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 RESPONDENT MIDLAND FUNDING, LLC

Filed in the Supreme Court of the State of Alaska, this 19th day of April, 2013.

Marilyn May, Clerk
By: _____

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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.

AS 45.50.471 Unlawful acts and practices.

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

(b) The terms "unfair methods of competition" and "unfair or deceptive acts or practices" include, but are not limited to, the following acts:

(1) fraudulently conveying or transferring goods or services by representing them to be those of another;

(2) falsely representing or designating the geographic origin of goods or services;

(3) causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval, or another person's affiliation, connection, or association with or certification of goods or services;

(4) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

(5) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, secondhand, or seconds;

(6) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(7) disparaging the goods, services, or business of another by false or misleading representation of fact;

(8) advertising goods or services with intent not to sell them as advertised;

(9) advertising goods or services with intent not to supply reasonable expectable public demand, unless the advertisement prominently discloses a limitation of quantity;

(10) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(11) engaging in any other conduct creating a likelihood of confusion or of misunderstanding and which misleads, deceives or damages a buyer or a competitor in connection with the sale or advertisement of goods or services;

(12) using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression, or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived or damaged;

(13) failing to deliver to the customer at the time of an installment sale of goods or services, a written order, contract, or receipt setting out the name and address of the seller and the name and address of the organization that the seller represents, and all of the terms and conditions of the sale, including a description of the goods or services, which shall be stated in readable, clear, and unambiguous language;

(14) representing that an agreement confers or involves rights, remedies, or obligations which it does not confer or involve, or which are prohibited by law;

(15) knowingly making false or misleading statements concerning the need for parts, replacement, or repair service;

(16) misrepresenting the authority of a salesman, representative, or agent to negotiate the final terms of a consumer transaction;

(17) basing a charge for repair in whole or in part on a guaranty or warranty rather than on the actual value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the guaranty or warranty, if any;

(18) disconnecting, turning back, or resetting the odometer of a vehicle to reduce the number of miles indicated;

(19) using a chain referral sales plan by inducing or attempting to induce a consumer to enter into a contract by offering a rebate, discount, commission, or other consideration, contingent upon the happening of a future event, on the condition that the consumer either sells, or gives information or assistance for the purpose of leading to a sale by the seller of the same or related goods;

(20) selling or offering to sell a right of participation in a chain distributor scheme;

(21) selling, falsely representing, or advertising meat, fish, or poultry which has been frozen as fresh food;

(22) failing to comply with AS 45.02.350 ;

(23) failing to comply with AS 45.45.130 - 45.45.240;

(24) counseling, consulting, or arranging for future services relating to the disposition of a body upon death whereby certain personal property, not including cemetery lots and markers, will be furnished or the professional services of a funeral director or embalmer will be furnished, unless the person receiving money or property deposits the money or property, and money or property is received, within five days of its receipt, in a trust in a financial institution whose deposits are insured by an instrumentality of the federal government designating the institution as the trustee as a separate trust in the name only of the person on whose behalf the arrangements are made with a provision that the money or property may only be applied to the purchase of designated merchandise or services and should the money or property deposited and any accrued interest not be used for the purposes intended on the death of the person on whose behalf the arrangements are made, all money or property in the trust shall become part of that person's estate; upon demand by the person on whose behalf the arrangements are made, all money or property in the trust including accrued interest, shall be paid to that person; this paragraph does not prohibit the charging of a separate fee for consultation, counseling, or arrangement services if the fee is disclosed to the person making the arrangement; any arrangement under this paragraph which would constitute a contract of insurance under AS 21 is subject to the provisions of AS 21;

(25) failing to comply with the terms of AS 45.50.800 - 45.50.850 (Alaska Gasoline Products Leasing Act);

(26) failing to comply with AS 45.30 relating to mobile home warranties and mobile home parks;

(27) failing to comply with AS 14.48.060 (b)(13);

(28) dealing in hearing aids and failing to comply with AS 08.55;

(29) violating AS 45.45.910 (a), (b), or (c);

(30) failing to comply with AS 45.50.473 ;

(31) violating the provisions of AS 45.45.400 ;

(32) knowingly selling a reproduction of a piece of art or handicraft that was made by a resident of the state unless the reproduction is clearly labeled as a reproduction; in this paragraph, "reproduction" means a copy of an original if the copy is

(A) substantially the same as the original; and

(B) not made by the person who made the original;

(33) violating AS 08.66 (motor vehicle dealers);

(34) violating AS 08.66.260 - 08.66.350 (motor vehicle buyers' agents);

(35) violating AS 45.63 (solicitations by telephonic means);

(36) violating AS 45.68 (charitable solicitations);

(37) violating AS 45.50.474 (on board promotions);

(38) referring a person to a dentist or a dental practice that has paid or will pay a fee for the referral unless the person making the referral discloses at the time the referral is made that the dentist or dental practice has paid or will pay a fee based on the referral;

(39) advertising that a person can receive a referral to a dentist or a dental practice without disclosing in the advertising that the dentist or dental practice to which the person is referred has paid or will pay a fee based on the referral if, in fact, the dentist or dental practice to which the person is referred has paid or will pay a fee based on the referral;

(40) violating AS 45.50.477 (a) - (c);

(41) failing to comply with AS 45.50.475 ;

(42) violating AS 45.35 (lease-purchase agreements);

(43) violating AS 45.25.400 - 45.25.590 (motor vehicle dealer practices);

(44) violating AS 45.66 (sale of business opportunities);

(45) violating AS 08.18.023 (b) or 08.18.152;

(46) violating AS 45.50.479 (limitations on electronic mail);

(47) violating AS 17.06.010 (sale of, or offering to sell, organic food);

(48) violating a labeling or advertising provision of AS 17.20 (Alaska Food, Drug, and Cosmetic Act);

(49) violating AS 45.45.920 (free trial period);

(50) violating AS 45.45.930 (opt-out marketing plans);

(51) violating AS 45.45.792 (deceptive acts or practices relating to spyware);

(52) violating AS 06.60.340 (mortgage lending regulation);

(53) offering a check, through the mail or by other means, to promote goods or services, if the cashing or deposit of the check obligates the endorser or payee identified on the check to pay for goods or services; in this paragraph, "services" does not include the extension of credit or the lending of money;

(54) violating AS 45.65.055 (authentic Alaska Native art identification seals);

(55) an information collector, other than a governmental agency, violating AS 45.48.010 - 45.48.090 (breach of security involving personal information); in this paragraph,

(A) "governmental agency" has the meaning given in AS 45.48.090 ;

(B) "information collector" has the meaning given in AS 45.48.090 ;

(56) violating AS 45.27 (marine products and motorized recreational products);

(57) violating AS 45.45.450 - 45.45.459 (rental car fees).

(c) The unlawful acts and practices listed in (b) of this section are in addition to and do not limit the types of unlawful acts and practices actionable at common law or under other state statutes.

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:

(1) Postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or

(2) The order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or decision may materially advance the ultimate termination of the litigation, or may advance an important public interest which might be compromised if the petition is not granted; or

(3) The trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or

(4) The issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest.

JURISDICTIONAL STATEMENT

On July 25, 2012, the Superior Court granted Respondents' Motion to Compel Arbitration and Stay Action in *Stewart v. Midland et al.*, Case No. 3AN-11-12054 CI, and denied Stewart's Cross Motion for Partial Summary Judgment. [Exc. 417–20.] Stewart timely filed a Petition for Review. This Court has authority to decide this appeal pursuant to AS 22.05.010 and Alaska R. App. P. 402.

PARTIES TO THE CASE

Respondent Midland Funding LLC ("Midland") is a Delaware corporation with a principal office in San Diego, California. [Exc. 562.] Petitioner Cynthia Stewart ("Stewart") is an Alaska resident who was the owner of a Sears Gold MasterCard credit card issued in 2002 by Citibank (South Dakota), N.A. ("Citibank"), a national bank located in South Dakota. [Exc. 12, 270, 301.] Stewart's credit card account was sold by Citibank to Midland on or around January 22, 2010. [Exc. 562.]

Respondent Alaska Law Offices, Inc. ("ALO") is an Alaska law firm hired to represent Midland in a collection action filed against Stewart when she failed to make payments owing on her account. [Exc. 330.] Respondent Clayton Walker ("Walker") is a lawyer at ALO who handled the collection action. [Exc. 332.] After the collection action was concluded, Stewart filed this new, separate lawsuit, alleging that Midland, ALO and Walker violated the Alaska Unfair Trade Practices Act ("UTPA"). [Exc. 269–76.]

STATEMENT OF THE ISSUES

The Court identified the following issues for review:

(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 Alaska Uniform Trade Practices and Consumer Protection Act (UTPA). [Exc. 836.]

STATEMENT OF THE CASE

A. The Arbitration Agreement

Petitioner Cynthia Stewart ("Stewart") was the owner of a Sears Gold MasterCard credit card issued in 2002 and administered by Citibank (South Dakota), N.A. ("Citibank"), a national bank located in South Dakota. [Exc. 301.] Petitioner's Card Agreement included an arbitration provision (the "Arbitration Agreement"). [Exc. 303–320]. 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.

What time frame applies to Claims subject to arbitration? Claims arising in the past, present, or future, including Claims arising before the opening of your account, are subject to arbitration.

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? The party filing an arbitration must choose one of the following two arbitration firms and follow its rules and procedures for initiating and pursuing an arbitration: American

> Arbitration Association or National Arbitration Forum. . . .
>
> 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 these 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 person 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. 315–17 (bolding and italics in original, underlining added).]

The Arbitration Agreement includes specific language (underlined above) that permits arbitration of any particular claims, despite a prior waiver of arbitration with respect to different claims. [Exc. 316.] The Agreement requires that any arbitration may resolve only individual claims. [Exc. 317.]

On or around January 22, 2010, Citibank sold Stewart's account (along with many others) to Midland Funding, LLC ("Midland") and assigned to Midland its right to enforce the Card Agreement, including the Arbitration Agreement. [Exc. 562.]

B. The Prior Litigation

Stewart ultimately failed to pay amounts owing on her credit card. Midland filed suit for amounts owing on her account and obtained a default judgment against her in Anchorage District Court for $3,655.37. [Exc. 270.] A Final Default Judgment issued in February 2011. Included in the judgment were attorney fees awarded by the court in the amount of $371.04. [Exc. 270–71.] Midland obtained a Writ of Execution and began executing on the judgment. Stewart never appeared in the collection action. She did not challenge the attorneys' fee motion, order or the execution efforts in that lawsuit.

C. The Current Action

On November 28, 2011, Stewart filed this putative class action lawsuit against Midland, claiming that Midland's collection attorneys supposedly obtained an excessive attorneys' fees award in the prior collection lawsuit that had concluded approximately nine months earlier. [Exc. 269.] Stewart alleges that such conduct of the collection attorneys violates Alaska's Unfair Trade Practices and Consumer Protection Act ("UTPA") AS 45.50.471, *et seq*. [Exc. 271-74.] She seeks damages, an injunction and declaratory relief. [Exc. 275.]

Stewart brings her claim on her own behalf and purportedly on behalf of a putative class of similarly situated persons. [Exc. 272-73.] However, the Arbitration Agreement provides that *claims sought as part of a class action must be arbitrated on an individual, non-class basis, and the arbitrator may award relief only on an individual, non-class basis*. [Exc. 315.]

Midland filed its answer to the First Amended Complaint on January 11, 2012, including its assertion that "Plaintiff's claims are subject to arbitration, and the proper forum for resolution of this dispute is arbitration." [Exc. 286.] By letter dated January 30, 2012, Midland demanded arbitration pursuant Stewart's Arbitration Agreement. [Exc. 677.] Stewart did not comply with Midland's demand. *Id.* Midland thereafter sought leave to conduct an out-of-state deposition for the express purpose of "obtaining records demonstrating that this matter is subject to binding arbitration between the parties," noting that Midland "intends to bring a motion to compel arbitration." [Exc. 545.] Midland thereafter filed the Motion to Compel Arbitration. [Exc. 296–97, 555.] Stewart opposed the motion and sought partial summary judgment in her favor. [Exc. 341.]

The Superior Court granted Midland's Motion to Compel Arbitration, staying the action pending completion of arbitration, "according to the same terms ordered by this court in *Hudson v. Citibank*, Case No. 3AN-11-9196 (Order, April 30, 2012)." [Exc. 417; *see also* Exc. 205–68 (Order in *Hudson v. Citibank*, Superior Court Case No. 3AN-11-9196 CI (April 30, 2012).] The Court ruled that Stewart could "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, 417.] The Court ruled that Midland did not waive its right to compel arbitration of Stewart's claims. *Id.* The Court also denied Stewart's cross-motion for partial summary judgment. [Exc. 419.]

STANDARD OF REVIEW

A. The Arbitrator Should Decide Whether Respondent Waived its Right to Compel Arbitration and, If So, the Scope of the Waiver. If This Court Nevertheless Decides the Waiver Issue, the Appropriate Standard of Review is Clear Error.

The United States Supreme Court has expressly held that in the absence of an agreement to the contrary, waiver is a matter of procedural arbitrability for arbitrators to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002). "[T]he presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'" *Id.* (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)); *ATSA of Cal., Inc. v. Continental Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983) ("A dispute about a waiver of arbitration may properly be referred to the arbitrator."); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011) ("Both waiver and estoppel generally fall into that latter group of issues presumptively for the arbitrator."). This Court therefore should decline to address the waiver issue, and should instead leave that for the arbitrator to decide.

Furthermore, even if it were proper for this Court to determine the issue, the proper standard of review is clear error, and not de novo review as Petitioner contends. Petitioner relies on *Airoulofski v. State*, 922 P.2d 889, 894 n. 5 (Alaska 1996), for the proposition that de novo review applies when a waiver issue is decided without trial. Opening Brief at 11. However, this Court said otherwise in *Blood v. Kenneth Murray Ins. Inc.*, 68 P.3d 1251, 1254 (Alaska 2003), a case decided seven years after

Airoulofski.[1] In that much more recent case, this Court held that "[w]hether a waiver occurred is a question of fact. A trial court's finding of waiver will therefore be set aside on review only if it is clearly erroneous." *Blood*, 68 P.3d at 1254. As support for its holding, the Court cited *Miscovich v. Tryck*, 875 P.2d 1293, 1302 (Alaska 1994), for the principle that"[t]he issue of whether a waiver occurred involves a question of fact; a trial court's finding on the issue will be set aside on review only if clearly erroneous."

In *Blood*, the plaintiff was injured in an accident and sued his insurer for a declaration of coverage and damages. 68 P.3d at 1253. The trial court considered whether the plaintiff waived his right to demand arbitration by failing to plead arbitration in his complaint. *Id.* at 1254. The day trial was to begin, at a pretrial hearing, plaintiff informed the court that he simply wanted a declaration of coverage so he could proceed to arbitration. *Id.* Defendant argued that plaintiff waived his right to arbitration by failing to plead it in his complaint. *Id.* Before starting trial, the court heard argument on the waiver issue from both parties—neither party argued the issue should be decided by an arbitrator. Following argument, the court "held that Blood had waived his right to arbitration." *Id.* On appeal, this Court stated that the issue of waiver is "a question of fact" and, therefore, applied the "clearly erroneous" standard to whether Blood had waived his right to demand arbitration. *Id.* (holding he had not).

Even if it were proper for this Court to address the waiver issue, which it is not, the clear error standard applies because—as in *Blood*, but unlike *Airoulofski* —this case

[1] The parties in *Blood* did not raise the question of whether the issue of waiver should be decided by the arbitrator in the first instance.

is specifically concerned with whether there was a waiver of a right to arbitration. In *Blood*, as in this case, the trial court heard argument from the parties on whether the plaintiff waived arbitration, and then, without trying the issue, ruled that arbitration was waived. Although the ruling amounted to a grant of summary judgment, this Court nevertheless held that clear error was the proper standard for review on appeal.

This Court decided *Blood* years after *Airoulofski*. Thus, this Court had the benefit of considering whether to apply the summary judgment standard versus de novo review. Yet, the *Blood* court declined to apply the summary judgment standard, and instead reaffirmed the clear error standard it previously applied in *Tryck*, even though the waiver issue was decided before trial. *See Blood*, 68 P.3d at 1254. The result should be the same here.

Under the clear error standard, findings of fact are clearly erroneous only when the Court is left with "'a definite and firm conviction on the entire record that a mistake has been made, although there may be evidence to support the finding.'" *Tryck*, 875 P.2d at 1297 (quoting *Mathis v. Meyeres*, 574 P.2d 447, 449 (Alaska 1978)). "[I]n making this determination, this court must view the evidence *in the light most favorable to the prevailing party below*." *Tryck*, 875 P.2d at 1297 (emphasis added).

B. <u>De Novo Review is Appropriate for the Question of Whether a Private Arbitrator has Authority to Issue Statewide Injunctions Under the UTPA.</u>

The question of whether a private arbitrator has authority to issue a specific remedy under the UTPA goes to the scope of the arbitrator's authority. Whether issuance

of statewide injunctive relief would exceed the arbitrator's authority is therefore a question of law subject to de novo review. *See Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139 (9th Cir. 1991) ("Decisions regarding the validity and scope of arbitration agreements are reviewed de novo."); *OK Lumber Co. Inc. v. Alaska R.R. Corp.*, 123 P.3d 1076, 1078 (Alaska 2005). "When applying de novo review, [the Alaska Supreme Court] adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy." *Gibson v. NYE Frontier Ford, Inc.*, 205 P.3d 1091, 1096 (Alaska 2009) (internal quotation omitted).

ARGUMENT

A. Midland's Prior Collection Action Does Not Waive its Right to Arbitrate the New Claims Asserted by Stewart in this Separate and Distinct Lawsuit.

Midland has not waived its right to arbitrate the claims presented by Stewart in this action. The question of waiver is for the arbitrator to decide, not the court. *Howsam*, 537 U.S. 79, 84-85. Even assuming that it is appropriate for this Court to consider the question, the Superior Court's determination that there has been no waiver may not be overturned unless such determination was clearly erroneous. *Blood*, 68 P.3d at 1254.

Stewart does not allege that Midland engaged in any actions during the course of this lawsuit to establish a waiver of its right to arbitrate. It is undisputed that Midland promptly and repeatedly asserted its right to arbitrate as soon as it was informed of Stewart's UTPA claim. [Exc. 286, 296–97, 676–78.]

Moreover, the express language of the parties' arbitration agreement is central to any evaluation of the parties' understanding of their rights and, thus, whether a waiver has occurred. The Arbitration Agreement in the instant case permits a party who initiates a proceeding in court to elect arbitration with respect to any claim advanced in that proceeding by any other party. [Exc. 315] It expressly permits a party to arbitrate a counterclaim, or new claim asserted in a separate lawsuit, even if that party has previously litigated other claims. [Exc. 316]

The UTPA claim presented by Stewart is a distinct legal claim and it was raised in a new lawsuit after a final judgment was executed in the collection action. Even if Stewart's claim had been asserted as a counterclaim in the initial lawsuit, Midland was permitted by the terms of the arbitration agreement to compel arbitration of that claim. Stewart incorrectly applies Alaska law to the waiver issue, but regardless of whether you analyze the issue under Alaska law or the FAA, no waiver has occurred.

The Arbitration Agreement states in relevant part:

> A party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party. . . .
>
> * * *
>
> ...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 these 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.

[Exc. 316]. This language unequivocally permits a party to elect arbitration in a new lawsuit, involving a separate and distinct legal claim. The only time a party may not compel arbitration of particular claims is if a trial has begun or final judgment issued with respect to the particular claims the party is seeking to arbitrate.

Midland is not engaged in gamesmanship. It merely responded to new claims asserted in a newly-filed lawsuit in a manner expressly permitted by the arbitration agreement—namely, by seeking to arbitrate those claims. Furthermore, because Stewart contends her claim arises out of the facts at issue in the collection action, such claims are barred by res judicata (though that issue is one for the arbitrator to decide). [Exc. 286, 315]; *Robertson v. Am. Mech., Inc.*, 54 P.3d 777, 780 (Alaska 2002); *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 763-64 (9th Cir. 2002).

1. Waiver is an Issue to be Decided by the Arbitrator, and the FAA Governs the Question of Whether Waiver has Occurred.

In the absence of an agreement to the contrary, waiver is a matter of procedural arbitrability for arbitrators to decide. *Howsam*, 537 U.S. at 84-85. "[T]he presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'" *Id.* at 84 (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25); *ATSA of Cal., Inc.*, 702 F.2d at 175 ("A dispute about a waiver of arbitration may properly be referred to the arbitrator."); *Republic of Ecuador*, 638 F.3d at 394 ("Both waiver and estoppel generally fall into that latter group of issues presumptively for the arbitrator.").

Accordingly, as an initial matter, any issue regarding waiver must be determined in arbitration. However, even if it were proper for this Court to determine the issue of waiver, which it is not, Stewart cannot establish a waiver.

Contrary to what Stewart says, the question of whether a waiver has occurred is governed by the Federal Arbitration Act ("FAA") and not Alaska law. *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."). In *Sovak*, the Court distinguished between substantive law and the law governing the rules of arbitration, explaining that "the FAA supplies the rules for arbitration." *Id.* With respect to the waiver inquiry, the court held, "the question of whether a party has waived its right to compel arbitration directly concerns the allocation of power between courts and arbitrators. . . .Accordingly, the FAA, and not . . .[state] law, supplies the standard for waiver." *Id.* Likewise, in the instant case, the arbitration provision is governed by the FAA. [Exc. 316.]

Petitioners are mistaken in their reliance on *Arthur Andersen LLP v. Carlisle* and *Powers v. United Services Auto. Ass'n* to establish the application of Alaska law to the question of waiver. Opening Brief, p. 22. The court in *Arthur Anderson* did not address whether a party to an enforceable arbitration agreement waived its rights under that agreement or what law applies to a waiver determination. Rather, the court decided whether arbitration agreements that are otherwise enforceable by (or against) third parties

trigger protection under the FAA. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009) (noting that general principals of state contract law are applicable only to determine whether an arbitration agreement is enforceable). In the instant case, the arbitration agreement has been ruled enforceable and that issue is not before this court. The question here is whether Midland has waived its rights under that binding and enforceable agreement. While Alaska law was applied to the waiver inquiry in *Powers v. United Services Auto. Ass'n*, 6 P.3d 294 (Alaska 2000), the parties in that case did not dispute the applicable law. *Id.* at 300.

Under the FAA, arbitration waivers "are not favored." *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986). 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."). These elements are not satisfied in this case. The Superior Court's determination that Midland did not waive its right to arbitrate is not clearly erroneous.

2. *Midland Has Not Taken Any Action Inconsistent with Its Right to Arbitrate the Separate and Distinct Claims Filed by Stewart in this Action.*

The issue of waiver and consistency of Midland's actions cannot be viewed in a vacuum, without regard for the language of the Arbitration Agreement. *See Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 719 (9th Cir. 2012) (beginning analysis with discussion of language in arbitration agreement). The Arbitration Agreement in the instant case undoubtedly permits a party to elect arbitration with respect to a new claim or counterclaim asserted a new lawsuit. [Exc. 315–16]. The Agreement states, "[a] party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party." [Exc. 315]. It further explains, "[a]t any time you or we may ask an appropriate court to compel arbitration of Claims . . . Even if a party fails to exercise these 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." [Exc. 316]. The U.S. Supreme Court has made clear that private arbitration agreements are to be enforced according to their terms. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). If the language of the Arbitration Agreement is to be given any meaning, it is that a party can still require arbitration in a new lawsuit involving a new legal claim, even if that party previously brought an action pursuing its own claims in court.

Stewart brought this separate action to assert a new claim under the UTPA. [Exc. 269-75.] If Stewart had asserted a UTPA claim as a counterclaim in the prior lawsuit,

Midland would have been entitled under the express terms of the agreement to compel arbitration of that claim. [Exc. 315-16.] Midland does not lose its right to arbitrate merely because Stewart chose to wait until that suit was concluded before asserting her claim in a new lawsuit. Midland was not on notice of Stewart's UTPA claim at any time during the pendency of the prior lawsuit. Stewart has to this date never made any attempt to participate in that suit. It was only after that action was concluded that Stewart chose to file a new action to assert a new and distinct claim under the UTPA. As soon as Midland was informed of that claim, it asserted its right to compel arbitration and promptly pursued a course of action to invoke that right. [Exc. 277-88, 296-97.]

In short, Midland has taken no action that is inconsistent with its right to compel arbitration of the claims asserted in this action. The fact that it "invoked the judicial process" with respect to the collection action has no bearing on arbitrability of the UTPA claim. *See Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328-29 (5th Cir. 1999) (to invoke judicial process for purposes of establishing waiver of right to arbitrate, a party must have litigated the same claim that the party now proposes to arbitrate).

Stewart has not identified and cannot identify even a single case where a party is deemed to have waived arbitration of a new claim despite express language in the arbitration agreement similar to that at issue in this case. Even if Stewart had asserted her claims while the initial lawsuit was still pending, Midland had a right under the Agreement to arbitrate those claims. [Exc. 315–16].

In claiming that prior litigation by a party is a waiver of the right to arbitrate, Stewart relies on cases that are inapposite and easily distinguishable from this case. For example, she looks to cases where either the movant seeks to arbitrate claims filed by the movant in a pending action, or where the movant seeks to arbitrate the same claims that the movant already litigated in the prior action. *See e.g.*, *Cabinetree of Wis. 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 eleven months before seeking arbitration without any explanation for delay); *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."). Here, Stewart did not appear in Midland's collection action, and her claim for alleged violation of the UTPA was obviously not part of that action. Accordingly, Midland's litigation of its collection action is not a waiver of Midland's right to arbitrate Stewart's new and separate suit.[2] *See Subway*, 169 F.3d at 328-29.

Stewart ignores the express language of the Arbitration Agreement, arguing that "[f]iling and litigating a claim in court waives arbitration not only for that claim but for closely related claims as well." Opening Brief, at 18. The "closely related" analysis is simply not relevant where the arbitration agreement unequivocally permits a party to

[2] Indeed, because Plaintiff contends that her claim arises out of the facts at issue in the collection action, such claims are barred by res judicata (though that issue is one for the arbitrator to decide). [Exc. 315]; *Robertson*, 54 P.3d at 780; *United Computer Sys., Inc.*, 298 F.3d at 763-64.

compel arbitration of counterclaims even when those counterclaims are asserted in a court proceeding initiated by the party seeking to arbitrate.

Moreover, unlike this case, the cases cited by Stewart regarding closely related claims involve counterclaims arising out of a single contract or course of dealing where the courts determined it was practically or equitably inappropriate to divorce the counterclaims from the rest of the dispute. *See e.g., Gutor Int'l. AG v. Raymond Packer Co., Inc.*, 493 F.2d 938, 945 (1st Cir. 1974)[3] (plaintiff could not arbitrate defendant's counterclaims where both claims and counterclaims addressed parties' respective rights and obligations under distributorship agreement); *Owens & Minor Med., Inc. v. Innovative Mktg. & Distrib. Servs., Inc.*, 711 So.2d 176, 177 (Fla.4th DCA 1998) (matters raised in counterclaim were "intertwined with issues raised in the amended complaint, since to decide each claim a fact finder would necessarily have to resolve fact issues common to both."). In contrast, Stewart's suit presents a new and independent claim that is already divorced from the facts that gave rise to the prior action. Regardless of whether it is submitted to arbitration, Stewart's new claim must be resolved in a proceeding independent from the prior action, which has concluded. The reasoning of the cases cited by Stewart is simply not applicable.

In fact, none of the cases cited by Stewart involve a most critical fact at issue here: the prior lawsuit has been fully and finally resolved and that judgment remains undisturbed. The closest scenario presented by Stewart is in *Midwest Window Sys., Inc.*

[3] Abrogation recognized by *ITV Direct, Inc. v. Healthy Solutions, LLC*, 445 F.3d 66 (1st Cir. 2006).

v. Amcor Indus., Inc., 630 F.2d 535, 536 (7th Cir. 1980), which is easily distinguishable. In that case, Amcor filed suit in Pennsylvania state court to collect on promissory judgment notes that it knew were disputed. *Id.* at 536. Midwest succeeded in opening the judgment obtained against it by Amcor. Midwest then filed an answer in Amcor's suit, and that action was consolidated with a suit filed by Midwest against Amcor in Illinois. *Midwest Window Sys., Inc.*, 630 F.2d at 536. Amcor then sought to compel arbitration. *Id.* Amcor was well aware that Midwest disputed the amount owed to it when it filed suit to collect on the promissory judgment notes, and it ultimately sought to compel arbitration of the very lawsuit it had commenced after Midwest opened the judgment and had that action consolidated with its own. *Id.* By contrast, in the instant case, Stewart did not seek to vacate the judgment in the prior lawsuit, and the prior suit has not been consolidated with this one. Thus, the *Midwest Window* case has nothing to say about whether Midland has waived its right to arbitrate in this case.

The parties' Agreement permits either party to compel arbitration when presented with either counterclaims or an independent lawsuit. Midland's pursuit of the prior collection action without any knowledge of the claim at issue in the instant suit cannot possibly be said to be inconsistent with its right or intent to arbitrate the later claim. The Superior Court's holding with respect to this issue was not clearly erroneous.

3. Stewart Has Suffered No Prejudice by Midland's Decision to Invoke its Right to Arbitrate the Separate and Distinct Claims Presented in this Action.

The FAA, and not state law, govern the question of whether a waiver has occurred. *Sovak*, 280 F.3d at 1270 (FAA, not state law, governs the question of waiver).

Even if Stewart could establish behavior inconsistent with Midland's intent to arbitrate, the FAA requires that she also establish prejudice. *ATSA of Cal.*, 702 F.2d at 175 ("inconsistent behavior alone is not sufficient; the party opposing the motion to compel arbitration must have suffered prejudice."). The prejudice requirement means there must be "delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.'" *Subway*, 169 F.3d at 327. Stewart has not suffered any delay, expense or damage to its legal position by reason of Midland's decision to arbitrate upon receipt of the complaint in this action.

Stewart's prejudice argument is based on nothing more than the fact that Midland was successful in the prior collection action due to Stewart's own decision not to participate in that action. This fact does not establish prejudice, let alone prejudice arising from Midland's decision to take the UTPA claim to arbitration. Midland immediately sought arbitration upon being informed of Stewart's claim against it.

Stewart complains of gamesmanship and argues that fairness dictates that all claims be heard in one forum, but she is the party who chose to initiate a new and separate lawsuit after a final judgment issued in the prior action. Not only is Stewart's claim a separate and distinct legal claim (as opposed to a defense to the claims asserted by Midland), but Stewart is responsible for further separating and distinguishing her claim by pursuing it in a separate lawsuit. It is disingenuous for Stewart to argue that Midland "should not be permitted to bifurcate the controversy and complicate it by

partially changing the arena and the rules" (Opening Brief, p. 21), when it is Stewart who ignored the prior action until it was concluded and then filed a new claim in this separate and distinct lawsuit.

4. Even under Alaska Law, Midland Did Not Waive its Right to Pursue Arbitration of the Current Dispute.

Even if the Court were to evaluate the waiver issue under Alaska law, there has been no waiver. To establish waiver under Alaska law, a party must (1) engage in a course of conduct evidencing an intent to waive a right; (2) engage in conduct inconsistent with any other intention than waiver; or (3) neglect to insist upon a right, resulting in prejudice to another party. *Airoulofski*, 922 P.2d at 894. "To prove an implied waiver of a legal right, there must be direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel by the party whose conduct is to be construed as a waiver." *Id.* (citing *Milne v. Anderson*, 576 P.2d 109, 112 (Alaska 1978); *see also Tryck*, 875 P.2d at 1301.

Where the Arbitration Agreement expressly permits a party to arbitrate any counterclaims and any claims asserted in a separate lawsuit, Midland's filing of the collection action did not indicate an intent to waive its right to arbitrate a claim by Stewart, nor was it inconsistent with its intent to arbitrate such a claim. Midland promptly insisted upon its right to arbitrate upon learning of Stewart's UTPA claim. In light of the parties' Arbitration Agreement, it cannot be said that Midland's pursuit of the collection action in court was "direct, unequivocal conduct" indicating an intent to waive

its right to arbitrate a separate and distinct legal claim asserted against it in a new lawsuit. Under the express terms of the Agreement, filing the collection action would not even have precluded Midland from compelling arbitration of the UTPA claim even if it had been timely asserted in that action, let alone when it is asserted in a separate lawsuit. Thus, regardless of whether the issue is reviewed under the waiver standards required by the FAA, or the Alaska law standard cited by Stewart, no waiver has occurred.

B. The Superior Court Properly Enforced the Parties' Arbitration Agreement Pursuant to the FAA, but Petitioner is Required to Arbitrate Her Claims on an Individual Basis.

The FAA "evinces a strong policy in favor of the arbitration of disputes." *Gibson*, 205 P.3d at 1096 (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24). As noted by the U.S. Supreme Court in *Concepcion,* the FAA was designed to overcome the "judicial hostility towards arbitration ... [that] had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747. Thus, "[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." *Id.*

While Section 2 of the FAA 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." *Id.* at 1748. Moreover, "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753. *Concepcion* makes clear that the FAA precludes state law impediments to enforcing arbitration agreements according to their terms, whether under

the guise of generally applicable contract principles or state law specifically targeting arbitration. *See id.* at 1746-48. In abrogating the California law at issue in *Concepcion,* the U.S. Supreme Court held that "[b]ecause it [stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" – namely, ensuring that arbitration agreements are enforced as written – the law was preempted by the FAA. *Id.* at 1753.

In short, because the "FAA requires courts to honor parties' expectations," plaintiffs in *Concepcion* were required to arbitrate their claims on an individual (non-class, non-representative) basis, as required by the parties' contract. *Concepcion,* 131 S. Ct. at 1752. For the same reason, the Petitioner in this case is required to arbitrate her claims against Midland on an individual basis pursuant to the express terms of the Arbitration Agreement. *Id.*

1. Stewart's Agreement to Arbitrate on an Individual, Non-Representative Basis Must be Enforced under the FAA, and Any State Law Right to the Contrary is Preempted.

Petitioners rely on this Court's pre-*Concepcion* decision in *Gibson v. NYE Frontier Ford,* for the proposition that an arbitration agreement is unenforceable if it prevents the vindication of Petitioner's right under the UTPA to bring a claim as a private attorney general. Opening Brief, p. 31-32. However, as *Concepcion* and other decisions by the U.S. Supreme Court make clear, it is only if plaintiffs are prevented from enforcing *federal* statutory rights that the Court may refuse to enforce an arbitration agreement, and then only if the congressional policy manifested in the FAA is

"overridden by a contrary congressional command" expressed in the other federal statute. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (enforcing arbitration agreement despite non-waiver provision of federal consumer protection law, looking to whether "the FAA's mandate has been 'overridden by a contrary congressional command.'"). No such balancing is permitted in the instant case, because only state statutory rights are involved:

> We recognize that the PAGA [California's Private Attorney General Act] serves to benefit the public and that private attorney general laws may be severely undercut by application of the FAA. But we believe that [the] United States Supreme Court has spoken on the issue, and we are required to follow its binding authority.

Iskanian v. CLS Transp. L.A., LLC, 206 Cal. App. 4th 949, 965 (2012);[4] *see also*, *Conroy v. Citibank, N.A.*, No. 10-CV-04930-SVW-AJW, 2011 WL 10503532, *4 (C.D. Cal. July 22, 2011) (finding that under *Concepcion* very same Citibank Arbitration Agreement presented in this case must be enforced as written pursuant to the FAA).

In *Conroy*, the U.S. District Court noted,

> Plaintiff's primary argument in opposition to Defendant's Motion to Compel Arbitration is that the 'practical effect of compelling arbitration here would be to preclude Plaintiff

[4] The Supreme Court of California has granted review of this case (*Iskanian v. CLS Transp. of Los Angeles LLC*, 286 P.3d 147 (Ca. 2012)), so the opinion is technically superseded, but the reasoning of the court is nonetheless persuasive. The Supreme Court of California has likewise granted review of *Flores v. West Covina Auto Group*, which persuasively concluded that, after *Concepcion*, the FAA preempts the CLRA's anti-waiver provision because "no meaningful distinction exists" between the CLRA's anti-waiver provision and the *Discover Bank* rule because "[b]oth are state law rules that stand as an obstacle to the accomplishment and execution of the full objectives of the FAA[.]" *Flores*, 151 Cal.Rptr.3d 481, 490–94 (2013) (petition granted and opinion superseded by *Flores v. West Covina Auto Group*, --- P.3d ----, 2013 WL 1459250 (Cal. Apr 10, 2013)).

> 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 [*Concepcion*]. . . .

Conroy, 2011 WL 10503532, *4. In short, the question of whether the Arbitration Agreement will allow Petitioners to vindicate their state law right to sue as a private attorney general is simply irrelevant to the question of whether the Arbitration Agreement is enforceable.[5] *Iskanian*, 206 Cal. App. 4th at 960 ("[T]he premise that [plaintiff] brought a class action to "vindicate statutory rights" is irrelevant in the wake of *Concepcion*.").

Under *Concepcion*, there are two situations in which a state law rule will be preempted by the FAA. First, "[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. A second, and more complex, situation occurs "when a doctrine *normally thought to be generally applicable* . . . is alleged to have been applied in a fashion that disfavors arbitration." *Id.* (emphasis added). In the latter case, a court must determine whether the state law rule "stand[s] as an obstacle to

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[5] The Ninth Circuit Court of Appeals reached this same conclusion in *Kilgore v. KeyBank, N.A.*, 673 F.3d 947, 962 (9th Cir. 2012), which was later reheard *en banc* and decided on more narrow grounds in *Kilgore v. KeyBank, Nat'l Ass'n*, Nos. 09-16703, 10-15934, 2013 WL 1458876 (9th Cir. April 11, 2013). Before rehearing, the Ninth Circuit concluded that "analysis of whether a particular statute precludes waiver of the right to a judicial forum — and thus whether that statutory claim falls outside the FAA's reach — applies only to federal, not state, statutes." 673 F.3d at 962. Although the Ninth Circuit's prior opinion is not precedent, it is nevertheless persuasive as a straightforward, and correct, interpretation of *AT&T Mobility*, and its reasoning is persuasive. *See Miguel*, 2013 WL 452418, at *5.

the accomplishment of the FAA's objectives," which are principally to "ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1748.

The *Concepcion* Court held that a state law rule prohibiting class action waivers in arbitration posed such an obstacle. As stated by the Ninth Circuit:

> The Court observed that *individualized proceedings are an inherent and necessary element of arbitration, id.* at [131 S. Ct.] 1750-52, and concluded that a rule banning class-action waivers is therefore impermissible: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

Coneff v. AT&T Corp., 673 F.3d 1155, 1158 (9th Cir. 2012) (emphasis added).

The U.S. Supreme Court specifically rejected the plaintiff's argument that the availability of class actions was a matter of important state public policy, and was unmoved by the dissent's argument that only class proceedings would allow for vindication of small-dollar claims: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753; *see also*, *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 protection claims . . . are preempted by the FAA, even if they may be "desirable" . . .). *Concepcion* thus made clear that the FAA guarantees that contracting parties may agree not only "to limit *with whom* a party will arbitrate," 131 S. Ct. at 1748-49 (emphasis the Court's), but also to limit *in what capacity* a party will arbitrate. *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 WL 452418, *9-10 (C.D.Cal. Feb. 2, 2013);

Quevedeo v. Macy's, Inc., 798 F.Supp.2d 1122, 1141 (C.D. Cal. 2011); *Iskanian*, 206 Cal. App. 4th at 965.

In *Miguel*, the plaintiff argued that an arbitration agreement was unenforceable because his complaint included a claim under California's Private Attorney General Act ("PAGA"). The trial court rejected the argument, because litigation in a representative capacity—whether as a class representative or as a private attorney general—is fundamentally incompatible with arbitration:

> When an employee sues under PAGA, he acts "as the proxy or agent of the state's labor law enforcement agencies" to "supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves." *Arias v. Superior Court*, 46 Cal. 4th 969, 95 Cal.Rptr.3d 588, 209 P.3d 923 (2009). In light of this, Plaintiff appears to argue that sending the PAGA claim to arbitration would prohibit Plaintiff from fulfilling the Legislature's mandate that he be deputized as an attorney general to remedy labor law abuses.
>
> The Court disagrees. . . . [D]espite the unique nature of PAGA and the Legislature's intent to deputize private citizens, 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. *Id.* [*Concepion*] at 1142.

2013 WL 452418 at *9-10. The court therefore enforced the parties' arbitration agreement notwithstanding the plaintiff's argument that he could not vindicate his rights under PAGA: "Accordingly, the Arbitration Agreement is enforceable in spite of Plaintiff's claim that he cannot vindicate his statutory rights if compelled to arbitrate his claims individually." *Id.* at *7.

In *Iskanian v. CLS Transportation Los Angeles,* the plaintiff brought various claims against his employer for certain wage and hour violations, including claims in a representative capacity under California's PAGA. The defendant employer moved to compel arbitration under an arbitration agreement. The California Court of Appeals held that the arbitration agreement was enforceable notwithstanding that it contained a waiver of the right to sue in a representative capacity:

> Following Concepcion, the public policy reasons underpinning the PAGA do not allow a court to disregard a binding arbitration agreement. The FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration.
>
> Therefore, giving effect to the terms of the arbitration agreement here, [plaintiff] may not pursue representative claims against [defendant].

Iskanian, 206 Cal. App. 4th at 966.

In this case, the Petitioners expressly agreed that "[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." [Exc. 315.] Under *Concepcion*, the Petitioners' agreement to arbitrate on a non-representative basis *must* be enforced, because the "FAA requires courts to honor parties' expectations" not only as to the issues subject to arbitration, but also as to the capacity in which they will arbitrate. *Conception*, 131 S. Ct. at 1750-51; *Miguel*, 2013 WL 452418 at *9-10; *Iskanian*, 206 Cal. App. 4th at 966. This is true regardless of any state statute or policy to the contrary, because such state law would "stand[] as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress" – namely, ensuring that arbitration agreements are enforced as written. *Concepcion*, 131 S. Ct. at 1753.[6]

The FAA preempts any state law requirement that Petitioners be allowed to proceed as private attorneys general for the further reason that such proceedings would change the fundamental nature of the arbitral process. Just as class arbitration creates distinct legal issues and procedures, any public injunctive order issued by an arbitrator in a private attorney general proceeding would create significant problems with respect to enforcement and would frustrate many of the goals and purposes of the FAA and the Arbitration Agreement in this case. "A primary objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Concepcion*, 131 S. Ct. at 1749 (quoting *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008)).

As Stewart herself points out, a private attorney general action greatly expands the scope of Stewart's litigation to include nonparties, and relief on that basis would open the door to enforcement by those nonparties in matters involving different facts, would require that the arbitrator exercise continuing jurisdiction, and would dramatically increase the commercial stakes even while judicial review remains limited or nonexistence. Opening Brief, at 34-35. If the Arbitration Agreement did not prohibit

[6] In *Gibson*, this Court refused to uphold an arbitration agreement that required an employee to pay arbitral costs, because the conclusion that such a contract "is contrary to the policies of the AWHA is not specific to arbitration." *Gibson*, 205 P.3d at 1101. As stated in *Concepcion*, however, doctrines normally thought to be generally applicable are nevertheless preempted if they stand as an obstacle to the enforcement of arbitration agreements "*according to their terms*." *Concepcion*, 131 S. Ct. at 1748 (emphasis added). Under *Concepcion*, the fact that a particular defense to enforcement is applicable to contracts generally is only the beginning of the analysis.

Stewart from bringing claims in a representative capacity, then the streamlined and more informal procedures of the arbitral process would be much less acceptable to Midland, and the policies sought to be advanced by the FAA would be thwarted. These are precisely the concerns that were raised by the Supreme Court in *Concepcion*, 131 S. Ct. at 1750-52; *see also Stolt-Nielsen, S.A. v. AnimalFeeds Int'l. Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1775 (2010) ("a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so"). Like the class-wide arbitration analyzed in *Concepcion*, permitting a party to proceed as a private attorney general would fundamentally impede the informality, speed, efficiency and relatively inexpensive nature of a bilateral arbitration and enforcement of a bilateral arbitration. Thus, a private attorney general claim for public injunctive relief in arbitration may not be required by Alaska law any more than class-wide arbitration can be required.

Furthermore, the UTPA cannot be read to require the parties to litigate the private attorney general claim in court where the arbitration agreement includes a waiver of such claim contrary to state law. As the Eleventh Circuit Courts of Appeals has explained:

> Because ATTM's blow-up provision assures that ATTM will not be forced into class *arbitration*—but only class *litigation*—they claim that *Concepcion* is not implicated here. . . . It would be anomalous indeed if the FAA—which promotes arbitration, *see Concepcion,* 131 S. Ct. at 1749—were offended by imposing upon arbitration nonconsensual procedures that interfere with arbitration's fundamental attributes, but not offended by the nonconsensual elimination of arbitration altogether. *Cf. id.* at 1747 ("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."). In fact, the parties in *Concepcion* faced no risk of being forced into class arbitration either, because nonconsensual class arbitration was already prohibited under *Stolt–Nielsen*. *See* 130 S. Ct. at 1775 (holding that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so"). . . . Even a cursory reading of the opinion reveals that the *Concepcion* Court described the "fundamental" changes brought about by the shift from bilateral to class arbitration to show that nonconsensual class procedures are inconsistent with the FAA—not to argue for increased class action litigation. Accordingly, *Concepcion* cannot be distinguished on this ground.

Cruz, 648 F.3d at 1213-14; *see also Coneff*, 673 F.3d at 1160.

In the instant case, the Superior Court attempted to avoid the issue of FAA preemption of the UTPA by holding that the arbitrator could issue public injunctive relief.[7] Midland disagrees. The FAA does not permit Petitioners to avoid the express waiver of a private attorney general action. However, the Arbitration Agreement must nevertheless be enforced: if the UTPA does not permit the waiver of Petitioner's right to

[7] The Superior Court relied on a pre-*Concepcion* decision from a California Court of Appeal in *Brown v. Ralphs Grocery Co.*, 197 Cal. App.4th 489 (Ct. App. 2 Dist. Div. 5 2011) for the proposition that public injunctive relief may be pursued in arbitration without running afoul of the FAA. This conclusion was wrong for two reasons: 1) the FAA requires enforcement of the express provision of the arbitration agreement prohibiting Stewart from seeking public injunctive relief; and 2) to the extent Alaska law makes such an agreement unenforceable, *Concepcion* says Alaska law is preempted. Even if Alaska has a policy against waivers of private attorney general claims, that policy cannot save such rule from FAA preemption any more than state policy could save the *Discover Bank* rule from preemption in *Concepcion*. *See Cruz*, 648 F.3d at 1213-15; *Coneff*, 673 F.3d at 1159-60.

bring a private attorney general action for public injunctive relief, then the UTPA stands as an obstacle to the FAA's objective of allowing parties to agree to what, with whom, and in what capacity they will arbitrate, and is therefore preempted.

2. *The Arbitrator Cannot Issue "Public Injunctive Relief," But this Court May Not Deny Enforcement on that Basis.*

The Arbitration Agreement in this case expressly encompasses "[a]ll Claims . . . no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek . . . [and] includes Claims based on contract . . . statutory or regulatory provisions, or any other sources of law . . . ." [Exc. 315.] It further requires that "[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." *Id.* Put simply, Petitioner remains free to arbitrate her claims, including all her statutory claims, and to pursue all the same remedies (including injunctive relief) she would have in court – albeit on an individual basis. The arbitrator does not have authority beyond that agreed upon by the parties, and the FAA does not permit Stewart to avoid the terms of the parties' agreement. *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1286–88 (9th Cir. 2009) (arbitrator had authority over all disputes, equitable and legal, but arbitrator exceeded authority by issuing permanent injunctions attempting to bind persons not party to arbitration agreement); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203, 182 L. Ed. 2d 42 (2012) (the FAA"requires courts to enforce the bargain of the parties to arbitrate.") (quoting *Dean*

Witter Reynolds Inc. v. Byrd, 470 U. S. 213, 217 (1985)). For this reason, the arbitrator does not have authority to issue statewide public injunctive relief.

As shown in Part B(1) above, the parties' agreement as to the capacity in which they will arbitrate must be enforced under the FAA. Insofar as Alaska's UTPA or any other state law says otherwise, that state law is preempted. Thus, this Court may not deny enforcement of the Arbitration Agreement on the basis that the arbitrator cannot issue public injunctive relieve. *Concepcion*, 131 S. Ct. at 1747; *Cruz*, 648 F.3d at 1213–14; *Coneff*, 673 F.3d at 1160.

CONCLUSION

Stewart cannot avoid the express language of the Arbitration Agreement or bind Midland to terms the parties did not agree upon. Filing a collection action does not constitute waiver of Midland's express right under the Arbitration Agreement to nonetheless arbitrate any claim asserted by Stewart, particularly where that claim is asserted in a new action and is entirely distinct from the facts that gave rise to the collection action.

More importantly, Stewart agreed that any claims she may assert against Midland were subject to arbitration on an individual basis. The FAA requires that she be held to the terms of that agreement, regardless of any state policy underlying the UTPA. Thus, Stewart cannot pursue public injunctive relief as part of arbitration, and this Court should enforce the arbitration agreement notwithstanding that such relief is unavailable.

DATED this 15th day of April, 2013.

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