citi's addition of the Arbitration Agreement was unconscionable under Alaska law because it was unilateral and lacked consideration, that the Agreement contravenes Alaska's requirement that an arbitral forum be substantially equivalent to a judicial forum, and that Citi waived its right to compel arbitration in this case by suing her in Kenai District Court for her credit card debt.

The motion is denied. As discussed in section IVE, the Agreement's formation was valid under the applicable South Dakota law. As discussed in section IVF, Hudson may vindicate her UTPA rights in an arbitral forum because the UTPA precludes waiver of the ability to pursue public injunctive relief. As

discussed directly below in section IVD, the terms of Citi's initial card agreement allowed it to unilaterally add an arbitration provision. Finally, as discussed in section IVG, Citi did not waive its right to compel arbitration of a *separate* claim from its debt collection claim.

D. Change of Terms Clause Allows Addition of an Arbitration Agreement.

Hudson argues that adding an arbitration clause is outside the scope of a change-of-terms provision that allows Citi to change fees and financial terms. The change-of-terms provision in the parties' initial card agreement is broad and non-exclusive.[33] The terms of the parties' initial card agreement gave Citi the freedom to add the Arbitration Agreement. The next question is whether this addition was valid under the controlling state's law.

E. Choice of Law: South Dakota, Missouri, or Alaska?

Citi and Hudson's initial card agreement states that South Dakota law governs the agreement and disputes that arise thereunder. The Restatement (Second) of Conflict of Laws guides Alaska's choice of law analysis. The choice of law provision in a contract controls with regard to a particular issue unless either: "1) [T]he chosen state has no substantial relationship with the transaction

[33] Walters Aff., Exhibit 2, Notice of Change in Terms Regarding Binding Arbitration to Your Citibank Card Agreement, under heading "Changing this Agreement."

or there is no other reasonable basis for the parties' choice or 2) the application of the law of the chosen state would be contrary to a fundamental public policy of a state that has a materially greater interest in the issue and would otherwise provide the governing law."[34]

This case raises *two* choice of law questions. First, which state's law applies to Citi's addition of the Arbitration Agreement? Resolving this question may affect the determination of whether the Arbitration Agreement is valid. Second, which state's law applies to the question of whether Citi may invoke the Arbitration Agreement to compel Hudson to arbitrate her UTPA claims on an individual basis with exclusively individual relief? Resolving this question may affect the forum in which plaintiff must proceed and her available remedies.

For reasons explained below, the court finds that South Dakota law applies to the first question and Alaska law applies to the second. Three states' laws are contenders: South Dakota (Citi's domicile), Alaska (Hudson's current domicile and the place of some performance), and Missouri (the place of contract formation and some performance).

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[34] *Peterson v. Ek*, 93 P.3d 458, 465 (Alaska 2004), *citing* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

1. Choice of Law Analysis Under Alaska Law.

South Dakota law applies to Citi's unilateral addition of the Arbitration Agreement to Hudson's card agreement because the parties' choice of law provision controls this issue. South Dakota has a substantial relationship with the parties' agreement because Citi is located in South Dakota.[35] The court will therefore only depart from South Dakota law if either Alaska or Missouri 1) would otherwise provide the governing law *and* 2) have a materially greater interest in the additions of the arbitration agreement *and* 3) have a fundamental public policy difference from South Dakota on this issue.

To determine whether Alaska or Missouri law would otherwise apply in the absence of a choice of law agreement, Restatement (Second) of Conflict of Laws § 188 instructs the court to consider the following non-exhaustive factors:

> (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 domicil, residence, nationality, place of incorporation and place of corporation and place of business of the parties.[36]

The court considers the above factors in light of the other non-exhaustive factors it uses to determine which state has the most significant relationship to an

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[35] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f.

[36] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2).

issue. Factors relevant here include "the relevant policies of the forum," "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue," "certainty, predictability and uniformity of result," and "ease in the determination and application of the law to be applied."[37]

The Alaska Supreme Court adds that the "place of performance" is the most important factor and that when the parties' negotiate remotely, the place of negotiation and contract have little weight.[38] The place of the parties' domicile, incorporation, or doing business is moderately important, though still less important than performance.[39]

2. First Choice of Law Question: Formation of Agreement.

The critical event for determining the state with the most significant relationship to the Arbitration Agreement's formation is Citi's addition of the Agreement to Hudson's initial card agreement.[40] Citi added the Agreement to

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[37] The Restatement (Second) of Conflict of Laws § 187 points to § 188 which points to § 6, which lists the factors.

[38] *Long v. Holland America Line Westours, Inc.*, 26 P.3d 430, 433 (Alaska 2001).

[39] *Id.*

[40] Plaintiff argues that the relevant "acts" for the choice of law analysis are defendants' suit against Hudson on her debt. This is not true for the analysis of the contract's *formation*, which occurred long before the debt suit and was an "act" in itself.

Hudson's card agreement when Hudson lived in Missouri. She continued to use the card, after the addition, when she lived in Missouri. Alaska was simply not yet in the picture. Though Hudson *continued* to use the card when she moved to Alaska, this does not give Alaska a *more* significant relationship with the addition of the Arbitration Agreement to the contract that she was *already performing* when she arrived. In the absence of a choice of law agreement, Missouri law would apply.

Still, the court will not depart from the choice of law agreement unless Missouri public policy is contrary to South Dakota's policy on the issue of unilateral additions of Arbitration Agreements *and* Missouri has a materially greater interest in this issue. Because South Dakota law is not contrary to Missouri public policy, the court does not evaluate Missouri's interest. The choice of law provision selecting South Dakota law is valid with regard to the question of whether Citi validly added the Arbitration Agreement.

3. Missouri's Public Policy on Additions of Arbitration Agreements.

A credit card issuer's unilateral addition an arbitration agreement to a card agreement is not contrary to fundamental Missouri public policy. In *Citibank (South Dakota), N.A. v. Wilson*, the Missouri Court of Appeals applied Missouri law to the question of whether a credit card holder accepted a revised card agreement when the card issuer—as here, Citibank—mailed her a copy of the

revised agreement with the notice that her continued use of the card would mean she accepted the revisions unless she cancelled her account within 30 days.[41] The Missouri court found the revised contract valid.[42] In *Wilson*, the court does not state *how* Citibank revised the customer's agreement. But, in the absence of authority suggesting that Missouri would *not* extend this policy to the addition of an arbitration agreement, specifically, this court will not find a fundamental policy difference with South Dakota law on the issue.

Plaintiff cites several Missouri cases addressing unilateral additions of arbitration agreements to *employment* contracts, but that issue differs from unilateral changes to consumer contracts. In *Frye v. Speedway Chevrolet*, the Missouri Court of Appeals found that an arbitration agreement in an employment contract was *not* valid because neither the continuation of at-will employment nor an employer's "'promise' to be bound by the [alternative dispute resolution program]'" sufficed as consideration when an employer retained a unilateral right to amend the program.[43] In *Owen v. Bristol Care, Inc.*, the Western District of Missouri (applying Missouri law) reiterated that "contracts which permit unilateral

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[41] 160 S.W. 3d 810, 813–14 (Mo. App. W.D. 2005).

[42] *Id.*

[43] 321 S.W.3d 429, 438–39, 442 (Mo. App. W.D. 2010) *citing Morrow v. Hallmark Cards, Inc*, 273 S.W. 3d 15 (Mo. App. W.D. 2008) (addressing arbitration agreements in employment contracts).

modification or amendments are deemed illusory and thus, are unenforceable,"[44] but the court again addressed an employment contract and Missouri courts analyze employment contracts and consumer contracts differently, including determination of consideration.[45]

Though Missouri limits an employer's ability to add an arbitration provision to an employment contract without meaningful consent or consideration, plaintiff has not demonstrated that Missouri extends this policy to *consumer* contracts. On the latter, *Wilson* is on point and states that when defendant Citibank mailed a card holder a revised agreement, plaintiff's *continued use* of her existing credit card, and Citibank's *continued* advance of credit constituted consideration for the *revised* agreement.[46] South Dakota law, which allows a credit card issuer to unilaterally add terms in this manner, is therefore not contrary to fundamental Missouri policy on this issue. The court will apply South Dakota law to the first choice of law question—whether the parties' formed a valid and enforceable arbitration agreement.

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[44] *Owen v. Bristol Care, Inc.* 2012 WL 1192005, a *2 (W.D. Mo. 2012).

[45] *See id.* at *4 (noting that *Concepcion* does not control employment contract analyses).

[46] *Citibank (South Dakota), N.A.*, 160 S.W. 3d at 81314.

4. South Dakota Law is Not Contrary to Fundamental Alaska Policy.

Even if Alaska law would apply in the absence of a choice of law agreement, the court would still apply South Dakota law to the first choice of law question. Assuming Alaska had a more significant relationship than Missouri with the Arbitration Agreement's formation, the court would depart from the choice of law provision *if* Alaska had a materially greater interest in the issue *and* South Dakota law is contrary to fundamental Alaska policy on this issue. Hudson argues that Alaska has a policy stance that the unilateral addition of an arbitration agreement is unconscionable.[47] However, Alaska law does not take a firm stance. South Dakota law is therefore not contrary to fundamental Alaska policy on this issue.

5. *Gibson v. Nye Frontier Ford* Does Not State a Policy.

Hudson reads an Alaska Supreme Court case, *Gibson v. Nye Frontier Ford*, to state a policy that a unilateral change to an arbitration agreement is unconscionable. If this were the case, the policy difference could justify departure from the parties' choice of law agreement.[48]

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[47] Pl.'s Opp. at 8–9.

[48] *See* Pl.'s Consolidated Reply Memo. in Support of Pl's Cross-Mot P.S.J, at 13 n. 41 (collecting cases) (Nov. 21, 2011) [hereafter Pl.'s Reply]; *see also id.*, at n.40, *citing* RESTATEMENT (SECOND) CONFLICT OF LAWS § 187, cmt. g.

Citi characterizes South Dakota and Alaska as having a "mere difference" on the unilateral change issue, rather than a "fundamental policy" disagreement. This is because Citi does not read *Gibson* as creating a *rule*. Citi sees the states' difference to be simply South Dakota's choice to codify a card issuer's ability to unilaterally change an agreement, contrasted with Alaska's failure to do so. Though *Gibson* does *suggest* a policy, its discussion is not thorough enough nor its statements firm enough to constitute a fundamental policy stance.

In *Gibson*, the plaintiff employee argued that an arbitration agreement with his employer was unconscionable because, in part, the employer could unilaterally change the agreement. The employee pointed to persuasive cases holding that "clauses giving one party to an arbitration agreement the authority unilaterally to change its terms are unconscionable and unenforceable."[49] The employer, Nye, argued successfully that the contract's unilateral change provision applied to some parts of the contract but *not* to the arbitration clause. The court therefore did not decide whether the unilateral change provision *would* have rendered the arbitration agreement unconscionable.

Nevertheless, the Alaska Supreme Court briefly addressed the issue, and its statements *suggest* but do not explicitly state a position. It first noted that "Nye does not take issue with the proposition that the unilateral power to change an

[49] *Id.*

arbitration agreement would be unconscionable."[50] It later stated, when agreeing with Nye's argument, that it favored interpretations under which a contract is enforceable and that "Given the prevalence of the view that arbitration clauses that may be changed unilaterally are unconscionable, this rule of interpretation supports an interpretation that [the unilateral change provision] does not govern the arbitration agreement"[51]

Plaintiff reads this as a statement that the Alaska Supreme Court *agreed* that unilateral change provision are unconscionable, and that it needed no further discussion of the issue.[52] Citi reads this as a statement that the court reserved the question for a later case.[53] Citi is correct that the statements are *dicta*. The court could have been acknowledging but not adopting the prevalent view. *Gibson* is noncommittal and this court will not read the Alaska Supreme Court's *dicta* as a rule of law. Because there is no fundamental Alaska policy stance on the issue, the court would not apply Alaska law to the first choice of law question, even if Alaska law would apply in the absence of a choice of law provision.

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[50] *Id.*

[51] *Id.* at 1097.

[52] Pl.'s Reply, at 5.

[53] Citi's Consolidated Reply in Support of Mot. to Compel Arbitration and to Stay Action and Opp. to Pl's Cross-Mot. P.S.J., at 8 [hereafter Citi's Reply].

6. Addition of the Arbitration Agreement under South Dakota Law.

The parties formed a valid and enforceable Arbitration Agreement under South Dakota law. South Dakota statutes quite specifically permit unilateral changes to credit card terms by mail: "Upon *written notice*, a credit card issuer may *change the terms* of any credit card agreement, if such right of amendment has been reserved . . . so long as the card holder does not, within twenty-five days . . . of the change" inform the card issuer "that he does not agree to abide by such changes."[54] There is no indication in South Dakota law that this provision does not encompass the addition of an arbitration clause; in fact, the South Dakota Attorney General has stated that it *does*.[55]

The Arbitration Agreement's formation was valid under South Dakota law. Citi mailed Hudson a copy of the revised card agreement, containing the Arbitration Agreement. Hudson did not reject the addition in writing. She continued to perform the contract by using the credit card. South Dakota law also makes clear that "use of an accepted credit card . . . creates a binding contract between the card holder and the card issuer" if the card user does not cancel the

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[54] S.D. CODIFIED LAWS § 54-11-10 (former and current) (emphasis added).

[55] Citi's Request for Judicial Notice, Exhibit 4, Letter Opinion dated May 7, 2002 from Harold H. Deering, Jr., S.D. Assistant Attorney General, to Richard R. Duncan, South Dakota Director of Banking (Aug. 24, 2011).

card in writing within 30 days of its issuance.[56] Hudson therefore accepted the Agreement through her continued credit card use.[57] The second choice of law question, discussed below, is whether and to what extent the Agreement applies to Hudson's UTPA claims.

7. The Second Question: What Law Applies to Citi's Motion to Compel Arbitration?

The second choice of law question addresses what state's law applies to the question of whether Citi may compel Hudson to arbitrate her pending UTPA claims on an individual basis and may limit any award to individual rather than public injunctive relief. On this question, Alaska law governs. Here, Alaska rather than Missouri law would apply in the absence of a choice of law provision. Alaska has a materially greater interest than South Dakota in whether an out of state company may compel arbitration of an Alaska consumer's UTPA claims, and South Dakota's consumer protection law is contrary to Alaska's public policy.

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[56] S.D. CODIFIED LAWS § 54-11-9.

[57] This applies to both the Arbitration Agreement in October, 2001, and the revision to the Arbitration Agreement in February, 2005.

8. Alaska Law Would Govern Absent a Choice of Law Provision.

Missouri had a more significant than Alaska relationship with the parties' contract *formation* but Hudson's later performance and breach of the contract is a separate issue.

Hudson's UTPA claim stems from events that took place between plaintiff and defendants in Alaska. The parties entered the Arbitration Agreement in Missouri in 2001. Hudson performed the contract in both Missouri and Alaska. When she breached the contract, Citi sued her for the breach in Alaska rather than South Dakota state court or Missouri state court. Hudson's UTPA claims stem from an attorney fee award to the Alaska law firm that Citi hired to collect her debt. Citi's actions recognize that its contractual relationship with Hudson shifted from Missouri to Alaska. In the absence of a choice of law provision, Alaska law would apply. Following the Restatement (Second) of Conflict of Laws § 187 analysis, the court will depart from the parties' choice of law agreement if Alaska has a materially greater interest in the issue of compelled arbitration of UTPA claims and if South Dakota law is contrary to Alaska public policy on this issue.

9. Alaska Has a Materially Greater Interest in the Current Dispute.

Alaska has a materially greater interest than South Dakota in the question of whether and to what extent Citi may compel arbitration of UTPA claims.

Citi argues that South Dakota has a greater interest than Alaska in Hudson's claim because South Dakota "has a compelling interest in applying its law to businesses operating within its borders, as well as protecting consumers in all 50 states."[58] South Dakota law agrees with this proposition.[59] Citi also cites Supreme Court precedent holding that federal law allows a national bank to apply its home state's loan interest rates to customers who reside in states with a lower interest rate cap.[60] However, these cases are not directly on point because they address a narrower issue in which a federal statute preempted state law.

Citi also argues that the federal preemption standards for national banks support its position,[61] but these standards do not address a conflict between two *states'* laws.[62] Finally, Citi does not explain why it has a responsibility to protect consumers nationwide or how the application of South Dakota's relatively weak consumer protection laws would do so.

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[58] Citi's Reply, at 9.

[59] *Id. citing* S.D. CODIFIED LAWS § 51A-12-12.

[60] *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 308 (1978); *Smiley v. Citibank*, 11 Cal. 4th 138, 164 (Cal. 1995), *aff'd*, 517 U.S. 735 (1996).

[61] Citi's Reply, at 9.

[62] *See* 12 C.F.R. § 7.4008. Further, it is not clear that the regulations would preempt the UTPA. *See* 12 C.F.R. § 7.4008(e).

Alaska has a strong interest in protecting its resident consumers. For instance, the Alaska Supreme Court has found that Alaska has a greater interest in protecting its residents from negligent torts of a nonresident corporation than the corporation's home state has in protecting the corporation's contract rights.[63] Hudson does not allege *negligence*, but persuasive authority supports the more general proposition that a state has a greater interest in ensuring its residents' ability to hold an out of state company responsible for unlawful conduct than the company's home state has in ensuring that the company follows only one set of laws.[64] Further, the Restatement commentary cautions courts to carefully scrutinize choice of law provisions in adhesion contacts (such as the Agreement) and to consider whether they "would result in substantial injustice to the adherent."[65] The court finds that Alaska has a materially greater interest than

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[63] Pl.'s Reply at 14, *citing Long v. Holland America Line Westours, Inc.*, 26 P.3d 430, 434 (Alaska 2001).

[64] *See Oestreicher v. Alienware Corp.*, 322 Fed.Appx. 489, 491 (9th Cir. 2009) ("[Plaintiff] . . . 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."); *Feeney v. Dell Inc.*, 908 N.E.2d 753, 767 (Mass. 2009) (". . .[T]he protection of large classes of consumers and the deterring of corporate wrongdoing—is materially greater than Texas's interest, which the defendants identify as 'minimizing its companies' legal expense.'"); *cf. Wood v. Palisades Collection, LLC*, 2010 WL 2950323, at *6 (D.N.J. 2010).

[65] RESTATEMENT (SECOND) CONFLICT OF LAWS § 187, cmt. b.

South Dakota in the question of whether Citi may compel arbitration of Hudson's UTPA claims.

10. Alaska Has a Fundamental Policy that Consumers Have Remedies Under the UTPA.

South Dakota and Alaska have fundamentally different consumer protection laws. Though the court would not "apply" South Dakota consumer protection statutes to plaintiff's UTPA claim, the court looks to these statutes to determine 1) whether South Dakota's consumer protection policy fundamentally differs from Alaska's; and 2) whether the difference is so substantial that that evaluating a motion to compel arbitration of Hudson's UTPA claims under South Dakota law would frustrate fundamental Alaska policy. It does, and it would. Alaska law *guarantees* Hudson the right to request public injunctive relief on a private attorney general claim. South Dakota does not. Applying South Dakota law to the pending motions would mute the importance Alaska places on the availability of this remedy. The court further explains the states' policy differences below.

Alaska's consumer protection policies are substantially stronger than South Dakota's. Alaska's UTPA prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce."[66] Alaska case

[66] ALASKA STAT. § 45.50.471(a).

law further explains how a practice may be unlawfully unfair even if not deceptive.[67] South Dakota's analogous consumer protection statute[68] prohibits only *deceptive* acts or practices, and only when a defendant acts "knowingly and intentionally."[69] South Dakota case law confirms this limitation. In *Nygaard v. Sioux Valley Hospitals & Health System*, the South Dakota Supreme Court held that a plaintiff's alleged deceptive trade practices act violation did not state a claim in part because the "pleading simply allege[d] unfairness . . . This type of allegation does not fall within the deceptive practices prohibited by the Act."[70]

Alaska's UTPA prohibits a *non-exhaustive* list of 55 acts.[71] South Dakota's list of prohibited acts is narrower and *exclusive*.[72] Alaska allows a prevailing plaintiff to recover full costs and attorney fees,[73] treble damages, and a minimum

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[67] *State v. O'Neill Investigations*, 609 P.2d 520, 535 (Alaska 1980).

[68] S.D. CODIFIED LAWS §§ 37-24-1 *et seq.* (Deceptive Trade Practices and Consumer Protection).

[69] S.D. CODIFIED LAWS § 37-24-6. There is an exception to this standard of proof for claims the state brings but not for private actions. *Id.* at § 37-24-8.

[70] 731 N.W.2d 184, 197 (S.D. 2007).

[71] ALASKA STAT. § 45.50.471(b).

[72] S.D. CODIFIED LAWS §§ 37-24-6; 37-24-7 ("actions brought pursuant to this chapter shall relate exclusively to practices declared to be unlawful by § 37-24-6.").

[73] ALASKA STAT § 45.50.537.

recovery of $500.00.[74] South Dakota limits recovery for violations to "actual damages suffered."[75] Most importantly, Alaska allows private citizens to bring an action for public injunctive relief to enjoin a seller's unlawful actions.[76] South Dakota does not provide this action.[77] Also importantly, Alaska guarantees consumers access to the UTPA's protection; waivers of UTPA provisions are unenforceable and void.[78] South Dakota has no analogous provision.

11. Alaska's Private Attorney General Claim is a Fundamental Policy.

Many states provide for "private attorney general" claims to allow consumers, rather than only the state, the power to identify and enjoin unlawful business conduct. Alaska enacted this provision for a more practical reason as well. Because the Attorney General's consumer protection division did not have sufficient funding to rigorously pursue these claims, the legislature decided to

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[74] ALASKA STAT § 45.50.531(a).

[75] S.D. CODIFIED LAWS § 37-24-31.

[76] ALASKA STAT. § 45.50.535.

[77] *See* S.D. CODIFIED LAWS § 37-24-1 *et seq.* (no action stated); *see also* § 37-24-23 (providing that attorney general can bring action for injunction to enjoin deceptive practice).

[78] ALASKA STAT. § 45.50.542.

empower consumers to help protect themselves and each other by pursuing private attorney general claims under the UTPA.[79]

Providing this claim and ensuring its non-waivability is a fundamental Alaska policy. South Dakota does not have such a claim for consumers. It would offend Alaska policy to decide whether, and in what manner, Citi may compel Hudson to arbitrate her UTPA claim if the court did not consider the importance that Alaska places on private attorney general claims and public injunctive relief. Though *Concepcion* and its progeny make clear that Alaska cannot enforce the provision of a private attorney general claim in a manner that would frustrate arbitration, the court may enforce the provision in a manner that does *not* do so.

Alaska law makes clear that the arbitration agreement cannot deprive Hudson of her ability to obtain public injunctive relief.[80] Though the Arbitration Agreement is valid and enforceable under Alaska law, its restrictions on plaintiff's available awards are unenforceable to the extent that the restrictions extinguish Hudson's opportunity to obtain public injunctive relief. For reasons explained in section IV.F.3 the court finds that *Concepcion* does not preclude this conclusion.

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[79] Pl.'s Response to Ct's Mar. 1, 2012, Order (Mar. 19, 2012) [hereafter Pl.'s Supp.], App. A, Alaska State Legislature House Judiciary Committee Meeting, (Feb 9, 1998), at 3, 5, 8–9, 34–37, 46–47.

[80] ALASKA STAT. § 45.50.542.

12. Enforceability of Arbitration Agreements in Alaska.

Under the FAA, the court must enforce a valid arbitration agreement that encompasses a party's claim. Alaska, like most states, favors arbitration because it is flexible and "a relatively inexpensive and expeditious method of dispute resolution."[81] That said, an arbitral forum must preserve a party's substantive rights and allow the party to "effectively . . . vindicate [his or her] statutory cause of action,"[82] though this does not mean, categorically, that a party cannot waive statutory remedies in an arbitration agreement.[83]

More specifically, the Alaska Supreme Court quoted approvingly from a D.C. Circuit case that listed the following requirements for arbitral resolution of statutory claims: "The arbitration agreement must (1) provide for neutral

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[81] *Barnica v. Kenai Peninsula Borough School Dist.*, 46 P.3d 974, 978 (Alaska 2002) *citing Department of Pub. Safety v. Public Safety Employees Ass'n,* 732 P.2d 1090, 1093 (Alaska 1987) (quoting *Univ. of Alaska v. Modern Constr., Inc.,* 522 P.2d 1132, 1138 (Alaska 1974)).

[82] *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1095-96 (Alaska 2009), *citing Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20, 26–28 (1991) *quoting Mitsubishi Motors Corp. v. Saler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). There is dispute as to whether *Gilmer* and *Mitsubishi* apply to state as well as federal statutes. *See Coneff v. AT&T Corp.*, 2012 WL 887589, at n.2 (9th Cir. March 16, 2012) (citing conflicting cases). The Alaska Supreme Court appears to apply these cases to state statutory rights. *See Gibson*, 205 P.3d at 1095; *see also Barnica*, 43 P.3d at 979–80 (adopting *Gilmer* for analysis of state statutory rights).

[83] *Gilmer*, 500 U.S. at 32.

arbitrators, (2) provide for 'more than minimal discovery,' (3) require a written award, (4) provide for all 'types of relief that would otherwise be available in court,' and (5) 'not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.'"[84] Though plaintiff argues repeatedly that the Arbitration Agreement frustrates the fourth condition, as noted elsewhere herein, this court finds no frustration of that condition. Plaintiff has not attacked the other requirements for arbitral resolution of plaintiff's UTPA claim.

13. Arbitration Agreement is Enforceable under Alaska Law.

The Arbitration Agreement is enforceable under Alaska law and Hudson must pursue her UTPA claims in an arbitral forum. The parties validly formed the Arbitration Agreement under South Dakota law and the Agreement encompasses Hudson's claims.

The Arbitration Agreement is broad and applies to "[a]ll Claims relating to [the] account . . . or [Citi and Hudson's] relationship . . . . no matter what legal theory they are based on or what remedy (damages or injunctive or declaratory relief) they seek . . . ."[85] Hudson's claim is based on Citi's previous suit for her

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[84] *Gibson*, 205 P.3d at 1100, *citing Cole v. Burns Internat'l Security Serv.* 105 F.3d 1465, 1482 (D.C. Cir. 1997).

[85] Walters Aff., Exhibit 2.

breach of the credit card agreement. This is related to Citi's attempt to collect payment on the account.[86] Hudson must arbitrate her claim for damages under AS 45.50.531(a).

Hudson alleges that the Agreement extinguishes her right to pursue a class action and her right to effectively vindicate her private attorney general claim.[87] For reasons explained below, these issues do not render the Agreement unenforceable. Summarily, the Agreement's class action waiver is valid under *Concepcion* and Hudson can effectively vindicate her private attorney general claim in an arbitral forum. Hudson may not pursue class-wide arbitration and must arbitrate her private attorney general claim.

F. The Effect of Federal Law.

1. Class Action Waiver is Valid under *Concepcion*.

Hudson brings her claim on her own behalf and also on behalf of a putative class under Alaska R. Civ. P. 23. Other Alaska consumers from whom Citi collected allegedly unlawful attorney fees after July 15, 2009, comprise the putative class.

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[86] *See* ALO's Joinder in Mot. to Compel Arbitration, at 7 (Sep. 6, 2011), *citing, e.g., Koch v. Compucredit Corp.*, 543 F.3d 460, 466 (8th Cir. 2008).

[87] Hudson does not allege that the arbitrator will not be neutral or that she will have insufficient discovery or be subject to unreasonable costs.

The parties' Arbitration Agreement waives Hudson's right to pursue or participate in a class action. In *Concepcion*, the Supreme Court found that the FAA preempted a state rule that invalidated class action waivers in arbitration agreements. Though UTPA allows a party to pursue private or class actions,[88] *Concepcion* directs that the court may not force Citi into class-wide arbitration when the consumer claimant has waived that right. A finding that the class action waiver rendered the Agreement unenforceable would similarly frustrate the FAA. Under *Concepcion*, the class action waiver in Citi and Hudson's Arbitration Agreement is valid and enforceable. For reasons explained below, Hudson's private attorney general claim is a more complicated matter.

2. The FAA's Effect on a Right to Litigate UTPA Claims.

The UTPA provides that a person may pursue a private attorney general claim "to obtain an injunction prohibiting a seller or lessor from continuing to engage in an act or practice declared unlawful under [UTPA's prohibitions]."[89] If this provision means that the UPTA creates a non-waivable right to *litigate* this claim rather than a non-waivable right to obtain this *relief*, then *Concepcion* and its progeny would preempt the provision.

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[88] ALASKA STAT. § 45.50.531.

[89] ALASKA STAT. § 45.50.535.

Under *Concepcion*, the FAA preempts state law to the extent that it creates an *obstacle* to arbitration agreements. A non-waivable right to litigate private attorney general claims would render some arbitration agreements unenforceable under state law and would frustrate the purposes and objectives of the FAA.

Though the UTPA states that a consumer may bring a "civil action" or "action" to enforce its provisions,[90] the Supreme Court has recently made clear that language like this does not preclude enforcement of an arbitration agreement.[91] The Court explained that while words like "action" and "court" may evoke a "judicial proceeding," this does not create a right to litigate.[92] Such provisions guarantee only "*the legal power to impose liability*" whether in a judicial forum or an arbitral forum subject to judicial review.[93] Though words like "sue" may appear to refer to a right to sue a party in court, the Supreme Court concluded that lawmakers use words like this "to describe the law to consumers in a manner that is concise and comprehensible to the layman."[94] Accordingly, informing consumers of a "right to sue" is an effective "colloquial" way to convey

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[90] ALASKA STAT. §§ 45.50.531, .535.

[91] *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 670–71 (2012).

[92] *Id.*

[93] *Id.* at 672 (emphasis in original).

[94] *Id.*

that consumers have a legally enforceable right "to recover damages," even if a "suit in court has to be preceded by an arbitration proceeding."[95] Applied to this case, *CompuCredit* makes clear that the court cannot find a right to litigate UTPA claims based on UTPA's reference to bringing an "action" or "civil action." The court next addresses, more specifically, waiver of private attorney general claims.

The parties' initial briefing cited conflicting California district court cases addressing *Concepcion*'s effect on state rules that prohibit arbitration agreements from waiving a persons' right to litigate a private attorney general claim. The Ninth Circuit has since resolved its internal division and held that *Concepcion* invalidates these rules. Though the Ninth Circuit does not bind Alaska state courts, its reasoning is persuasive and this court agrees that under *Concepcion*, the FAA *would* preempt a right to litigate UTPA private attorney general claims, if the UTPA created this right.

Plaintiff's reply pointed to *In Re DirectTV Early Cancellation Fee Marketing & Sales Prac. Litig.* and *Ferguson v. Corinthian Colleges* as cases harmonizing *Concepcion* with the remaining limits on the enforceability of arbitration contracts.[96] The Ninth Circuit has since reversed these two cases. In *In*

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[95] *Id.*

[96] *See* Pl.'s Reply at 18–19, *citing Ferguson v. Corinthian Colleges*, 2011 WL 4852339 (C.D. Cal. Oct. 6, 2011) and *In Re DirectTV Early Cancellation Fee Marketing & Sales Prac. Litig.*, 2011 WL 4090774 (C.D. Cal. Sep. 6, 2011).

Re DirectTV, the Central District of California found that even post-*Concepcion*, arbitration was not an appropriate forum to resolve private attorney general claims seeking public injunctive relief under the California Consumer Relations Act (CLRA) and that the FAA did not preempt a decisional rule that guaranteed this right.[97] Hudson argues that the UTPA creates the same, un-preempted right. In the time between Hudson's initial reply memoranda and her supplemental brief, though, the Ninth Circuit pulled this support from under her.

a. ***Kilgore v. KeyBank.***

In *Kilgore v. KeyBank*, the Ninth Circuit addressed whether an arbitration agreement could validly waive a party's right to pursue a claim for public injunctive relief.[98] It reversed the district court decisions noted above and found that *Concepcion* extends to invalidate state rules that prohibit waiver of the right to litigate claims seeking public injunctive relief because these rules, like the *Discover Bank* rule, frustrate the FAA.

In *Kilgore*, the plaintiff students alleged that defendants, KeyBank, N.A. and a loan servicing center ("KeyBank"), violated California's Unfair Competition Law (UCL) by aggressively and deceptively enticing students to take out

[97] 2011 WL 4090774, at *10 (C.D. Cal. Sep. 6, 2011).

[98] 2012 WL 718344 (9th Cir. Mar. 7, 2012).

KeyBank loans to finance helicopter school tuition.[99] The loan contracts had mandatory arbitration clauses that encompassed all claims, waived class action participation, and notified plaintiffs that they may lose "certain rights" available in court.[100]

The students sought to enjoin KeyBank from, among other things, "engaging in false and deceptive acts and practices" with respect to consumer credit contracts involving purchase money loans."[101] At that time, California state courts followed a decisional rule that arbitration agreements could not prohibit parties from pursuing claims for public injunctive relief (the "*Broughton-Cruz* rule")[102] because the purpose of such claims was not simply to redress an individual but to stop a defendant's unlawful conduct and protect the public in the future.[103] Under the *Broughton-Cruz* rule, an arbitration agreement was unenforceable if it attempted to waive these claims.

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[99] *Id.* at *1.

[100] *Id.* at *2.

[101] *Id.* at *3.

[102] *Id.* at *1, *citing Broughton v. Cigna Healthplans of California,* 988 P.2d 67 (Calif. 1999); *Cruz v. PacifiCare Health Systems, Inc.,* 66 P.3d 1157 (Calif. 2003).

[103] *Id.* at *7.

The *Kilgore* court found, with some difficulty, that the FAA preempted the *Broughton-Cruz* rule. In *Concepcion* the Supreme Court had reversed the Ninth Circuit and made clear that the FAA preempts, broadly, any state law that creates an obstacle to arbitration and, as the *Kilgore* court emphasized repeatedly: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[104]

With this redirection, the Ninth Circuit turned to the *Broughton-Cruz* rule.[105] It noted the district courts' split of authority. Some district courts maintained that the *Broughton-Cruz* rule survived *Concepcion* because the rule does not "'outright' . . . prohibit arbitration of all injunctive relief claims, but only those 'brought on behalf of the general public.'"[106] Other districts found the rule invalid because the FAA preempts state rules that impede arbitration, "notwithstanding 'public policy arguments'" to the contrary.[107]

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[104] *Id.* at *7, *10 *citing Concepcion* at 1753.

[105] *Id.*

[106] *Id.* at *9, *quoting In re Direct TV*, at *10; see also *Corinthian*, at *9.

[107] *Id.* at *9, *quoting Nelson v. AT & T Mobility LLC*, 2011 WL 3651153, at *2 (N.D. Cal. Aug. 18, 2011).

With palpable reluctance, the Ninth Circuit abandoned the *Broughton-Cruz* rule. "We are not blind to the concerns engendered by our holding today," it stated:

> It may be that enforcing arbitration agreements even when the plaintiff is requesting public injunctive relief will reduce the effectiveness of state laws like the UCL. It may be that FAA preemption in this case will run contrary to a state's decision that arbitration is not as conducive to broad injunctive relief claims as the judicial forum. And it may be that state legislatures will find their purposes frustrated. These concerns, however, cannot justify departing from the appropriate preemption analysis as set forth by the Supreme Court in *Concepcion*.[108]

Plaintiff notes that the Ninth Circuit is not the most accurate bellwether for Supreme Court direction. She refers, apparently, to its liberal decisions' low survival rate.[109] But in *Kilgore*, the Ninth Circuit took pains to *follow* Supreme Court precedent.[110]

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[108] *Id.* at *10. The *Kilgore* court also explained that "the motivation of state legislators" is not relevant to the preemption analysis because only federal, not state, statutes may "preclude[] waiver of the right to a judicial forum," but this statement's relevancy to Alaska law is unclear because it relates back to the question of whether *Mitsubishi* and *Gilmer* apply to state statutes—the Ninth Circuit believes they do *not*. *See id.* at *11–*12.

[109] Pl's Combined Reply to Def.'s Supp. Briefs Re: Arbitration, at 5 (Mar. 29, 2012) *citing* Carol J. Williams, *U.S. Supreme Court Again Rejects Most Decisions By the U.S. 9th Circuit Court of Appeals*, L.A. TIMES (July 18, 2011), *available at* http://articles.latimes.com/2011/jul/18/local/la-me-ninth-circuit-scorecard-20110718.

[110] *See Kilgore*, 2012 WL 718344, at * 8.

b. The FAA Would Preempt a Right to Litigate UTPA Claims.

The *Concepcion* decision and its progeny (particularly *Kilgore*) suggest that if the UTPA creates a right to litigate private attorney general claims, as Hudson argues it does, the FAA would preempt this law.

Plaintiff argues that the FAA does not preempt a right to litigate UTPA claims because this right to litigate would not apply only to arbitration or derive its "meaning from the fact that an agreement to arbitrate is at issue."[111] To read *Concepcion* this broadly, she argues, "writes the savings clause of the FAA completely out of existence."[112] But *Concepcion* and its progeny suggest that court *must* take a narrow interpretation of the § 2 savings clause because *Concepcion* instructs courts to consider whether a state law would tend to impede arbitration agreements, even if the state did not intend the law to do so.[113]

Plaintiff argues that her case is distinguishable from decisions invalidating state rules that "prohibit[] outright the arbitration of a particular type of claim."[114] Here, a guarantee that consumers may litigate UTPA claims would not on its face

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[111] Pl's Supp., at 7.

[112] *Id.*

[113] *Concepcion*, 131 S.Ct at 1747.

[114] Pl.'s Supp., at 8, *quoting Marmet*, 132 S.Ct at 1747.

frustrate arbitration agreements, but it would frustrate them nonetheless by exposing parties to litigation after they have contracted out of that exposure.

The Ninth Circuit looked to recent Supreme Court edicts on FAA preemption and invalidated a state law rule that rendered arbitration agreements unenforceable if the agreements waived the right to litigate private attorney general claims. Ninth Circuit decisions do not bind Alaska courts, but do provide persuasive authority.[115] The *Kilgore* decision persuades this court that the FAA would preempt the UTPA's anti-waiver provision if that provision created a right to litigate the claim. The court finds instead that the UTPA creates a right to pursue the public injunctive *relief* and that Hudson must pursue this relief in an arbitral forum. For reasons explained in section IV.F.3, *Concepcion* does not preclude this conclusion.

3. Hudson May Receive Public Injunctive Relief in an Arbitral Forum.

Citi emphasizes repeatedly that the arbitration agreement does not prevent Husdon from vindicating her statutory rights. Instead, it says, she retains "the substantive rights afforded by the statute [but] submits to their resolution in an

[115] *E.g.*, *Totemoff v. State*, 905 P.2d 954, 963 (Alaska 1995) ("[T]his court is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law."); *see also Heffle v. State*, 633 P.2d 264, 272 (Alaska 1981) (explaining that federal decisions interpreting federal statutes are persuasive authority).

arbitral . . . forum."[116] It *also* states that she is "free . . . to pursue all the same remedies (including injunctive relief) she would have in court—albeit on an individual basis."[117] Citi is correct only if Hudson is able to obtain public injunctive relief in an arbitral forum. For reasons explained below, the court finds that she is.

The UTPA provides in AS 45.50.535 that a person may pursue a private attorney general claim "to obtain an injunction prohibiting a seller or lessor from continuing to engage in an act or practice declared unlawful under AS 45.50.471." Further, UTPA provides in AS 45.50.542 that "[a] waiver by a consumer of the provisions of AS 45.50.471 – 45.50.561 is contrary to public policy and is unenforceable and void." These provisions mean that Alaska law will not recognize an agreement to give up public injunctive relief as a possible remedy, *regardless* of the claim's forum. If Hudson prevailed in court, she would be able to obtain injunctive relief enjoining Citi's unlawful actions and an injunction of this nature would have a broad impact for consumers.

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[116] Citi's Reply, at 13, *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 728 (1985).

[117] Citi's Reply, at 13.

Citi claims that that the Arbitration Agreement does not "'prohibit[] [Hudson] from seeking injunctive relief on her UTPA claim."[118] But several provisions of the Agreement evince this intent.[119] The Agreement states that, "Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative), basis, and the arbitrator may award relief only on an individual non-class, non-representative basis." It states that the arbitration award "shall determine the rights and obligations between the named parties only and only in respect of the Claims in arbitration, and shall not have any bearing on the rights and obligations of any other person, or on the resolution of any other dispute." Finally, it restricts the arbitrator from awarding relief "for or against anyone who is not a party" and states that "neither you, we, nor any other person may pursue the Claim in arbitration as a class action, private attorney general action or other representative action, nor may such claim be pursued on your or our behalf in any litigation in any court." The arbitration agreement clearly intends to limit plaintiff's remedies by foreclosing the type of injunctive relief that she could obtain in court under AS 45.50.535.

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[118] Citi's Reply, at 12.

[119] Walters Aff., Exhibit 2.

Though the Arbitration Agreement is enforceable to require Hudson to arbitrate her claim for public injunctive relief, it is *not* enforceable to the extent that it extinguishes her effective relief on the claim. As plaintiff points out, the Alaska Supreme Court has stated the arbitral forum must allow a claimant to effectively vindicate substantive statutory rights.[120] Defendants contend that the Arbitration Agreement does not deprive plaintiff of any rights available under Alaska law because she may pursue these claims in arbitration. Defendants do not explain how the Agreement preserves plaintiff's right to public injunctive relief if the Agreement permits the arbitrator to award only individual relief.

a. This Case Differs From Both *Concepcion* and *Kilgore*.

In *Concepcion*, the Supreme Court held that California could not force a party to participate in class-wide arbitration because class actions entail numerous, onerous requirements that interfere with the purpose of arbitration of providing fast, efficient, and relatively inexpensive dispute resolution.

The *Concepcion* Court considered that California's rule against class action waivers, in effect, allowed virtually any consumer law claimant to demand class-wide arbitration.[121] It found that imposing class, rather than bilateral, arbitration

[120] Pl.'s Memo., at 13–14, *citing Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1100 (Alaska 2009).

[121] *Concepcion*, 131 S.Ct at 1750.