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 Case No. S-14740
Trial Court No. 3AN-11-09196 CI

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 Case No. S-14826
Trial Court No. 3AN-11-12054 CI

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

BRIEF OF RESPONDENTS CITIBANK (SOUTH DAKOTA), N.A.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

STATUTES AND REGULATIONS RELIED ON

FEDERAL STATUTES:

Federal Arbitration Act

9 U.S.C. § 2 – Validity, irrevocability, and enforcement of agreements to arbitrate
A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATE STATUTES & RULES:

Alaska Unfair Trade Practices Act:

AS § 45.50.471 – Alaska Unfair Trade Practices and Consumer Protection Act

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful.

AS § 45.50.535 – Private Injunctive Relief

(a) Subject to (b) of this section and in addition to any right to bring an action under AS 45.50.531 or other law, any person who was the victim of the unlawful act, whether or not the person suffered actual damages, may bring an action 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

AS § 45.50.542 – Provisions not waivable

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.

AS 22.05.010 Jurisdiction.

(a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.
(b) Appeal to the supreme court is a matter of right only in those actions and proceedings from which there is no right of appeal to the court of appeals under AS 22.07.020 or to the superior court under AS 22.10.020 or AS 22.15.240 .
(c) A decision of the superior court on an appeal from an administrative agency decision may be appealed to the supreme court as a matter of right.

(d) The supreme court may in its discretion review a final decision of the court of appeals on application of a party under AS 22.07.030. The supreme court may in its discretion review a final decision of the superior court on an appeal of a civil case commenced in the district court. In this subsection, "final decision" means a decision or order, other than a dismissal by consent of all parties, that closes a matter in the court of appeals or the superior court, as applicable.

(e) The supreme court may issue injunctions, writs, and all other process necessary to the complete exercise of its jurisdiction.

A. **Alaska R. App. P. 402** Petitions for Review of Non-appealable Orders or Decisions.

(a) When Available.

(1) An aggrieved party, including the State of Alaska, may petition the appellate court as provided in Rule 403 to review any order or decision of the trial court, not appeal-able under Rule 202, and not subject to a petition for hearing under Rule 302, in any action or proceeding, civil or criminal. In addition, a defendant may petition the supreme court as provided in Rule 403(h) to review an unsuspended sentence of imprisonment which is not appealable under Appellate Rule 215(a)(1), and a victim as defined in AS 12.55.185 may petition the court of appeals as provided in Rule 403(i) to review an unsuspended sentence of imprisonment that is below the applicable presumptive sentencing range.

(2) A petition for review shall be directed to the appellate court which would have jurisdiction over an appeal from the final judgment of the trial court in the action or proceeding in which it arises.

(b) When Granted. Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed because:

Alaska Rules of Civil Procedure

Rule 82 – Attorney's Fees

(a) Allowance to Prevailing Party. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) Amount of Award.

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgment and, if awarded, Prejudgment Interest	Contested With Trial	Contested Without Trial	Non-Contested
First $25,000	20%	18%	10%
Next $75,000	10%	8%	3%
Next $400,000	10%	6%	2%
Over $500,000	10%	2%	1%

[(b)(2), (3) omitted]

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

California Business & Professions Code § 17204. Actions for Injunctions by Attorney General, District Attorney, County Counsel, and City Attorneys

Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or by a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association, or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.

California Civil Code § 1751

Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.

California Civil Code § 1781(a)

Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.

JURISDICTIONAL STATEMENT

Jurisdiction is proper pursuant to AS 22.05.010 and Alaska Rule of Appellate Procedure 402.

STATEMENT OF THE CASE

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Instant Action

Plaintiff Janet Hudson ("Hudson") maintains that defendant/appellee Citibank, N.A. ("Citibank") violated Alaska law based on allegations that Citibank's outside counsel[1] charged an excessive fee in connection with a default judgment on a delinquent credit card account.[2] The claims asserted in this case, which are brought on a putative class basis, are separate and apart from the claims asserted in the default judgment case because they do not turn on whether Hudson is liable for the balance owing on the Account (which Hudson concedes).[3] Rather, the dispute in this case is whether the conduct of Citibank's counsel in connection with that prior lawsuit (which Hudson is

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[1] Citibank's counsel was the Alaska Law Offices, Inc. ("ALO") and Clayton Walker ("Walker").

[2] The prior collection case was filed in the Kenai District Court, State of Alaska (case no. 3KN-10-01139CI) (the "Collection Action").

[3] In February 2010, ALO and Walker filed the Collection Action to recover $24,170.20 Hudson owed Citibank on her delinquent Account. [Exc. 2-3.] Hudson did not respond or object to the amount owed, and Citibank obtained a default judgment against Hudson. [*Id.*] Citibank was awarded the full amount owed on the Account; Citibank requested $4,834.05 in attorneys' fees, but was awarded $2,417.02 in fees under Alaska R. Civ. P. 82 (i.e., 10% of the default judgment amount). [*Id.* 3.]

imputing to Citibank) violates Alaska's Unfair Trade Practices and Consumer Protection Act ("UTPA"), AS 45.50.471, *et seq.*[4] [*Id.*]

Because Hudson sued Citibank in a completely separate lawsuit, Citibank elected to arbitrate Hudson's claims on an individual basis pursuant to the arbitration agreement contained in the Card Agreement governing Hudson's Account. As discussed below, the trial court granted Citibank's Motion to Compel Arbitration and Stay the Action. Hudson, however, continues to maintain that, unlike the numerous other jurisdictions where Citibank's arbitration agreement has been enforced (see pp. 11-12 below), Citibank's arbitration agreement supposedly is not enforceable in Alaska. As discussed below, Hudson is wrong, and Citibank's arbitration agreement should be enforced in accordance with the Federal Arbitration Act ("FAA") and U.S. Supreme Court precedent.

B. <u>The Account & The Binding Arbitration Agreement</u>

In April 1999, Hudson was issued a Citibank credit card account ("Account"). *[Id.* 14.] Like other credit card accounts, the Account is subject to written terms and conditions contained in a written credit card agreement (the "Card Agreement"), as amended from time to time. [Exc. 14.] The Card Agreement provides that "the terms and enforcement of this agreement shall be governed by federal law and the law of South Dakota, where we are located." [Exc. 457.] In addition, the Card Agreement expressly

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[4] Hudson's "Statement of the Case" sets forth a legal discussion and argument of the merits of her underlying claims under the guise of "Factual and Procedural Background." *See* Opening Brief at 2-7. Of course, the merits of Hudson's claims are irrelevant. *See AT&T Tech., Inc. v. Comm'n Workers of Am.*, 475 U.S. 643, 649-50 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims").

authorizes Citibank to change the terms of the Agreement, which changes are binding on the cardmembers. [*Id.*]

In October 2001, Citibank mailed to cardmembers, including Hudson (who at the time lived in Missouri), a "Notice of Change in Terms Regarding Binding Arbitration to Your Citibank Card Agreement" (the "Arbitration Change-in-Terms") with Hudson's October 2001 periodic statement for the Account. [Exc. 447-52, 460-63.] The Arbitration Change-in-Terms added the Arbitration Agreement to the Card Agreement. [*Id.*] The Arbitration Agreement provides that either party can elect mandatory binding arbitration as follows:

> **ARBITRATION**
>
> **PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.**
>
> **Agreement to Arbitrate:**
>
> Either you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called "Claims").
>
> ***Claims Covered***
>
> • **What Claims are subject to arbitration?** All Claims relating to your account, a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; Claims made as counterclaims, cross-claims, third-

party claims, interpleaders or otherwise; and Claims made independently or with other claims. A party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party. 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.

• **Whose Claims are subject to arbitration?** Not only ours and yours, but also Claims made by or against anyone connected with us or you or claiming through us or you, such as a co-applicant, authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir assignee, or trustee in bankruptcy.

* * *

• **Broadest Interpretation.** Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").

* * *

• **How does a party initiate arbitration?** . . . 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. Even if a party fails to exercise those rights at any particular time, or in connection with any particular Claims, that party can still require arbitration at a later time or in connection with any other Claims.

* * *

• **Who can be a party?** Claims must be brought in the name of an individual party or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party. If you or we require arbitration of a Claim, 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. . . .

[Exc. 19-20, 460-61 (bolding in original, underlining added).] As noted above, the Arbitration Agreement includes specific language (underlined above) that requires that: (i) any arbitration may resolve only individual claims; (ii) counterclaims and claims made

independently of other claims are subject to arbitration; and (iii) any party may seek to compel arbitration of claims at any time. [*Id.*]

When Citibank mailed the Arbitration Change-in-Terms, Citibank alerted Hudson to the Arbitration Agreement by including a special message (in all capital letters) on Hudson's October 2001 billing statement for the Account. [Exc. 463.] Citibank followed up with another special message (again in all caps) printed on Hudson's November 2001 billing statement, again alerting her to the Arbitration Change-in-Terms. [Exc. 468.] Contrary to Hudson's characterization of the facts, Citibank did not "unilaterally" add the Arbitration Agreement. Instead, and critically, the Arbitration Change-in-Terms gave Hudson – like all other recipients of the Arbitration Change-in-Terms – the opportunity to opt out of, and reject, the Arbitration Agreement and to continue to use the Account. [App. 460.] Specifically, had Hudson elected not to accept the Arbitration Agreement, she was entitled to "continue to use [her] card(s) under [her] existing terms until the end of [her] current membership year or the expiration date on [her] card(s), whichever is later. At that time, [her] account will be closed and [she] will be able to pay off [her] remaining balance under [her] existing terms." [Exc. 449-452, 460.]

Hudson did not opt out and, instead, continued to use her Account after the Arbitration Change-in-Terms became effective. [Exc. 449-452.] In February 2005, Citibank mailed another change-in-terms notice, which further advised Hudson of additional amendments to the Arbitration Agreement, including the removal of one of the arbitration firms and revising the severability clause. [Exc. 451-52, 473-77.] Hudson also had the opportunity to opt out of these changes, but did not do so; instead, she

continued using the Account. [*Id.*] Finally, in June 2005, Citibank mailed Hudson a complete copy of the Card Agreement, which included the Arbitration Agreement. [Exc. 451-52, 479-86.]

C. Citibank's Motion To Compel Arbitration

On August 24, 2011, Citibank filed the Motion to Compel Arbitration in response to Hudson's First Amended Complaint. [Exc. 10.] In support of the Motion, Citibank submitted the Declaration of Cathleen A. Walters, attaching the Arbitration Agreement. [Exc. 421-87.] Citibank argued that the Arbitration Agreement was valid and enforceable under South Dakota law (pursuant to the choice-of-law provision in the Card Agreement) and the FAA. [*Id.*] Citibank further argued that, under the FAA and the United States Supreme Court's seminal decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (Apr. 27, 2011) ("*Concepcion*"), the Arbitration Agreement must be enforced as written and Hudson must arbitrate all claims on an individual (i.e., non-class, non-representative) basis. [*Id.*] Hudson opposed the Motion, arguing that Citibank waived its right to arbitrate by filing the Collection Action and the Arbitration Agreement was unconscionable and unenforceable because, among other things, the Arbitration Agreement precluded her from pursuing a class action (through the inclusion of a "class action waiver") and from effectively vindicating her rights under the UTPA to pursue non-party, statewide public injunctive relief. [Exc. 39.] Hudson also simultaneously moved for summary judgment, arguing that she is entitled to summary judgment for the same reasons that the Motion should be denied. [*Id.*]

On April 30, 2012, the Superior Court for the Third Judicial District at Anchorage, the Honorable Frank A. Pfiffner, presiding (the "Trial Court"), issued a (64-page) Order, granting the Motion and compelling arbitration of Hudson's claims. [Exc. 205.] Among other things, the Trial Court held that, under South Dakota law (which applied pursuant to the change-in-terms provision in the Card Agreement), Citibank's addition of the Arbitration Agreement to the Card Agreement is valid.[5] [Exc. 219.] The Trial Court further held that the Arbitration Agreement also is valid and enforceable under Alaska law. [*Id.*]

Finally, while the Trial Court found the class action waiver in the Arbitration Agreement valid under *Concepcion*, the Trial Court simultaneously held invalid that portion of the Arbitration Agreement that might be construed to restrict Hudson from pursuing injunctive relief under UTPA on behalf of the general public. [Exc. 267.] The Trial Court ordered Hudson to "proceed in arbitration individually" and that, despite language in the Arbitration Agreement to the contrary, the arbitrator could issue non-party, statewide injunctive relief on behalf of the general public. [Exc. 267.] The Trial Court also held that Citibank did not waive its right to compel arbitration of Hudson's claims "because the debt collection action against Hudson in Kenai District Court was a separate action in which it had no notice of the claims Hudson now raises." [Exc. 267.] The Trial Court also denied Hudson's cross-motion for summary judgment. [Exc. 267.]

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[5] As discussed below, the issues subject to review are limited and do not include the formation and validity of the Card Agreement and Arbitration Agreement. Thus, that portion of the Order holding the formation of the Arbitration Agreement valid under South Dakota law is not affected by this appeal.

D. The Petition For Review & Issues Presented For Review

On September 17, 2012, this Court granted Hudson's Petition for Review and consolidated Hudson's Petition with the petition for review filed by petitioner Cynthia Stewart. [Exc. 836-38.] The Court granted review as to the following issues: "(a) Whether respondents waived their right to arbitrate petitioners' claims by pursuing their claims in superior court; (b) If so, what is the scope of the waiver; and (c) Whether a private arbitrator has the authority to issue statewide injunctions under the [UTPA]." [*Id.*]

STANDARD OF REVIEW

Because the question of waiver is a question of fact, the Trial Court's ruling on the issue of waiver will "be set aside on review only if it is clearly erroneous." *Blood v. Kenneth Murray Ins., Inc.*, 68 P.3d 1251, 1254 (Alaska 2003) (citing *Miscovich v. Tryck*, 875 P.2d 1293, 1302 (Alaska 1994)). Citing *Airoulofski v. State*, 922 P.2d 889, 894 (Alaska 1996), Hudson argues that a de novo standard of review should be applied to the question of waiver because the Trial Court decided the waiver issue without trial. [Opening Brief 11.] *Airoulofski* is distinguishable because, there, the issue concerned waiver of the right to assert a claim for failure to prosecute, not waiver of the contractual right to arbitrate. *See Airoulofski*, 922 P.2d at 892-93. Unlike *Airoulofski*, *Blood v. Kenneth Murray* did address waiver of the right to arbitrate, and the clearly erroneous standard was applied. *Blood*, 68 P.3d at 1254. Importantly, a finding is "clearly erroneous" only if this Court is "left with 'the definite and firm conviction on the entire

record that a mistake has been committed.'" *Fun Products Distributors, Inc. v. Martens*, 559 P.2d 1054, 1058 (Alaska 1977).

The question of whether the arbitrator is authorized to issue non-party, statewide injunctive relief is subject to de novo review because it concerns whether the UTPA claim is arbitrable under the Arbitration Agreement and FAA. Whether a claim is arbitrable is a question of law subject to de novo review. *See Lexington Marketing Group, Inc. v. Goldbelt Eagle, LLC*, 157 P.3d 470, 472 (Alaska 2007).

SUMMARY OF ARGUMENT & INTRODUCTION

This appeal presents two straightforward questions: (1) was the Trial Court clearly erroneous in finding that Citibank did not waive its right to compel arbitration of Hudson's claims by pursing the Collection Action, and if so, what is the scope of the waiver; and (2) can an arbitrator issue non-party statewide injunctive relief in connection with Hudson's UTPA claims notwithstanding that the Arbitration Agreement requires that arbitration may resolve only individual claims between the parties to the arbitration and not class or representative claims on behalf of the general public. The answer in both instances is no.

First, Citibank did not waive its right to compel arbitration of claims filed *after* the Collection Case was completed. As set forth below, under the FAA, which unquestionably applies here, waiver is disfavored and Hudson "bears a heavy burden of proof" to establish waiver.[6] Most notably, Hudson does not dispute that she completely

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[6] *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986); *see also Blood*, 68 P.3d at 1255 (stating that the "law favors arbitration," "[w]aiver is not to be

failed to appear in the Collection Action and object either to the underlying debt owed to Citibank or its right to collect fees. Hudson fails to cite any authority for the proposition that a party can elect not to defend a claim, wait until *after* a default judgment is entered and then seek to challenge the manner in which the judgment was obtained (as well as the amount of the judgment) by asserting (frivolous) putative class claims in a completely separate action. Similarly, Hudson fails to establish any prejudice. Indeed, before the Trial Court, Hudson made no showing whatsoever regarding prejudice. That a default judgment was entered does not demonstrate prejudice because Hudson does not contest that the debt was owed or that the default was improper. In addition, although there might be a dispute as to the amount of attorneys' fees Citibank would be entitled to recover in a collection arbitration, under the Card Agreement and South Dakota law, Citibank would still be entitled to seek fees. Any dispute regarding the amount of fees goes to the merits of Hudson's claims and it is settled law that the merits of a dispute are irrelevant when assessing whether parties to a contract agreed to arbitrate claims.[7]

Second, with *Concepcion v. Concepcion*, 131 S. Ct. 1740, 1747 (2011), and its progeny, the United States Supreme Court has set a clear mandate –arbitration agreements requiring arbitration on an individual, non-class basis, like the Arbitration Agreement here, must be enforced as written. Under the FAA, as interpreted by the Supreme Court, enforcement of an arbitration agreement cannot be conditioned on requiring either classwide arbitration or class procedures in contravention of the parties'

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lightly inferred" and "courts should resolve doubts concerning whether there has been a waiver in favor of arbitration.").

[7] *AT&T Tech., Inc.*, 475 U.S. at 649-50.

agreement. Indeed, prior to and after *Concepcion*, courts nationwide have enforced the same Citibank Arbitration Agreement at issue here. *See, e.g., Cayanan v. Citi Holdings, Inc.*, --- F.Supp.2d ----, 2013 WL 784662 (S.D. Cal. Mar. 1, 2013); *Coppock v. Citigroup, Inc.*, 2013 WL 1192632 (W.D. Wash. Mar. 22, 2013); *Ackerberg v. Citicorp USA, Inc.*, No. C 12–03484 SI, 2012 WL 4932618 (N.D. Cal. Oct. 16, 2012); *Golba, et al. v. Citigroup, Inc.*, No. SACV 11-01003 AG (ANx) slip op. (C.D. Cal. Mar. 30, 2012); *Daugherty v. Experian Info. Solns., Inc.*, 847 F.Supp. 2d 1189, 1194-97 (N.D. Cal. 2012); *Guerrero v. Equifax Credit Info. Servs., Inc., et al.*, 2012 WL 7683512 (C.D. Cal. Feb. 24, 2012); *Conroy v. Citibank, N.A.*, No. 10-cv-04930-SVW-AJW, 2011 WL 10503532 (C.D. Cal. Jul. 22, 2011); *Yaqub v. Experian Info. Solns., Inc., et al.*, No. CV11-2190-VBF (FFMx), slip op. at 5-6 (C.D. Cal. Jun. 10, 2011); *Hershler v. Citibank (South Dakota), N.A.*, No. 2:08-cv-06363-R-JWJ, slip op. at 3-8 (C.D. Cal. Dec. 19, 2008); *Lowman v. Citibank (South Dakota), N.A.*, CV-05 -8097 RGK, 2006 WL 6108680, at *3-4 (C.D. Cal. Mar. 24, 2006); *Egerton v. Citibank, N.A.*, CVO36907DSF (PLAX), 2004 WL 1057739, at *2 (C.D. Cal. Feb. 18, 2004); *see also Tractenberg v. Citigroup Inc.*, No. CIV.A. 10-3092, 2011 WL 6747429 (E.D. Pa. Dec. 22, 2011); *Taylor v. Citibank USA, N.A.*, 292 F.Supp. 2d 1333 (M.D. Ala. 2003); *Citibank USA v. Howard*, No. 4:02CV64LN, slip op. at 7, 2002 WL 34573997 (S.D. Miss. Aug. 30, 2002); *Ingram v. Citicorp Credit Servs., Inc. (USA)*, No. 05-2095 B/An, 2005 WL 6518077, at *1-2 (W.D. Tenn. July 11, 2005), *mag.* recomm. adopted at 2005 WL 6518076 (W.D. Tenn. Aug. 25, 2005); *Sesto v. Nat'l Fin. Sys., Inc.*, No. 04 C 7768, 2005 WL 6519430, at *3 (N.D. Ill. Apr. 25, 2005); *Barker v. Citibank (South Dakota), N.A.*, No. A:03CA-130JN, 2003 WL

25943008 (W.D. Tex. May 30, 2003); *Dumanis v. Citibank (South Dakota), N.A.*, No. 07-cv-6070 (CJS), 2007 WL 3253975, at *3 (W.D.N.Y. Nov. 2, 2007); *Eaves-Leonos v. Assurant, Inc.*, 3:07-CV-18-S, 2008 WL 80173, at *6-7 (W.D. Ky. Jan. 8, 2008).

Here, the Trial Court did err in authorizing the arbitrator to issue non-party statewide injunctive relief while simultaneously upholding the class action waiver contained in the Arbitration Agreement. In accord with *Concepcion*, such a ruling is preempted by the FAA because it stands as a direct obstacle to the primary purpose of the FAA – enforcing Arbitration Agreements as written. However, reversal of the Order is not necessary because Hudson can still vindicate her claims in arbitration. Namely, she can obtain individual injunctive relief to redress her supposed injuries. To the extent Hudson contends that – based either on public policy or practical reasons – absent class-wide injunctive relief, no individual injunctive relief is sufficient to redress her injury, such a conclusion is preempted by the FAA. Again, *Concepcion* is clear: "States cannot require a procedure that is inconsistent with the FAA, *even if it is desirable for unrelated reasons*." *Concepcion*, 131 S. Ct. at 1753 (emphasis added). The FAA preempts any state law conditioning the enforcement of an arbitration agreement on the availability of class-wide procedures or relief.

Accordingly, the Trial Court's Order should be affirmed, and the matter allowed to proceed to arbitration on an individual basis.

ARGUMENT

I. CITIBANK DID NOT WAIVE ITS RIGHT TO COMPEL ARBITRATION.

A. Under The FAA, The Arbitrator Should Decide The Issue Of Waiver.

It is undisputed that the Arbitration Agreement is governed by the FAA. The Arbitration Agreements clearly states: "This arbitration provision is governed by the Federal Arbitration Act (the "FAA")." [Exc. 19.] Because the Arbitration Agreement is governed by the FAA, federal law applies in determining whether a waiver has occurred. *See Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (concluding that "waiver of the right to compel arbitration is a rule for arbitration, such that the FAA controls" even when the underlying agreement includes a choice of law provision). Thus, any issue regarding waiver should be referred to the arbitrator. Under the FAA, "[a] dispute about a waiver of arbitration may properly be referred to the arbitrator." *ATSA of Cal., Inc. v. Continental Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("[T]he presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'") (citation omitted); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2nd Cir. 2011) ("Both waiver and estoppel generally fall into that latter group of issues presumptively for the arbitrator.").

Accordingly, in the first instance, the waiver issue should be decided by the arbitrator. [8]

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[8] In granting the Motion, and finding that Citibank did not waive the right to compel arbitration, the Trial Court held that the Trial Court, not the arbitrator, should decide the

B. The Trial Court's Order Is Not Clearly Erroneous.

Under the FAA, arbitration waivers "are not favored." *Letizia*, 802 F.2d at 1187. Pursuant to federal law, to prove that a waiver of arbitration exists, a party opposing arbitration "bears a heavy burden of proof" and must demonstrate all of the following: "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Id.*; *accord Sovak*, 280 F.3d at 1270. "Any doubts as to waiver are resolved in favor of arbitration." *Creative Telecomm., Inc. v. Breeden*, 120 F.Supp.2d 1225, 1232 (D. Haw. 1999) ("If there is any ambiguity as to the scope of the waiver, the court must resolve the issue in favor of arbitration."). It is the general rule that, absent a showing a prejudice, a party does not per se waive the right to arbitrate by filing pleadings, including initially filing a lawsuit, in Court. *See, e.g.*, *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 765 (9th Cir. 2002) (holding that party did not waive the right to arbitrate merely by initially filing complaint in state court); *ATSA of Cal., Inc.*, 702 F.2d at 175 (holding that party did not waive right to arbitrate by filing pleadings in response to cross-claims asserted by other party).

Here, Hudson cannot demonstrate any prejudice arising out of Citibank's election to arbitrate her claims. Indeed, before the Trial Court, Hudson made no argument whatsoever regarding prejudice, notwithstanding that she "bears a heavy burden" of

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issue, citing this Court's decision in *Blood v. Kenneth A. Murray Ins., Inc.*, 151 P.3d 428, 430 (Alaska 2006). That decision, however, is distinguishable because it did not involve an arbitration agreement specifically governed by the FAA, like the Arbitration Agreement here.

proving waiver. [Exc. 48-51.] Primarily citing state law cases, including from Alaska, Arizona, Hawaii and Florida, Hudson contends that a showing of prejudice is not necessary because Citibank acted inconsistent with the right to arbitrate by filing the Collection Action.[9] [Opening Brief, at 22-24.] Hudson also contends that, even if prejudice were required, she was prejudiced because Citibank obtained a judgment in the Collection Action and attorneys' fees pursuant to Alaska R. Civ. P. 82 that would not have been obtained had Citibank arbitrated the Collection Action under South Dakota law. Neither ground warrants reversal of the Trial Court's Order.

1. Citibank Did Not Waive Its Right To Arbitrate Hudson's UTPA Claims Filed After Completion Of The Collection Action.

Even assuming that this Court, not the arbitrator, has authority to consider waiver, Citibank's filing of, and the default judgment obtained in, the Collection Action does not manifest an intent by Citibank to arbitrate new and separate claims asserted *after* conclusion of the Collection Action. Indeed, the cases cited by Hudson are inapposite and distinguishable because they pertain to situations where parties seek to arbitrate: (i) claims in *pending* actions, not a *separate* action, as here, initiated by the party seeking arbitration; (ii) the same claims in subsequent actions that *the party seeking arbitration*

[9] If the Court concludes that Alaska law, and not the FAA, applies to the issue of waiver and that a showing of prejudice is not required, the Order should be affirmed for the reasons set forth in Section B.1., i.e., Citibank has taken no action (including by filing the Collection Action) that is inconsistent with its right under the parties' Arbitration Agreement to compel arbitration of new claims asserted for the first time by Hudson in a separate action filed after completion of the Collection Action.

has already litigated; or (iii) claims for which a previous motion to compel arbitration had already been denied.[10]

This is not a situation where Hudson filed a counter-claim in the Collection Action and several months later after the parties engaged in discovery and motion practice, for example, Citibank sought to compel arbitration of the counter-claim (or other defense asserted by Hudson). Nor is it a situation where Citibank is seeking to "bifurcate the controversy and complicate it by changing the arena and the rules" of a contested

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[10] *See, e.g., La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 160 (2d Cir. 2010) (finding waiver where party waited ten months to arbitrate same claims that party previously "litigated at length" in prior action); *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1090 (8th Cir. 2007) (finding waiver were party delayed sixteen months between filing proof of claim in bankruptcy proceeding and motion to arbitrate adversary proceeding and party sought arbitration of claims after extensive discovery and substantive motions in the initial proceeding); *Kelly v. Golden*, 352 F.3d 344, 349-50 (8th Cir. 2003) (finding waiver where plaintiff, after "extensively litigat[ing]" claims, waited until after court entered summary judgment against plaintiff before seeking to arbitrate counterclaims); *Otis Hous. Ass'n v. Ha*, 201 P.3d 309, 312 (Wash. 2009) (holding that plaintiff, in second action, waived right to arbitrate "by presenting the same issue-whether it had successfully exercised the option to purchase" in prior action and "[h]aving lost that issue, it may not later seek to relitigate the same issue in a different forum."); *Cabinetree of Wisconsin v. Kraftmaid Cabinetry*, 50 F.3d 388, 390-91 (7th Cir. 1995) (finding defendant waived right to arbitrate by removing action to federal court and delaying before seeking arbitration without any explanation for delay); *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 229 (Mo. Ct. App. 2002) (finding waiver when, among other things, the party seeking arbitration led the opposing party to believe that arbitration would not be sought); *Gutor Int'l AG v. Raymond Packer Co.*, 493 F.2d 938, 945-46 (1st Cir. 1974) (finding waiver by plaintiff that sought to compel arbitration of counterclaims during pending action); *Owens & Minor Med., Inc. v. Innovative Mktg. & Distrib. Servs., Inc.*, 711 So. 2d 176, 177 (Fla. Dist. Ct. App. 1998) (finding waiver of right to compel counterclaim where plaintiff engaged in discovery prior to seeking arbitration); *PPG Industries, Inc. v. Webster Auto Parts Inc.*, 128 F.3d 103, 109 (2d Cir. 1997) (finding plaintiff waived right to arbitrate counterclaims raised in second collection action after plaintiff unsuccessfully sought to compel arbitration of similar claims in prior collection action); *Schonfeldt v. Blue Cross of Cal.*, Case No. B142085, 2002 Cal. App. Unpub. LEXIS 5223 (Cal. App. Jan. 2, 2002) (applying California law).

proceeding or where the merits of a dispute were substantially litigated, as Hudson contends. [Opening Brief at 21.]

Rather, Hudson did not appear in the Collection Action *at all* and simply waited until *after* the Collection Action was completed and judgment was entered to file a *new* action. Hudson's subsequent putative class UTPA claim obviously was not part of the Collection Action. The filing of the Collection Action does not evince an intent by Citibank to waive its right to arbitrate new and separate claims filed after completion of the Collection Action. Indeed, if, as Hudson contends, her UTPA claim merely is an extension of the Collection Action, then Hudson's claim arguably would be barred by res judicata.[11] Similarly, Hudson's failure to seek to vacate or appeal the default judgment and, instead, challenge the judgment in a new and separate suit, supports the conclusion that the UTPA claim is distinct from the Collection Action.[12] Furthermore, adopting Hudson's analysis would encourage parties subject to an arbitration agreement to avoid arbitration by allowing a default judgment to be entered against them and then file a

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[11] *See Robertson v. Am. Mech., Inc.*, 54 P.3d 777, 780 (Alaska 2002) ("[A]ll claims arising out of a single transaction must be brought in a single suit, and those that are not become extinguished by the judgment in the suit in which some of the claims were brought.").

[12] For this reason, Hudson's reliance on *Midwest Window v. Amcor Industries, Inc.*, 630 F.2d 535 (7th Cir. 1980), is misplaced. There, after Amcor obtained judgment in Pennsylvania state court against Midwest on a disputed and contested promissory note, Midwest successfully moved to re-open the judgment and filed a separate action in Illinois. 630 F.2d at 536. After the cases were consolidated, Amcor's motion to compel arbitration (of, among other things, the same claims it had filed in the Pennsylvania action) was denied. *Id.* Here, Hudson never appeared in the Collection Action and that case is complete. More importantly, Citibank is *not* seeking to compel arbitration of its right to collect the debt, only Hudson's new and separate claim filed after completion of the Collection Action.

separate lawsuit based on supposed "related" claims. It defies logic that the judicial system would reward the defaulting party's decision not to respond to a valid lawsuit with a finding the other party has "waived" its right to arbitrate.

In addition, any claim of waiver cannot be considered without consideration of the Arbitration Agreement. Under the Arbitration Agreement, counterclaims, as well as claims "made independently or with other claims" are subject to arbitration and, "if a party fails to exercise [the right to arbitrate] at any particular time, or in connection with any particular Claims, that party can still require arbitration at a later time or in connection with any other Claims." [Exc. 19] For this reason, Hudson's contention that the Collection Action manifests an intent to litigate "closely related claims" is irrelevant here, because the parties already expressly agreed that subsequent claims are subject to arbitration. Moreover, even if Hudson had appeared and, for example, filed a counterclaim in the Collection Action, Citibank still would have been entitled to arbitrate the counterclaim under the express terms of the Arbitration Agreement.[13]

Quite simply, the Trial Court correctly held – and Hudson has failed to show any "clear error" by the Trial Court in holding – that Citibank's "decision to address Hudson's debt in court was not inconsistent with the intent to arbitrate other issues" [Exc.

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[13] As detailed below, under the FAA, arbitration agreements must be enforced as written and "parties are 'generally free to structure their arbitration agreements as they see fit.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010) (citations omitted).

264-65], and the Trial Court's Order should be affirmed for this reason.[14]

2. Hudson Does Meet Her Burden Of Establishing Prejudice.

The record clearly establishes that Hudson made *no* showing of prejudice. Again, "inconsistent behavior alone is not sufficient; the party opposing the motion to compel arbitration must have suffered prejudice." *ATSA of Cal.*, 702 F.2d at 175. Unlike the majority of cases cited by Hudson, there was no showing of prejudice due to "delay or by reason of extensive discovery."[15] Instead, on appeal, Hudson argues that she was prejudiced because Citibank was able to obtain attorneys' fees pursuant to Rule 82 as part of the Collection Action, rather than having to seek fees under South Dakota law or other provision of Alaska law. [Opening Brief 26.] Before the Trial Court, and on appeal, Hudson fails to meet her "heavy burden" of proof.

Any "prejudice" that Hudson now claims to have suffered by having to pay the amount of fees awarded to Citibank (under Rule 82) is due to her own decision not to

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[14] Under the FAA and Alaska law, any ambiguity or doubts concerning waiver must be resolved in favor of arbitration. *See Creative Telecomm., Inc.*, 120 F. Supp. 2d at 1232; *Blood*, 68 P.3d at 1254. Thus, to the extent there is any doubt as to the issue of waiver (and, here, there is none), the question must be resolved in favor of affirming the Trial Court's Order.

[15] *Midwest Window*, 630 F.2d at 537 ("The waiver of the right to arbitration cannot be determined by the application of some inflexible rule [e.g., the filing of a complaint]. All of the circumstances, of which prejudice should be one, must be considered in the context of the particular case. Prejudice may be found, for instance, in delay or by reason of extensive discovery."); *see also PPG Industries, Inc.*, 128 F.3d at 109 (finding waiver because plaintiff "engag[ed] in discovery and fil[ed] substantive motions" in prior collection action which prejudiced defendants in later-filed collection action); *La. Stadium & Exposition Dist.*, 626 F.3d at 159 (stating that there "is no rigid formula or bright-line rule for identifying when a party has waived its right to arbitration; rather, the above factors must be applied to the specific context of each particular case. That said, '[t]he key to a waiver analysis is prejudice.'") (citation omitted).

appear in the Collection Action, not conduct by Citibank. Tellingly, missing from Hudson's analysis is the recognition that *she* failed to appear at all in the Collection Action. Nor is there any dispute that she owed Citibank the debt sued upon in the Collection Action, or that Citibank is entitled to fees based upon its efforts to collect that debt. Further, while there may be a difference in the amount of fees Citibank might of have recovered if it pursued Hudson's undisputed debt in arbitration, such a dispute goes to the merits of Hudson's claims. As discussed above, the merits of Hudson's claims are irrelevant at this stage of the proceedings. *See AT&T Tech., Inc.*, 475 U.S. at 649-50.

Moreover, even if Citibank had pursued Hudson's debt in arbitration under South Dakota law, as Hudson posits, Citibank still would have had the right to pursue its fees. In the Card Agreement, Hudson agreed that, in the event that Citibank referred her account to an outside lawyer for collection, Citibank would be entitled to recover its reasonable attorneys' fees, "plus court costs or any other fees as allowed by law." [Exc. 457, 481 (under the heading "Collection Costs").] The Arbitration Agreement also authorizes the arbitrator "to award a party any damages or other relief provided for under applicable law." [Exc. 20.] Under South Dakota law, while an "award of attorney's fees is not the norm," attorneys' fees are allowed "when there is a contractual agreement that the prevailing party is entitled to attorney fees . . . ." *Credit Collection Services, Inc. v. Pesicka*, 2006 SD 81, ¶ 6, 721 N.W.2d 474, 476-77 (S.D. 2006) (citations omitted) (awarding attorneys' fees pursuant to provision in hospital "consent form"); *Assman v. J.I. Case Credit Corp.*, 411 N.W.2d 668, *671 (S.D. 1987) (awarding attorneys' fees pursuant to provision in financing agreement during foreclosure proceeding).

Thus, whether pursued via Rule 82 or under South Dakota law, Citibank could have pursued its fees in either situation. In any event, Hudson fails to meet her burden of demonstrating prejudice, or waiver at all. Accordingly, the Order should be affirmed.

II. PURSUANT TO U.S. SUPREME COURT PRECEDENT AND THE FAA, THE TRIAL COURT CORRECTLY ENFORCED THE ARBITRATION AGREEMENT AS WRITTEN AND COMPELLED ARBITRATION OF HUDSON'S CLAIMS ON AN INDIVIDUAL BASIS.

A. The FAA's Preemption Standard

To understand the basic principles of FAA preemption, one must first keep in mind that "[t]he FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *Concepcion*, 131 S. Ct. at 1745.[16] The primary provision of the FAA, Section 2, has been described as reflecting both a "liberal federal policy favoring arbitration," [citation] and the "fundamental principle that arbitration is a matter of contract". *Id.* at 1745 (citations omitted).[17]

The United States Supreme Court has repeatedly confirmed that the "'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms'" and, under the FAA, class procedures may not be imposed "based on policy judgments rather than the arbitration agreement itself or some

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[16] *See also KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) ("the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate.").

[17] As noted in *Preston v. Ferrer*, 552 U.S. 346 (2008), "Section 2 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner." 552 U.S. at 353 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

background principle of contract law that would affect its interpretation." *Id.* at 1748, 1750 (citations omitted); *see Stolt-Nielsen S.A.*, 130 S. Ct. at 1773 (holding that the FAA's "primary purpose" is "to ensure that private agreements to arbitrate are enforced according to their terms.") (internal quotation marks omitted). Indeed, the FAA "manifest[s] a 'liberal federal policy favoring arbitration agreements," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), and courts must therefore "rigorously enforce agreements to arbitrate." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985) (internal quotation marks omitted)). The strong federal policy favoring arbitration applies with full force "when a party bound by an agreement raises a claim founded on statutory rights." *Id.*

"Underscoring the consensual nature of private dispute resolution . . . parties are 'generally free to structure their arbitration agreements as they see fit.'" *Stolt-Nielsen*, 130 S. Ct. at 1774 (citations omitted). Thus, "parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes." *Concepcion*, 131 S. Ct. at 1748-49 (emphasis added) (citations omitted). Indeed, the "point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute . . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Id.* at 1749. Ultimately, "[i]t falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts

and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Stolt-Nielsen*, 130 S. Ct. at 1774-75; *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc.*, 470 U.S. at 218.

Put simply, the FAA strongly favors the validity and enforceability of arbitration agreements and, except in limited circumstances not present here, such agreements must be enforced according to their express terms in both federal and state courts, and regardless of whether the claims asserted arise under federal or state law. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). Moreover, the "savings clause" of Section 2[18] "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746.[19]

As instructed in *Concepcion*, federal preemption under the FAA can occur in two ways. Under the first scenario, "[w]hen state law prohibits outright the arbitration of a

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[18] The savings clause permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

[19] Citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Perry*, 482 U.S. at 492–493, n. 9.

particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747 (citing *Preston*, 552 U.S. at 353); *see Marmet Health Care Center, Inc.*, 132 S.Ct. at 1203-04 (holding that "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.").

The second situation is more complex – federal preemption arises when a doctrine normally thought to be generally applicable, such as the defense of unconscionability, is being "applied in a fashion that disfavors arbitration." *Concepcion*, 131 S. Ct. at 1747. For example, "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.'" *Id.* (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n. 9 (1987)). In *Concepcion*, the Supreme Court specifically abrogated the California Supreme Court's holding in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). In *Discover Bank*, the California Supreme Court held that, in certain circumstances, a class action waiver may be unconscionable under California law when the waiver is "found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank*, 36 Cal. 4th at 162-63 (emphasis added).

Squarely rejecting *Discover Bank*, the Supreme Court reasoned: "Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California's *Discover Bank* rule is preempted by the FAA." *Concepcion*, 131 S. Ct. at 1753 (internal quotations and citations omitted). Put differently, California's rule of unconscionability stood as an obstacle to the primary objectives of the FAA – enforcement of agreements to arbitrate according to their terms and promoting streamlined and efficient procedures in arbitration. *Id.* at 1748-53.

In *Concepcion*, the Supreme Court further made clear that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. at 1748. "As we have said, a federal statute's saving clause cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Id.* (internal quotations and citations omitted).

B. <u>The Arbitrator Does Not Have Authority To Issue Non-Party Statewide Injunctive Relief Under The Arbitration Agreement And Any Contrary Contention Is Preempted By The FAA.</u>

As discussed, *Concepcion* confirms that the FAA requires that arbitration agreements be enforced as written. The Supreme Court specifically concluded that "[r]equiring the availability of classwide arbitration [as a condition of enforcing an arbitration agreement] interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748. The Supreme Court

further held that invalidating an arbitration agreement containing a class action waiver "interferes with arbitration" because it "allows any party . . . to demand [classwide arbitration] *ex post*," leaving the other party with the unbargained-for choice of either acceding to the demand for classwide arbitration or being forced to forgo arbitration altogether. Id. at 1750. Thus, rejecting the dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," the Supreme Court held that "States cannot require a procedure that is inconsistent with the FAA, *even if it is desirable for unrelated reasons*." Id. at 1753 (emphasis added).[20]

Here, any contention that, as a matter of state law, to be enforceable as written, the Arbitration Agreement must guarantee non-party public injunctive relief before a UTPA claim can be arbitrated is a categorical rule prohibiting arbitration of a particular claim that clearly is "displaced" by the FAA. The use of state law to condition enforcement of an arbitration agreement governed by the FAA on a consumer's ability to obtain "class" relief directly runs afoul of *Concepcion*. *See Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212 (11th Cir. 2011) ("Thus, in light of *Concepcion*, state rules mandating the availability of class arbitration based on generalizable characteristics of consumer

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[20] *See also Conroy v. Citibank, N.A.*, No. 10-CV-04930-SVW-AJW, 2011 WL 10503532, *4 (C.D. Cal. July 22, 2011) (enforcing same Citibank Arbitration Agreement and rejecting plaintiff's "primary argument" that "practical effect of compelling arbitration here would be to preclude Plaintiff from bringing her damage and injunctive relief claims under the California Unfair Competition Law and California Legal Remedies Act." . . . This is precisely the sort of argument that the Supreme Court rejected in *AT&T*.").

protection claims . . . are preempted by the FAA, even if they may be 'desirable[.]'") (citing *Concepcion*).

This conclusion is the same as finding that Alaska law (or public policy) prohibits arbitration of UTPA claims entirely. As discussed above, the rule in this regard is clear - "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747; *Marmet Health Care Center*, 132 S. Ct. 1201 (discussed above); *Preston*, 552 U.S. at 359 ("When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (holding that FAA preempted state law requiring judicial resolution of claims involving punitive damages); *Perry*, 482 U.S. at 491 (holding that FAA preempted requirement that litigants be provided a judicial forum for wage disputes); *Southland Corp.*, 465 U.S. at 10 (holding that FAA preempted state law prohibition of arbitration of claims brought under financial investment statute).

Thus, the requirement that an arbitrator award non-party injunctive relief – contrary to the terms of the parties' arbitration agreement – stands as an obstacle to the primary objective of the FAA of enforcing arbitration agreements according to their terms, just as California's rule of unconscionability too stood as an obstacle to enforcing the arbitration agreement (at issue in *Concepcion*) as written. Hudson argues that *Concepcion* does not apply to UTPA claims because Alaska relies on private citizens to "enforce[e] the UTPA's mandate and protect[] Alaskans from fraud and empowers

citizens to carry out those duties traditionally conferred on the Attorney General." [Opening Brief 30.] Hudson's attempt to end-run *Concepcion* based on the supposed violation of "public policy" in having to arbitrate UTPA claims falls flat and is preempted by the FAA.[21]

Concepcion squarely applies here and confirms that the Arbitration Agreement must be enforced as written, including with respect to UTPA claims, as confirmed by analysis of *Concepcion* in the particular context presented here. Plaintiffs in *Concepcion* filed a putative class action asserting state statutory claims under, *inter alia*, California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* (the "UCL"), and Consumer Legal Remedies Act, Cal. Civ. Code § 1770, et seq. (the "CLRA"), alleging that AT&T engaged in false advertising and fraud by charging sales tax on phones it advertised as free.[22] Like the UTPA, the UCL provides that a consumer may bring an action (including for public injunctive relief) on behalf of the general public in a quasi-attorney general fashion. *See* Cal. Bus. & Prof. Code § 17204. In addition, like the UTPA, the CLRA includes an "anti-waiver" provision, as reflected in Civil Code

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[21] *Miguel v. JPMorgan Chase Bank, N.A.*, No. CV 12–3308 PSG (PLAX), 2013 WL 452418, *9–10 (C.D. Cal. Feb. 2, 2013) (enforcing arbitration on individual basis and holding that "despite the unique nature of [claims under California's Private Attorney General Act] and the Legislature's intent to deputize private citizens [to assert PAGA claims], requiring arbitration agreements to permit representative PAGA claims to go forward would be inconsistent with the Supreme Court's holding in Concepcion because it would sacrifice the advantages achieved by arbitration.").

[22] *See Laster v. T-Mobile USA, Inc.*, No. 05CV1167 DMS (AJB), 2008 WL 5216255, at *1-5 (S.D. Cal. Aug. 11, 2008); *see also Concepcion*, 131 S. Ct. at 1744.

Sections 1751 (declaring any waiver of the CLRA's provisions contrary to public policy) and 1781 (authorizing consumer to bring class actions).

Despite the presence of the private attorney general claims and a non-waiver provision, the Supreme Court in *Concepcion* still upheld enforcement of AT&T's arbitration clause as to claims under statutes similar to the UTPA. In doing so, the Supreme Court was not troubled by the fact that the enforcement of the arbitration provision in accordance with its terms would prevent individual consumers from pursuing public injunctive relief or a class action. Thus, Supreme Court's ruling recognizes that requiring non-party injunctive or class relief is inconsistent with the FAA.[23] *Concepcion*, 131 S. Ct. at 1748 (requiring classwide procedures as a condition of enforcing an arbitration agreement "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."); *see also Stolt-Nielsen*, 130 S Ct. at 1776 (holding that agreement could not be interpreted to require class procedures because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental.").

In arguing that public policy precludes enforcing the Arbitration Agreement as written, Hudson relies on the same general premise rejected in *Concepcion* – that the violation of public policy is a generally applicable contract defense not preempted by the

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[23] *See Conroy*, 2011 WL 10503532, *4-7 (enforcing Citibank's Arbitration Agreement and compelling arbitration of putative class UCL and CLRA claims for public injunctive relief on an individual basis).

FAA. In the wake of *Concepcion*, courts have rejected such "public policy" arguments by plaintiffs asserting consumer claims on behalf of the general public.[24]

Here, the Trial Court attempted to resolve the issue of FAA preemption by, on the one hand, enforcing the Arbitration Agreement, including the class action waiver, and compelling the parties to individual arbitration but, on the other hand, holding that the arbitrator can award the precise relief that the Arbitration Agreement prohibits – non-party relief. Citibank respectfully disagrees with this conclusion, as it is contrary to the Arbitration Agreement, which expressly states "[c]laims 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." [Exc. 19.] Thus, under the parties' agreement, the arbitrator is not authorized to award non-party statewide injunctive relief on behalf of the general public. Again, *Concepcion* makes clear that the Arbitration Agreement must be enforced as written, and insofar as the

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[24] *See Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012) (noting that after *Concepcion* "unrelated policy concerns, however worthwhile, cannot undermine the FAA."); *Meyer v. T-Mobile USA Inc.*, 836 F.Supp. 2d 994, 1006 (N.D. Cal. 2011) (holding that arbitration agreement prohibiting "private attorney general" claims seeking a "public injunction" was enforceable under *Concepcion*); *Kaltwasser v. Concepcion LLC*, 812 F.Supp. 2d 1042, 1051 (N.D. Cal. 2011) (holding that *Concepcion* prohibits "public policy contract principles to disfavor and indeed prohibit arbitration of entire categories of claims."); *Nelson v. Concepcion LLC*, No. C10-4802 TEH, 2011 WL 3651153, at *2-3 (N.D. Cal. Aug. 18, 2011) (compelling arbitration of claims for public injunctive relief under *Concepcion* despite "public policy arguments" concerning plaintiffs' ability to enjoin allegedly deceptive practices on behalf of the general public); *Arellano v. T-Mobile USA, Inc.*, No. C10-5663 WHA, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) (holding that, under *Concepcion*, the FAA requires arbitration of claims for public injunctive relief).

UTPA (or any other state law) stands as an obstacle to accomplishing the objective of the FAA, that state law is preempted.

Accordingly, pursuant to *Concepcion* and the FAA, the Arbitration Agreement must be enforced as written and arbitration must proceed on an individual, non-class basis. Any rule to the contrary is preempted by the FAA.

C. Hudson's Vindication Of Rights Argument Fails.

Hudson's assertion that enforcing the Arbitration Agreement prevents her from enforcing her substantive rights [Opening Brief 31-40] is equally unavailing. "It is by now clear that statutory claims may be the subject of an arbitration." *Gilmer*, 500 U.S. at 26; *see also Mitsubishi Motors Corp.*, 473 U.S. at 628 (in agreeing to arbitrate a statutory claim, a party "does not forgo the substantive rights afforded by the statute [but] submits to their resolution in an arbitral . . . forum"). Moreover, "[s]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors Corp.*, 473 U.S. at 637.

Here, Hudson remains free to arbitrate her claims and pursue remedies against Citibank in arbitration that are available to her in court (albeit on an individual basis), including injunctive relief. Hudson does not dispute that, under the Arbitration Agreement, she can pursue individual injunctive relief nor does she contend that such relief could not adequately redress her individual injury. In this respect, Hudson's discussion of *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012), is misplaced.

In *CompuCredit Corp.*, the Supreme Court – building on *Concepcion* – rejected the argument that statutory class-action claims could not be compelled to individual arbitration, holding "that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *CompuCredit*, 132 S. Ct. at 671. Like the plaintiff there, Hudson retains in arbitration the "legal power to impose liability" on Citibank, but on an individual, non-class basis. *Id.* Again, to condition enforcement of the Arbitration Agreement on the availability of classwide relief based on the public policy argument that unless the arbitrator is empowered to issue class-type injunctive relief, no individual injunctive relief could adequately redress individual injuries, is preempted by the FAA. *See Coneff*, 673 F.3d at 1159 (holding that "vindication of statutory rights" defense to enforcement of arbitration agreement is preempted by the FAA).

Similarly, Hudson's reference to the Second Circuit Court of Appeals' decision in *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.)* ("*Merchants*"), 667 F.3d 204 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012) (No. 12-133), is of no moment. In *Merchants*, the Second Circuit invalidated an arbitration agreement that prohibited class arbitration on the grounds that the predicted costs of pursuing the antitrust claims there, as presented through plaintiffs' evidentiary submission, would exceed plaintiffs' expected recovery. *Merchants*, 667 F.3d at 217. T The Supreme Court granted certiorari to determine whether the viability of the

"vindication of statutory rights" analysis under FAA as applied to federal claims. Obviously, Hudson does not assert a federal claim; thus, *Merchants* is immaterial here.[25]

Hudson's reliance on *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091 (Alaska 2009), for the proposition that the "vindication of statutory rights" defense applies to state statutes, is equally misplaced. *Gibson* addresses the enforceability of an employment arbitration agreement, not a consumer agreement, in connection with claims under the Alaska Wage and Hour Act, AS § 23.10.050-.150, not the UTPA. In addition, *Gibson* was decided by this Court without the benefit of *Concepcion*. Obviously, *Concepcion* requires a re-evaluation of all prior authority regarding arbitration of putative consumer class actions under the FAA, like the instant action.[26]

Because Hudson is able to vindicate her state statutory causes of action in arbitration, and impose liability on Citibank (albeit on an individual basis), and without non-party statewide public injunctive relief, reversal of the Order is not warranted.

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[25] *See, e.g., Crewe v. Rich Dad Educ., LLC*, 884 F.Supp. 2d 60, 79 (S.D.N.Y. 2012) (holding that "vindication of statutory rights" analysis under *Merchants* "applies only where a party's federal statutory rights are at issue.").

[26] *See Coneff*, 673 F.3d at 1159; *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1135-36 (2012), *rev. denied*, Oct. 31, 2012 (noting that *Concepcion* "adopts a sweeping rule of FAA preemption" that "preempts any rule or policy rooted in state law that subjects agreements to arbitrate particular kinds of claims to more stringent standards of enforceability than contracts generally."); *McKenzie Check Advance of Florida, LLC v. Betts*, No. SC11-514, 2013 WL 1457843, *6-9 (Fla. April 11, 2013) (holding that, in light of *Concepcion*, the FAA preempts invaliding a class action waiver as being void as against Florida public policy and rejecting argument that enforcing class action waiver would prevent consumer from vindicating rights under Florida's Deceptive and Unfair Trade Practices Act).

D. The Type Of Injury Hudson Seeks To Redress Does Not Require The Type Of Injunctive Relief Available Under The UTPA.

Hudson's discussion of why the supposed limitations of arbitration make non-party injunctive relief impractical in arbitration (Opening Brief at 36-39) is irrelevant.[27] On April 11, 2013, the Ninth Circuit Court of Appeals issued its *en banc* opinion in *Kilgore v. KeyBank, Nat'l Ass'n*, Nos. 09-16703, 10-15934, 2013 WL 1458876 (9th Cir. April 11, 2013). In Kilgore, the Ninth Circuit considered whether the "district court should have compelled arbitration" of putative class action claims for "broad injunctive relief" under the UCL (the same California attorney general/consumer protection statute at issue in *Concepcion*). The en banc opinion comes in the wake of the Ninth Circuit having previously held that claims for public injunctive relief are subject to arbitration, holding that California's state-law rule against arbitrating claims for public injunctive relief (as established in *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 988 P.2d 67 (1999), and *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 66 P.3d 1157 (2003)), preempted by the FAA after *Concepcion*. *See Kilgore v. KeyBank, N.A.*, 673 F.3d 947, 963 (9th Cir. 2012), *reh'g en banc ordered*, 697 F.3d 1191 (9th Cir. Sept. 21, 2012).

After restating the applicable preemption standard under the FAA, the Ninth Circuit held that "[a]lthough the [*Broughton/Cruz* rule] may be based upon the sound public policy judgment of the California legislature, we are not free to ignore *Concepcion's* holding that state public policy cannot trump the FAA when that policy prohibits the arbitration of a 'particular type of claim.'" *Id.* at 963 (citation omitted).

[27] This type of contention is precisely the type of propaganda that resulted in the passage of the FAA. *See Concepcion*, 131 S. Ct. at 1745, 1747.

Thus, regardless of any practical considerations or reasons for pursuing public injunctive relief in court versus arbitration, under the FAA, the court could not refuse to enforce the arbitration agreement at issue as written based on the unique application of state law (as would be the case here, if the UTPA were deemed to trump the FAA). *Id.*

In the *en banc* opinion (and after vacating its prior opinion), the Ninth Circuit did not deem it necessary to address the same "broad argument" again.[28] Instead, after considering the operative complaint's allegations, the record before it and the scope of the injunctive relief sought, the Ninth Circuit held that the injunctive relief claim did not fall within the "narrow exception to the rule that the FAA requires state courts to honor arbitration agreements." *Kilgore*, 2013 WL 1458876, at *5 (citation omitted). In *Kilgore*, former students of a defunct postsecondary school sued the lender that had provided their student loans. *Id.* at *1. Plaintiffs sought to enjoin defendants from reporting loan defaults to credit agencies and enforcing the students' promissory notes. *Id.* The Ninth Circuit reasoned that, based on the scope of injunctive relief alleged in the complaint, among other things, the proposed injunction would, "for all practical purposes, relate[] only to past harms suffered by the members of the limited putative class [i.e., approximately 120 putative class members]." *Id.* at *5. As a result, the proposed injunctive relief did not implicate the "institutional advantages" a judicial forum has over an arbitral forum "in administering a public injunctive remedy" that

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[28] Although the Ninth Circuit's prior opinion is not precedent, having been vacated after the grant of rehearing en banc, *Kilgore* stems from a straightforward, and correct, interpretation of *Concepcion*, and its reasoning is persuasive. *See Miguel*, 2013 WL 452418, at *5.

underlie the *Broughton/Cruz* rule. *Id.* Such a concern is absent when the alleged statutory violations have ceased, the "class affected by the alleged practices is small," and "there is no real prospective benefit to the public at large from the relief sought." *Id.*

Based on the allegations of Hudson's First Amended Complaint, the same "concern" addressed in *Kilgore*, and voiced by Hudson here, is absent. Hudson seeks to enjoin Citibank to "cease and desist from their illegal conduct; [] file corrected judgments; and [] disgorge to all class members any and all illegal fees that were obtained." [Exc. 6.] The putative class, as defined by Hudson, is inherently small and limited – "[a]ll individuals against whom defendants obtained a default judgment including attorney's fees since July 15, 2009." [Exc. 4.] Further, in seeking to require Citibank to "file corrected judgments" and disgorgement of fees "obtained," the relief innately relates to past, not prospective, harms.[29]

In light of the backward nature of the injunctive relief Hudson seeks, the overall benefit will inure to a limited number of potential recipients, and not to the general public. Thus, the concerns raised by Hudson are irrelevant, and do not warrant reversal of the Trial Court's Order.

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[29] There is no evidence in the record regarding the number of default judgment obtained during the class period. Hudson speculates that there have been "1600 cases in recent years" filed by Citibank [Opening Brief 6], but that assertion is not supported by any admissible evidence.

III. CONCLUSION

For all of the foregoing reasons, the Trial Court's Order should be affirmed and the case allowed to proceed to arbitration, albeit on an individual basis. As discussed, Hudson can obtain redress for her individual injuries and, in any event, non-party statewide injunctive relief would violate the FAA.

DATED this 15th day of April, 2013.

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