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

Midland baldly asserts that the state of South Dakota has a compelling interest in "applying its law to businesses operating within its borders."[33] It is unclear why this would result in South Dakota having any sort of obligation to Alaska consumers, or why this rule (if it were actually a real rule) applies here, where two of the three defendants do not operate within South Dakota's borders.

The fact is, South Dakota has little to no interest in this dispute. The mere fact the defendants bought plaintiff's debt from a South Dakota corporation does not give South Dakota any interest in preventing an Alaska resident – who represents a putative statewide class of Alaska residents – from being cheated by unlawful acts performed by Alaska businesses and that occurred solely within Alaska's borders.

Further, even if defendants were correct that South Dakota somehow had an interest in applying its law to this dispute, the Alaska Supreme Court has determined that such an interest is "decidedly weaker" than Alaska's interest in protecting its own citizens.[34] Numerous other courts are in accord.[35]

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[33] Midland Memo., at 9.

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

[35] *See Omstead v. Dell, Inc.*, 594 F.3d 1081, 1086 (9th Cir. 2010) ("California has

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3. Application of South Dakota Law Would Offend Fundamental Alaska Policy.

As discussed above, the *Gibson* court joined numerous jurisdictions across the country in holding that adhesion contracts which permit one party to make unilateral changes to material terms are unconscionable.[36] According to the commentary to Restatement § 187, state unconscionability rules such as this are "fundamental policies" because they are rules "designed to protect a person against the oppressive use of superior bargaining power."[37] Case law around the country is again in accord.[38]

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a materially greater interest than Texas in applying its own law. Accordingly, the validity of the arbitration provision is governed by California law."); *Oestreicher v. Alienware Corp.*, 322 Fed. Appx. 489, 491-92 (9th Cir. 2009) ("California has a materially greater interest than Florida in determining the enforceability of the class action waiver. Oestreicher seeks to represent a class composed solely of California residents and invokes solely California consumer protection laws. Florida's interest, by contrast, while not inconsequential, is limited to enforcement of contractual provisions made by one of its corporate citizens.") (citations omitted); *Davis v. Chase Bank USA, N.A.*, 299 Fed. Appx. 662, 663 (9th Cir. 2008) ("California has a materially greater interest than Delaware in determining the enforceability of the class action waiver provision given that the relevant transactions took place in California, California residents compose the class, the claims arose under California state law, and California has an interest in protecting its citizens from unconscionable class action waivers.") (citations omitted).

[36] *Gibson*, 205 P.3d at 1097.

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

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Defendants urge this Court to apply South Dakota law, which permits unilateral change clauses. But this would offend a fundamental policy of Alaska: namely, unilateral change clauses are unconscionable in Alaska.

C. Defendants Waived Their Right to Arbitrate.

Defendants sued Stewart in Alaska state court, obtained a wrongful and inflated state court judgment against her in state court, then proceeded to use the state court system to collect on that wrongful judgment. Now, when Stewart wants to turn around and use the state court system to sue defendants for their illegal debt collection practices, defendants argue that the doors to the state courthouse are closed to her and she must try to obtain justice in an arbitral forum. Defendants waived this argument by their own non-arbitral conduct.

Defendants cannot have their cake and eat it too.[39] Courts from around the

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

[39] *Roberts v. El Cajon Motors, Inc.*, 200 Cal. App. 4th 832, 846 (Cal. App. 2011) ("El Cajon cannot proverbially 'have its cake and eat it too.' That is, if El Cajon wanted to arbitrate the dispute involving Roberts, it should have promptly invoked

country make it clear that when a party chooses to litigate, as defendants have done here, instead of arbitrate, that party has waived its right to demand arbitration.[40]

While waiver is not to be found lightly, there is nothing "light" about how defendants conducted themselves; they used the full force of the judicial system against Stewart. It is impossible to see defendants' litigation-to-judgment actions as being anything but "direct, unequivocal conduct that indicated its purpose to abandon [their] right to demand arbitration."[41] Defendants should not be allowed now – in the

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arbitration regardless of the validity of the waiver provision in the arbitration provision.").

[40] *See, e.g., Nicholas v. KBR, Inc.*, 565 F.3d 904, 908 (5th Cir. 2009) ("We conclude that the act of a plaintiff filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process, unless an exception applies. Indeed, short of directly saying so in open court, it is difficult to see how a party could more clearly evince[ ] a desire to resolve [a] . . . dispute through litigation rather than arbitration, than by filing a lawsuit going to the merits of an otherwise arbitrable dispute.") (internal citations and quotations omitted); *Grumhaus v. Comerica Sec., Inc.*, 223 F.3d 648, 652 (7th Cir. 2000) (holding that prior litigation of conversion, unjust enrichment, and constructive fraud claims waived right to arbitrate negligence, breach of duty, and securities law claims because all arose out of the "same issue"); *Cabinetree of Wisconsin v. Kraftmaid Cabinetry*, 50 F.3d 388, 390-91 (7th Cir. 1995) ("We have said that invoking judicial process is presumptive waiver."); *Worldsource Coil Coating v. McGraw Constr. Co.*, 946 F.2d 473, 476-77 (6th Cir. 1991) (A "party waives its right to compel arbitration where its action in enforcing its claim is so inconsistent with arbitration as to indicate an abandonment of that right. . . . It is not what you say you are doing, it is what you actually do that controls."); *Otis Hous. Ass'n v. Ha*, 201 P.3d 309, 312 (Wash. 2009) ("Simply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate.").

[41] *Powers v. United Servs. Auto. Ass'n*, 6 P.3d 294, 299 (Alaska 2000); *see also*,

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face of a class action lawsuit – to switch tactics and demand arbitration when no prior desire to arbitrate has been expressed.

Finally, a consideration of the actual language in defendants' arbitration agreement shows that a waiver has, in fact, occurred here. Citi's arbitration agreement provides: "At any time you or we may ask an appropriate court to compel arbitration of Claims, or to stay the litigation of Claims pending arbitration even if such Claims are part of a lawsuit, **unless a trial has begun or a final judgment has been entered.**"[42] What this contractual language obviously means is that where one party has already used the judicial process and started trial or obtained a final judgment, the right to compel arbitration has been waived. Defendants have already obtained a judgment against Stewart. Thus, in accord with the language of their own adhesion contract, they have waived their right to compel arbitration.

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

42 *See* Kharmalova Decl., at MID0064 (emphasis added).

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D. Citi and Stewart Never Formed a Valid Contract to Arbitrate.

There was never an agreement to arbitrate between Stewart and Citi. "Arbitration is a creature of contract ... ."[43] "Because arbitration is a matter of contract, parties can only be compelled to arbitrate a matter where they have agreed to do so."[44] "Typically, the party seeking to compel arbitration has the burden of demonstrating by a preponderance of the evidence the existence of an agreement to arbitrate."[45] "In the context of a motion to compel arbitration, the Court applies a standard similar to the standard for a motion for summary judgment."[46]

Here, defendants have failed at the threshold: Defendants have not provided this Court with the actual credit card agreement signed by Stewart. Instead, the only thing defendants have provided in support of its claims – and that in a different set of pleadings – is a generic credit card agreement it believes to be like the one Stewart

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43 *Classified Emples. Ass'n v. Matanuska-Susitna Borough Sch. Dist.*, 204 P.3d 347, 353 (Alaska 2009).

44 *Lexington Marketing Group v. Goldbelt Eagle, LLC*, 157 P.3d 470, 477 (Alaska 2007) (*citing* AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986)).

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

46 *Id.*

signed.[47] Moreover, not only is this agreement undated, but there is absolutely no factual support for the premise that this generic credit card agreement is identical or even similar to the one signed by Stewart.

But there is another reason why defendants have failed to prove the existence of a binding contract to arbitrate between Citi and plaintiff. In Alaska, formation of a contract requires an offer, encompassing all essential terms, an unequivocal acceptance by the offeree of all terms of the offer, consideration, and intent to be bound by the offer.[48] In this case, there is no evidence proffered by defendants showing that Stewart ever executed an agreement with Citi containing an arbitration provision. And, there is no suggestion that any consideration ever changed hands via-à-vis Citi's "bill stuffer" setting out the new arbitration terms.[49]

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47 ALO's Motion to Stay Discovery, filed March 14, 2012, at Exhibit B.

48 *Hall v. Add-Ventures*, 695 P.2d 1081, 1087 (Alaska 1985).

49 *See Helenese v. Oracle Corp.*, 2010 U.S. Dist. LEXIS 15071 at *8-19 ("Furthermore, the purported agreement to arbitrate lacks consideration. . . . Consideration requires 'a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.' " . . . Since the defendants in this case did not make a specific promise to continue employing Helenese in exchange for agreeing to the arbitration provision, or provide another benefit or suffer a detriment, the policy lacks consideration.") (citations omitted). *See, e.g., Douglas v. United States Dist. Court*, 495 F.3d 1062, 1066 (9th Cir. 2007) ("a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so.").

Defendants try to avoid this fatal problem by telling this Court that it should apply South Dakota law. Midland Memo., at 11. Of course, it's well-known that South

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There is also no evidence that the original card member agreement allows Citi to unilaterally add an arbitration provision. Courts around the country have rejected the premise that credit card companies can unilaterally alter a credit card agreement to add an arbitration provision.[50] Simply put, an arbitration provision is outside the scope

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Dakota has won, or leads, in the race to the bottom. *See, e.g.*, Robin Stein, *Secret History of the Credit Card*, FRONTLINE (Nov. 23, 2004), at http://www.pbs.org/wgbh/pages/frontline/shows/credit/more/rise.html (discussing how South Dakota legislature allowed Citi to rewrite its usury laws, and passed those laws in *one* day, so as to favor Citi and to attract it to that state); Steve Benen, *Romney and the Race to the Bottom*, WASHINGTON MONTHLY (May 13, 2011), at http://www.washingtonmonthly.com/political-animal/2011_05/romney_and_the_race_to_the_bot029543.php (noting how South Dakota has eliminated all insurance regulations so as to attract insurers to headquarter in its state).

But South Dakota's de facto corruption is not the only reason this Court should reject defendants' request that it apply South Dakota law. The primary reason this Court should refuse to apply South Dakota law is because the application of the law of South Dakota "would be contrary to a fundamental policy" of Alaska. *Long*, 26 P.3d at 432 (*quoting* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)).

[50] *Long v. Fidelity Water Sys.*, No. C-97-20118 RMW, 2000 U.S. Dist. LEXIS 7827, *9 (N.D. Cal. May 24, 2000) ("Defendants argue that the insertion of the arbitration clause and subsequent modification of it was authorized by the 'Change of Terms' provision in Mr. Continolo's original credit card application. However, the provision is reasonably construed as allowing Household to terminate its agreement, change the credit limit or change financial terms of the account. It cannot be reasonably construed as explicitly allowing the insertion of an arbitration clause."); *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 198 (E.D.N.Y. 2004) ("[T]he terms discussed in the change-in-terms clause must supply the universe of terms which could be altered or affected pursuant to the clause. To hold otherwise would permit the Bank to add terms to the Customer Agreement without limitation as to the substance or nature of such new terms. There is nothing to suggest that plaintiff

of the original agreement.[51]

Because there is no evidence that Citi and Stewart's original contract

intended to give such unlimited power to the Bank, or that the law would sanction such a grant.") (citations omitted); *see also Myers v. MBNA Am. & N. Am. Capitol Corp.*, No. CV 00-163-M-DWM, 2001 U.S. Dist. LEXIS 11900, *13-15 (D. Mont. Mar. 28, 2001); *Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207, 217-18 (N.C. App. 2004); *Badie v. Bank of America*, 67 Cal. App. 4th 779, 803 (Cal. App. 1998); *Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693, 700-01 (Mont. 2009); *Robertson v. J.C. Penney Co.*, 484 F. Supp. 2d 561, 566-68 (S.D. Miss. 2007).

[51] *See Myers*, 2001 U.S. Dist. LEXIS 11900, *13-15 ("The amendment requiring arbitration is not foreshadowed in the original Agreement. . . . If MBNA's argument that Myers 'agreed' to arbitration when she agreed to allow MBNA to amend the Agreement were accepted, there would be no reason to stop at arbitration. MBNA could 'amend' the Agreement to include a provision taking a security interest in Myers' home or requiring Myers to pay a penalty if she failed to convince three friends to sign up for MBNA cards. Such provisions were as much within the agreement of the parties at the outset of their relationship as the arbitration provision."); *Avery*, 163 N.C. App. at 217-18 (N.C. App. 2004) (" '[N]othing could be more illusory' than to allow a party to unilaterally amend a contract based on a provision such as the one in the handbook"); *Badie*, 67 Cal. App. 4th at 803 ("[W]hen the account agreements were entered into, the parties did not intend that the change of terms provision should allow the Bank to add completely new terms such as an ADR clause simply by sending out a notice. Further, . . . ambiguous contract language must be interpreted most strongly against the party who prepared it, a rule that applies with particular force to the interpretation of contracts of adhesion, like the account agreements here. Application of this rule strengthens our conviction that the parties did not intend that the change of terms provision should permit the Bank to add new contract terms that differ in kind from the terms and conditions included in the original agreements.") (citations omitted); *Kortum-Managhan*, 204 P.3d at 700-01 ("[M]aking a change in a credit agreement by way of a 'bill stuffer' does not provide sufficient notice to the consumer on which acceptance of the unilateral change to a contract can be expressly or implicitly found. Consequently, Herbergers' unilateral attempt to amend its original cardholder agreement to include an arbitration clause was ineffective.").

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contemplates arbitration, Citi cannot unilaterally impose arbitration on Stewart via a "bill stuffer." As the Mississippi Supreme Court has stated in *Union Planters Bank, Nat'l Ass'n v. Rogers*:[52]

> Submitting to arbitration means giving up the right to file a lawsuit in a court of competent jurisdiction. Waiving that right requires more than implied consent: Waiver presupposes full knowledge of a right existing, and an intentional surrender of that right. It contemplates something done designedly or knowingly, which modifies or changes existing rights or varies or changes the terms and conditions of a contract. It is the voluntary surrender of a right. To establish a waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived.[53]

Here, as in *Rogers*, there is no evidence that Stewart "voluntarily and knowingly waived" her right to sue in court.[54] As such, the arbitration "agreement," if one such exists, is unenforceable.

E. Even if Citi and Stewart Had Formed an Arbitration Agreement, Midland and ALO Cannot Invoke It Because They Are Not Parties To It.

There is no dispute that neither Midland nor ALO is a party to the contract between Citi and Stewart. Midland contends that it is an assignee of Citi,[55] but because

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52 *Union Planters Bank, Nat'l Ass'n v. Rogers*, 912 So. 2d 116 (Miss. 2005).

53 *Id.*, at 119.

54 *Id.*, at 119-20.

55 Midland Memo., at 17; *see also* Affidavit of Kyle Hannan, dated April 3, 2012.

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the original card member agreement between Citi and Stewart has not been provided, there is no evidence that Citi has the right to assign its interests in Stewart's account – including the right to arbitrate any disputes – to Midland or anyone else.

The connection between ALO and Stewart is even more tenuous. ALO has not proffered any proof that it is an agent or representative of Midland (let alone Citi) or that it is an assignee of the credit card contract at issue.[56] From the record before this Court, it appears that ALO is simply an independent contractor retained to collect debts for Midland. As such, ALO is not covered by the arbitration provision in the contract between Citi (and by extension Midland) and Stewart.

Mundi v. Union Sec. Life Ins. Co.[57] is instructive with regard to both Midland and ALO. There the Ninth Circuit established whether and when a non-signatory to an arbitration provision could nonetheless avail itself of the arbitration provision's protections.[58] The court examined decisions from around the country and concluded that, "in light of the general principle that only those who have agreed to arbitrate are

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[56] *Cf., Mims v. Global Credit & Collection Corp.*, No. 10-23830-CIV, 2011 U.S. Dist. LEXIS 90220, *11-18 (S.D. Fla. Aug. 12, 2011) (holding that debt collector was independent contractor of credit card company and therefore not authorized representative of credit card company for purposes of arbitration provision).

[57] 555 F.3d 1042 (9th Cir. 2009).

[58] *Id.*, at 1044.

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obliged to do so,"[59] a non-signatory to the arbitration provision *cannot* avail itself of the arbitration provision's protections if the complained-of conduct is neither "intertwined with the contract providing for arbitration" nor does it "arise out of" or "relate directly to" that contract.[60]

Mundi's analysis was elaborated on in *Brantley v. Republic Mortgage Insurance Co.*[61] There, the Fourth Circuit affirmed the denial of the defendant non-signatory's motion to compel the plaintiffs to arbitrate their claims against the defendant. The plaintiffs entered into an arbitration agreement with their mortgage lender, but their mortgage insurance contract, which was a separate transaction from the mortgage, did not contain an arbitration agreement.[62] The Fourth Circuit held that equitable estoppel did not apply to compel the plaintiffs to arbitrate their Fair Credit

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59 *Id.*, at 1046.

60 *Id.*, at 1047. (*citing Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 361 (2d Cir. 2008) (non-signatory not bound by arbitration provision unless the "subject matter of the dispute was intertwined with the contract providing for arbitration."); *Brantley v. Republic Mortgage Insurance Co.*, 424 F.3d 392, 396 (4th Cir. 2005) (non-signatory not bound by arbitration provision because claim did not arise out of or relate to the contract that contained the arbitration agreement); *Chastain v. Union Sec. Life Ins. Co.*, 502 F. Supp. 2d 1072, 1079-81 (C.D. Cal. 2007) (denying insurer's motion to compel arbitration because plaintiff's claims regarding his insurance policies were not intertwined with the credit card agreements that the policies covered)).

61 424 F.3d 392 (4th Cir. 2005).

62 *Id.*, at 394.

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Reporting Act claim against the mortgage insurance company because the claim did not arise out of or relate to the contract that contained the arbitration agreement. Rather, the plaintiffs' claim was "wholly separate from any action or remedy for breach of the underlying mortgage contract that is governed by the arbitration agreement."[63] The court further reasoned that there were no allegations of collusion or misconduct by the mortgage lender to require equitable estoppel, and that the defendant was not a third party beneficiary of the arbitration agreement because the contract did not mention the defendant or the mortgage insurance transaction.[64]

In this litigation, plaintiff's complaint is based on ALO's actions, not Citi's actions. The subject matter of the parties' dispute — ALO's improper attorney's fee requests — does not relate to the contract between Stewart and Citi. Stewart's claims are not intertwined, or even connected to, the card member agreement between herself and Citi. It is obvious that "a party cannot be required to submit to arbitration any dispute which he had not agreed so to submit."[65] Here, when Citi and Stewart entered

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63 *Id.*, at 396.

64 *Id.*, at 396-97;*see also Just Film, Inc. v. Merch. Servs.*, 2011 U.S. Dist. LEXIS 96613 (N.D. Cal. Aug. 29, 2011) (rejecting claims by non-signatories that they had a right to demand arbitration and stating that "none of this establishes that Universal Card, National Payment Processing or Moore have "some sort of corporate relationship to a signatory party.")

65 *Classified Emples. Ass'n v. Matanuska-Susitna Borough Sch. Dist.*, 204 P.3d

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into the card member agreement, they could not have possibly agreed to arbitrate illegal debt collection actions that have nothing to do with any term or condition in the card member agreement.[66]

There is no conceivable way that a party signing a credit card agreement that contained an arbitration clause could knowingly be signing away the right to litigate illegal actions by an attorney in collecting the debt. If the attorney had been hired to litigate the validity of the debt, that would more easily be seen as a matter arising from the credit card agreement, but nowhere in the arbitration addendum to the card member agreement is there language suggesting binding arbitration over the means of collecting the debt.[67] For these reasons, and in accord with *Mundi*, neither Midland nor ALO can avail itself of the arbitration provision's protections.

347, 353 (Alaska 2009) (*quoting citing AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)).

[66] *See, e.g., Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172-73 (S.C. 2007).

[67] The arbitration addendum includes a rather exhaustive list of claims that are subject to arbitration: "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." Kharmalova Decl., at MID0063. While certainly broad, this language is limited to the relationship between the card holder (Stewart) and Citi. The attorney's fees tacked on by ALO, and which are the subject of this litigation, are well outside of this scope.

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There is a final, dispositive reason why ALO's efforts to seek shelter under Citi's arbitration clause must fail. ALO claims that it is entitled to the protection of Citi's arbitration agreement because of the "agency relationship between ALO and Midland."[68] Actually, ALO appears to be nothing other than a simple debt collector acting as an independent debt collector to collect Midland's debts. Certainly, *if* ALO were in fact an agent of Midland, ALO would have provided to this Court the actual agreement between itself and Midland. This Court could have seen for itself, had ALO given this Court that document, whether Midland designated ALO as an agent. But no such document has been produced. This Court should not indulge ALO and presume that it has the legal status as an agent of Midland when ALO has elected not to produce any evidence to this effect. This is, after all, ALO's burden.[69]

The case before the Court is not a simple matter of an attorney representing a client and making arguments on behalf of the client in an attorney-client relationship.[70]

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[68] ALO Joinder, at 4.

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

[70] ALO's argument that Midland can only act in court through an attorney is not dispositive here. ALO Joinder, at 9. Stewart is not contesting that ALO can make arguments on behalf of Midland, it is only arguing that ALO cannot step into Midland's shoes for the purposes of protection under Citi's arbitration clause.

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What is at issue here are not the actions of Midland but rather the actions of ALO. ALO can only avail itself of the protections of Citi's arbitration clause if it is contemplated as an agent of Citi via Midland. Where the actions being disputed are those of ALO as opposed to the credit card company, that cannot be the case.

ALO cites to multiple cases holding that a non-signatory to a credit card agreement can compel a signatory to arbitrate under a theory of estoppel.[71] However, these cases are premised upon the issues the non-signatory is seeking to arbitrate being intertwined with the underlying agreement. For the reasons just discussed, this is not the case here. Actions involved in collecting a debt are not covered by Citi's arbitration agreement with Stewart.

F. *Concepcion* Does Not Bar Stewart's Arguments.

For their argument that this Court should compel arbitration pursuant to Section 2 of the Federal Arbitration Act,[72] defendants rely primarily upon the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion.*[73] Defendants contend that *Concepcion* confirms the enforcement of arbitration agreements.[74] To a certain extent

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71 ALO Joinder, at 7, 9-11.

72 9 U.S.C. §§ 1, *et seq.*

73 ___ U.S. ___, 131 S. Ct. 1740 (2011).

74 Midland Memo., at 8; ALO Joinder, at 4.

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this is correct, and Stewart does not contest that arbitration is generally preferred.[75] But, defendants grossly over-read the holding of *Concepcion* and the applicability of the ruling to the present case. *Concepcion* does *not* apply to state laws that do not target arbitration provisions but, instead, are generally applicable to all contracts. Consequently, *Concepcion* is not controlling authority on Stewart's class action lawsuit.

Indeed, the Supreme Court's decision in *Marmet Health Care Ctr. v. Brown*[76] confirms plaintiff's analysis: state law unconscionability arguments can *still* be raised in cases that involve arbitration agreements (and are *not* preempted by the FAA) because the defense of unconscionability is not "specific to arbitration." We know this because the Supreme Court explicitly stated as much in its *Marmet Health Care* decision: the Supreme Court remanded the case to the Supreme Court of Appeals of West Virginia for that court to consider whether the at-issue arbitration agreement is unconscionable under West Virginia state law because the defense of unconscionability is not "specific to arbitration" and therefore not preempted by the

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[75] *See Gibson*, 205 P.3d at 1096 ("The FAA evinces a strong policy in favor of the arbitration of disputes. Alaska's Uniform Arbitration Act and Revised Uniform Arbitration Act reflect the same policy at the state level.").

[76] 132 S. Ct. 1201 (Feb. 21, 2012).

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FAA.[77]

In the present case, Stewart does *not* claim that Citi's arbitration agreement is unfair or for some reason unenforceable under some categorical anti-arbitration rule. To the contrary, Stewart's arguments in this case are much more discrete. First, Stewart never contracted with Citi for arbitration. Second, Stewart argues that even if she had entered into a contract with Citi for arbitration, Citi waived its right to demand arbitration by suing Stewart in state court and pursuing judgment against her through the state courts. Finally, Stewart argues that under Alaska law it is unconscionable to allow the stronger party to *any* adhesion contract, arbitration or otherwise, to unilaterally change the terms of that contract.[78]

As is self-evident, these defenses are plainly *not* categorical rules that only apply to arbitration. To the contrary, these defenses may be raised by any party with regard to *any* contract dispute, arbitration or otherwise.[79] Since Stewart's state law

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77 *Marmet Health Care Ctr.*, 132 S. Ct. at 1204.

78 *Gibson*, 205 P.3d at 1096.

79 *See, e.g.*, *Colton v. Colton*, 244 P.3d 1121, 1127-28 (Alaska 2010) (holding in case not involving arbitration that "[a]n essential requirement of an enforceable settlement agreement is the parties' mutual assent to the agreement's terms."); *Milne v. Anderson*, 576 P.2d 109, 112 (Alaska 1978) (in case not involving arbitration discussing requirements for express and implied waiver); *Municipality of Anchorage v. Locker*, 723 P.2d 1261, 1265-66 (Alaska 1986) (in case not involving arbitration holding that "unconscionability may exist where [the] circumstances

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defenses do *not* "apply only to arbitration" and do *not* derive their "meaning from the fact that an agreement to arbitrate is at issue,"[80] they do not meet the first step of *Concepcion's* analysis. They are thus not preempted by the FAA.

G. Citi's Agreement Is Unenforceable to the Extent It Requires Stewart to Waive a Nonwaivable Claim for Injunctive Relief that Belongs to the Alaska Public at Large.

1. Citi's abitration agreement requires Stewart to waive a nonwaivable claim for public injunctive relief.

The Alaska Supreme Court has been clear that if an arbitrable forum is to be substituted for a judicial one with respect to statutory claims, five basic conditions must be met. The arbitration agreement must (1) provide for neutral arbitrators, (2) provide for more than minimal discovery, (3) require a written award, (4) provide for all types of relief that would otherwise be available in court, and (5) not require participants to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.[81]

Here, condition number four is *not* met because the at-issue arbitration

---

indicate a vast disparity of bargaining power coupled with terms unreasonably favorable to the stronger party.").

80 *Concepcion*, 131 S. Ct. at 1746.

81 *Gibson*, 205 P.3d at 1100 (citing *Cole v. Burns International Security Services*, 105 F.3d 1465, 1468 (D.C. Cir. 1997)).

provision flatly prohibits Stewart from acting as a private attorney general.[82] This provision is therefore unconscionable and unenforceable because it is in direct conflict with Alaska's fundamental policy that Alaska consumers have a nonwaiveable right to seek public injunctive relief.[83]

2. Even if the UTPA's nonwaiver provision did not exist, the parties' alleged arbitration agreement does not cover Stewart's private attorney general claim.

Stewart could not possibly have agreed to waive her claim for public injunctive relief because that claim ultimately belongs to the people of the State of Alaska, not to Stewart herself. It has long been recognized that private attorney general provisions like the UTPA's "create a means of 'deputizing' citizens as private attorneys general to enforce" the law.[84] Alaska's UTPA provides *the public* with a right to protection from unfair or deceptive trade practices and allows individuals to sue for injunctive relief *on behalf of the public* despite their own lack of personal injury.[85] The real party

---

[82] *See* Kharmalova Decl., at MID0065 ("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.").

[83] *See* AS 45.50.535.

[84] *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 501 (Cal. App. 2d Dist. 2011).

[85] Under AS 45.50.535(a), any victim of an unfair or deceptive practice may bring an action to enjoin that practice *regardless* of whether that individual was harmed

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in interest in Stewart's private attorney general claim is not Stewart herself, but rather the Alaska public at large.

But the general populace of the State of Alaska is not a party to Citi arbitration agreement. Thus, their rights under the UTPA cannot possibly be affected by it. As the Sixth Circuit stated in *Albert M. Higley Co. v. N/S Corp.*,[86] "the federal policy in favor of arbitration is not an absolute one. Arbitration under the Federal Arbitration Act is 'a matter of consent, not coercion.'" "[N]o matter how strong the federal policy favors arbitration, arbitration is a matter of contract between the parties . . ."[87] The public of the State of Alaska is simply not a party to Citi's contract and their rights cannot be waived thereunder.

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personally. This same right exists in California. *See Consumers Union of U.S., Inc. v. Fisher Development, Inc.*, 208 Cal. App. 3d 1433, 1439 (1st Dist. 1989) (describing "**the right of the public** to protection from fraud and deceit" under California's UTPA and the right of individuals "**to sue on behalf of the public** for injunctive relief as 'private [attorneys] general,' even if they have not themselves been personally harmed or aggrieved.") (emphasis added). *See also Hockley v. Hargitt,* 510 P.2d 1123, 1133 (Wash. 1973) (stating that the Washington UTPA allows private litigants "to represent the public."); DEE PRIGDON, CONSUMER PROTECTION & THE LAW § 6:9 at 463 (2005) ("Some states are quite liberal in allowing individuals or groups to sue for injunctions under the consumer protection law, despite their own lack of injury").

[86] 445 F.3d 861, 863 (6th Cir. 2006) (*quoting Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 479 (1989)).

[87] *Simon v. Pfizer Inc.*, 398 F.3d 765, 775 (6th Cir. 2005) (internal citations omitted).

III. CONCLUSION

For the foregoing reasons, plaintiff requests that this Court deny defendants' motion to compel arbitration and grant her cross-motion for partial summary judgment.

DATED: May 30, 2012

NORTHERN JUSTICE PROJECT
Attorneys for Plaintiff

James J. Davis, Jr., AK Bar No. 9412140
Goriune Dudukgian, AK Bar No. 0506051
Ryan Fortson, AK Bar 0211043

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

Marc G. Wilhelm
Richmond & Quinn
360 K Street, Suite 200
Anchorage, AK 99501

Counsel for Alaska Law Offices, Inc. and Clayton Walker

Jon Dawson
Davis Wright Tremaine, LLP
701 West Eighth Avenue, Suite 800
Anchorage, AK 99501

Counsel for Midland Funding, LLC

Signature 5/30/12 Date

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CYNTHIA STEWART, on behalf of herself and all others similarly situated,

Plaintiffs,

v.

MIDLAND FUNDNG, LLC, ALASKA LAW OFFICES, INC. and CLAYTON WALKER,

Defendants.

Case No. 3AN-11-12054 CI

CERTIFICATE OF RYAN FORTSON IN OPPOSITION TO DEFENDANTS' MOTIONS TO COMPEL ARBITRATION AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Ryan Fortson, after being first duly sworn, upon oath depose and state:

1. I am one of the lawyers for the plaintiff. I have first hand-knowledge of the facts contained in this affidavit, except as otherwise qualified, and the facts contained herein are true and correct.

2. Attached hereto as Exhibit 1 are true and correct copies of September 9, 2010 and August 2, 2011 letters from Alaska Law Offices, Inc. to the plaintiff wherein the letters state "This is a communication from a debt collector."

3. Attached hereto as Exhibit 2 is a true and correct copy of the judgment

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defendants obtained on February 10, 2011 in 3AN-10-12555 CI.

4. Attached hereto as Exhibit 3 is a true and correct copy of a print-out from CourtView showing a disbursement on November 23, 2011 to defendants in 3AN-10-12555 CI.

5. Attached hereto as Exhibit 4 is a true and correct copy of the attorney's fee affidavit in 3AN-10-12555 CI.

6. Attached hereto as Exhibit 5 is the true and correct copy of the cease and desist letter that plaintiff sent to defendants on November 9, 2011 in accord with Alaska's Unfair Trade Practices Act.

FURTHER AFFIANT SAYETH NOT.

DATED: May 30, 2012

Ryan Fortson, AK Bar No. 0211043

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310 K Street, Suite 200
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Phone: (907) 264-6634 • Fax: (866) 813-8645

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

Marc G. Wilhelm
Richmond & Quinn
360 K Street, Suite 200
Anchorage, AK 99501

Counsel for Alaska Law Offices, Inc. and Clayton Walker

Jon Dawson
Davis Wright Tremaine, LLP
701 West Eighth Avenue, Suite 800
Anchorage, AK 99501

Counsel for Midland Funding, LLC

Signature 5/30/12 Date

Clayton Walker
Alaska Law Offices, Inc.
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IN THE DISTRICT COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

Midland Funding LLC

Plaintiff,

Cynthia Stewart,

Defendant.

Case No. 3AN-10-12555 CI

FINAL DEFAULT JUDGMENT

IT IS ORDERED that judgment is entered as follows:

1. Plaintiff, Midland Funding LLC, shall recover from and have judgment against Defendant(s), Cynthia Stewart d.o.b. 10/19/1956 as follows:

a.	Principal:	$3655.37
b.	Prejudgment Interest on $3655.37 Computed at the annual rate of 3.5000% From 09/07/2010 to date of Judgment:	$ 55.03
c.	Sub Total:	$ 3710.40
d.	Attorney's Fees Date Awarded: _____ Judge: _____	$ 371.04
e.	Costs: Date Awarded: _____ Clerk: _____	$ 146.00
f.	TOTAL JUDGMENT:	$ 4226.44
g.	Post Judgment Interest Rate	3.75 %

I hereby certify that this is a true and correct copy of the document on file in my office.
ATTEST:
Clerk of the Trial Courts at Anchorage
By _____ Deputy
DEC 30 2010

DATED this 10th day of February, 2011.

District Court Judge

I certify that on 2/11/11 a copy of the above was mailed/delivered to each of the following at their addresses of record: Law Offices

Default Ptf - Filed
Final Default Judgment
8533531198

EXHIBIT 2
Page 1 of 1

3AN-10-12555CI

Case Type: Civil District Court (3AN)
Case Status: Closed
Case Judge: Motyka, Gregory J

Initiating Action: Debt - District Court
File Date: 12/08/2010
Next Event:

All Information

Party Information

Midland Funding LLC - Plaintiff

DOB	Alias	Attorney/Bar Code	Phone Number
		Walker, Clayton H (0001002)	(907)277-8178

Stewart, Cynthia - Defendant

DOB	Alias	Attorney/Bar Code	Phone Number

Docket Information

Date	Docket Text	Amount
12/08/2010	Initial Judicial Assignment: Honorable Gregory Motyka	
12/08/2010	District Court Debt Complaint Receipt: 641618 Date: 12/08/2010	50.00
12/08/2010	Summons and Notice to Both Parties of Judicial Assignment	
12/08/2010	Case Flagged for Civil Rule 40 Tracking (3AN) Cynthia Stewart (Defendant);	
12/08/2010	Attorney Information Attorney Walker Jr, Clayton H representing Plaintiff Midland Funding LLC as of 12/08/2010	
12/16/2010	Return of Service - Summons Served On: C. Stewart Attorney: Walker Jr, Clayton H (0001002) Midland Funding LLC (Plaintiff);	
12/30/2010	Application for Default Clayton H Walker Jr (Attorney) on behalf of Midland Funding LLC (Plaintiff)	
02/10/2011	Entry of Default Granted Against: Cynthia Stewart (Defendant);	
02/10/2011	Default Judgment for Plaintiff Granted by Judge	
03/04/2011	Judgment Entered Default Judgment Amount: 3,685.37 Pre-Default Judgment Interest: 65.03 Attorney Fees: 371.64 Court Costs: 146.00 Other Fees: Default Judgment Total: 4,228.44 Total Accrued Costs: 0.00 Total Accrued Interest: 0.00 Terms: Post Judgment Interest Rate of 3.75% Type: Default Judgment Judge: Motyka, Gregory J Default Judgment Date: 03/10/2011 Default Judgment Time: 2:25PM Referee: Reconsideration Date: Default Judgment Status: Judgment Entered Default Judgment For: Midland Funding LLC - Plaintiff Default Judgment Against: Stewart, Cynthia - Defendant Issuance Writ Type: Date Issued: Accrued Interest: Satisfied Amount: Return Processed By: Received From: Accrued Costs: Satisfied Amount: Date Returned: Date Collected: Date Paid: Default Judgment Satisfied Amount: 0.00 Default Judgment Balance: 4,228.44 Case Total: 0.00 Case Satisfied Amount: 0.00 Case Balance: 0.00	
07/15/2011	Creditor's Affidavit & Notice of Levy, Sale of Property, Right to Exemptions Attorney: Walker Jr, Clayton H (0001002) Midland Funding LLC (Plaintiff);	
08/03/2011	Additional Costs To Be Added to the Judgment Attorney: Walker Jr, Clayton H (0001002) Midland Funding LLC (Plaintiff);	
08/16/2011	Writ of Execution (CIV-880) Issued	
10/18/2011	Creditor's Affidavit Attorney: Walker Jr, Clayton H (0001002) Midland Funding LLC (Plaintiff);	
10/24/2011	Return of Service on Execution & Payment 10/06/11 Process Server: Request Cost: 535.00 Receipt: 768532 Date: 10/25/2011	50.00
10/24/2011	Return of Service on Execution & Payment 10/06/11 Process Server: Request Cost: 50.00 Receipt: 768531 Date: 10/25/2011	50.00
11/17/2011	Affidavit of Attempted Service of Notice	

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EXHIBIT 3
Page 1 of 2

Date	Docket Text	Amount
11/17/2011	Request and Order to Release Funds Attorney: Walker Jr, Clayton H (0901033) Midland Funding LLC (Plaintiff); Filing Party: Midland Funding LLC Case Motion #1	
11/21/2011	Order Granting Motion to release funds to plaintiff Clayton H Walker Jr (Attorney) on behalf of Midland Funding LLC (Plaintiff) Case Motion #1: Request and Order to Release Funds	
11/23/2011	Writ of Execution Disbursement to Alaska Law Offices inc	$0.00

Financial Summary

Cost Type	Amount Owed	Amount Paid	Amount Adjusted	Amount Outstanding
Execution/Garnishment	$481.33	$481.33	$0.00	$0.00
Filing Fee	$90.00	$90.00	$0.00	$0.00
	$571.33	$571.33	$0.00	$0.00

Money on Deposit with the Court

Account	Deposit Amount
Trust Writ of Execution	$0.00
	$0.00

Money Distributed by Court

Payment Type	Amount
Disbursement	$481.33
	$481.33

Check Information

Created	Description	Account	Check	Amount
11/23/2011	Case: 3AN-10-12585CI Writ of Execution Disbursemen	6313JW	338173	$481.33

Receipts

Receipt Number	Receipt Date	Payment Amount
541010	12/02/2010	$90.00
758531	10/25/2011	$80.17
758532	10/25/2011	$401.16
		$571.33

Case Disposition

Disposition	Date	Case Judge
Default Judgment for Plaintiff by Judge	02/10/2011	Matsuo, Gregory J

EXHIBIT 3
Page 2 of 2

August 1, 2011Clayton Walker
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IN THE DISTRICT COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

Midland Funding LLC

Plaintiff,

Cynthia Stewart,

Defendant.

Case No. 3AN-10-12555 CI

AFFIDAVIT OF ACTUAL ATTORNEY FEES

STATE OF ALASKA)
)ss.
THIRD JUDICIAL DISTRICT)

I, Clayton Walker, being first duly sworn upon oath, depose and state as follows:

a. That I am an employee at Alaska Law Offices, Inc.

b. I am an attorney that has practiced law in this state since 2000 and am familiar with the rates charged by other attorneys in this jurisdiction for this type of case. The actual attorneys fees charged in this case are $739.04 exceed the Alaska Civil Rule 82 undisputed attorney's fees default rate of 10%.

c. Accordingly, the attorney fees under Alaska Civil Rule 82 should be $365.53.

DATED at Anchorage, Alaska, on December 30, 2010.

Clayton Walker, Jr. 0001002

SUBSCRIBED AND SWORN TO before me on December 30, 2010.

Notary Public in and for Alaska
My Commission Expires: August 1, 2011

KEVIN R. HOULIHAN * OFFICIAL SEAL * NOTARY PUBLIC * STATE OF ALASKA

Jon S. Dawson
Elizabeth P. Hodes
DAVIS WRIGHT TREMAINE LLP
701 West 8th Avenue, Suite 800
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Attorneys for Midland Funding, LLC

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CYNTHIA STEWART, on behalf of herself and all others similarly situated,

Plaintiffs,

vs.

MIDLAND FUNDING, LLC, ALASKA LAW OFFICES, INC, and CLAYTON WALKER,

Defendants.

Case No. 3AN-11-12054 CI

CONSOLIDATED REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND TO STAY ACTION; AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff's Opposition repeatedly mistakes the applicable law with respect to the issues at hand. Not only does she ignore the applicable South Dakota law, but she fails to acknowledge the import of the Federal Arbitration Act ("FAA") and the U.S. Supreme Court's decision in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748, 179 L. Ed. 2d 742 (Apr. 27, 2011). With respect to the validity of the arbitration agreement, Plaintiff's choice of law analysis looks to the wrong point in time – ignoring the factual circumstances at the time the applicable contract was formed. Plaintiff's misguided

analysis fails to even acknowledge that plaintiff was not located in Alaska at the time the parties entered into the pertinent Agreement. Plaintiff has previously acknowledged that the issues in this case are virtually identical to those in Hudson v. Citibank, 3AN-11-9196 CI (*see* Plaintiff's Motion for Extension of Time, Apr. 23, 2012), yet she essentially ignores this Court's choice of law analysis in that case, as well as various other holdings by this Court leading to the inevitable conclusion that the Arbitration Agreement in this case must be enforced.

Even if the Court were to agree with Plaintiff's contention that Alaska law applies despite its ruling based on essentially identical facts in Hudson, the new Card Agreement was *not* unilaterally implemented, because plaintiff had the opportunity to opt out of that Agreement and chose not to do so. Thus, there is no basis to conclude that the Card Agreement is unenforceable under Alaska law. Furthermore, to the extent that Alaska common law requirements for arbitration agreements, or the provisions of the UTPA, can be said to prohibit enforcement of the Arbitration Agreement, such law is preempted by the FAA and AT&T Mobility.

Not only does the Plaintiff repeatedly ignore applicable law, but she misrepresents and disregards established facts, without presenting any evidence to contradict the evidence offered by Midland. Midland has provided uncontested evidence of a valid and enforceable Card Agreement, including an Arbitration Agreement, between the Plaintiff and Citibank. It has presented evidence that the Card Agreement expressly permits assignment by Citibank and arbitration by any assignee. The plain language of the

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Arbitration Agreement obviously encompasses all of plaintiff's claims in this action, including those asserted under Alaska's Unfair Trade Practices Act ("UTPA"). The Arbitration Agreement cannot be read to preclude Midland from electing to arbitrate the claims in this case simply because different claims were previously litigated in a separate lawsuit.

Plaintiff cannot avoid her decision to accept the terms of the new Card Agreement provided to her in 2009 and the resulting conclusion that she is bound to arbitrate this dispute.

A. South Dakota, Not Alaska, Law Determines the Validity of the Arbitration Agreement.

As established in the Motion, pursuant to the express choice-of-law provision in the Card Agreement, South Dakota law governs the determination of whether a valid and enforceable agreement to arbitrate exists. Memorandum in Support of Motion to Compel Arbitration and Stay Action ("Memo in Support"), pp. 11–15. Plaintiff incorrectly analyzes the choice-of-law question by focusing on the current location of the parties and her current allegations against Defendants. She also fails to present any evidence to establish that Alaska has any connection to the arbitration agreement at issue.

Where the issue is the validity or enforceability of an arbitration agreement, the correct choice-of-law analysis focuses on the circumstances at the time the parties entered into the arbitration agreement – in this case, January 2009, when the new Card Agreement was provided to Plaintiff and she chose not to opt out of that agreement. See, this Court's Order in Hudson v. Citibank et al., 3AN-11-9196CI, p. 16 (April 30, 2012);

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see also, McKinney v. Nat'l Dairy Council, 491 F. Supp. 1108, 1113-14 (D. Mass. 1980) (it is "appropriate" when considering the choice of law question "to give greater weight to contacts in existence at the time of contracting than to contacts which arise after that time."); Boston Law Book Co. v. Hathorn, 127 A.2d 120, 125 (Vt. 1956) (examine choice of law with view toward "that aspect of the contract immediately before the court. . .[to identify] the proper law of the contract which the parties presumably had in view at the time of contracting.'"). Beyond that, any remaining inquiries go to the merits of the case and must be decided by the arbitrator.

1. *It is Undisputed that South Dakota Bears a Substantial Relationship to the Formation of the Arbitration Agreement.*

In Alaska, a choice-of-law clause "will generally be given effect unless (1) the chosen state [e.g., South Dakota] has no substantial relationship with the transaction . . . or (2) the application of the law of the chosen state would be contrary to a fundamental public policy of a state that has a materially greater interest in the issue and would otherwise provide the governing law." Peterson v. Ek, 93 P.3d 458, 465 n.11 (Alaska 2004) (applying Section 187(2) of the Restatement (Second) of Conflict of Laws). Critically, the "issue" before the Court currently is the formation of the Card Agreement—not the determination of Plaintiff's claims on the merits (which would be subject to a separate choice-of-law analysis to be determined by an arbitrator).

Plaintiff does not, and cannot, dispute that South Dakota has a substantial relationship to the parties' agreement because Citibank is, and has been, a national bank located in South Dakota. See Aff. of Kyle Hannan, ¶ 3, Ex. A; see also Smiley v.

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Citibank (South Dakota), N.A., 11 Cal. 4th 138, 164 (1995) (confirming that Citibank is located in South Dakota), *aff'd*, 517 U.S. 735 (1996); Restatement § 187 cmt. f (reasonable basis for a choice-of-law exists "where one of the parties is domiciled or has his principal place of business" in chosen state); Order in Hudson v. Citibank et al., 3AN-11-9196CI, p. 15 (April 30, 2012) ("South Dakota has a substantial relationship with the parties' agreement because Citi is located in South Dakota.").

2. *Examining the Facts During the Relevant Time Period, There is No Basis for Applying Alaska law When Evaluating the Validity of the Arbitration Agreement.*

In order to invalidate the parties' choice of South Dakota law, and apply Alaska law as the Plaintiff proposes, the following three conditions must be met: (1) Alaska's law would apply under Restatement § 188 in the absence of an effective choice-of-law; (2) Alaska has a materially greater interest in the issue (i.e., the formation of the parties' contract); and (3) the application of South Dakota law would offend a fundamental policy of Alaska (assuming it applies). Long v. Holland Am. Line Westours, Inc., 26 P.3d 430, 432 (Alaska 2001). Plaintiff cannot satisfy any of these three conditions.

To determine whether Alaska law would otherwise apply, the Court must apply the principles of Restatement § 6 to determine which state has the most significant relationship.[1] Id. at 432-33 (citing Restatement (Second) of Conflict of Laws § 188). In

[1] Restatement § 6(2) in turn references the following the factors to be considered in determining choice of law: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

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doing so, the Court should consider the relevant policies of South Dakota and Alaska, with special focus on the following: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, and (d) the domicile, residence, nationality, place of incorporation and place of business of the parties. Id. Generally speaking, the place of performance is often the determining factor, although the parties' domicile, residence, or place of incorporation also is an important consideration. Id. at 433. Evaluating these factors as of the time of contracting, it is clear that South Dakota, and not Alaska, has the most significant relationship to this case.

Alaska had no relationship to the parties' contractual relationship at the time they entered into the relevant agreement because Plaintiff was not even located in Alaska when she accepted the Card Agreement.[2] With respect to the place of performance, the place of performance at the time of the formation of the Agreement was South Dakota because that is where Citibank agreed to extend credit under the Card Agreement. The agreement was also entered into under the assumption it would be governed by South Dakota law. Looking at the domicile, residence, nationality, place of incorporation, and place of business of the parties, Alaska again has no relevance as of the time of the Agreement's formation. Accordingly, because Alaska is not the law that would apply in the absence of a choice-of-law provision, this Court need not evaluate any conflict of

[2] Plaintiff was not receiving account statements and apparently did not reside in Alaska from November 2008 through June 2009, during which time she was sent the new Card Agreement (with her January 2009 account statement) and she chose not to opt-out. *See* Notice of Filing of Declaration of Regularly Conducted Business Activity (MID0088-0110).

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fundamental public policy or whether Alaska has a materially greater interest.

Furthermore, Plaintiff is incorrect that application of South Dakota law would offend fundamental Alaska policy. The fact that South Dakota has codified the right to add an arbitration agreement to a credit card agreement through a change-in-terms or amendment notice (see Memo in Support at 15-16), but Alaska has not, does not constitute a conflict of fundamental public policy. A mere difference between the applications of two states' laws does not rise to the level of a conflict of fundamental policy that defeats the enforcement of a choice-of-law provision.

Plaintiff's reliance on Gibson v. Nye Frontier Ford, Inc., 205 P.3d 1091 (Alaska 2009) is misplaced. In Gibson, the plaintiff challenged changes to an arbitration agreement contained in an employment manual, arguing (based on non-Alaska cases) that a change in terms provision contained in the manual rendered the arbitration agreement unconscionable. 205 P.3d at 1096-97. Unlike the Card Agreement in the instant case, Gibson involved a change in terms provision that did not provide the plaintiff an opportunity to opt out of changes. Id. at 1093–94. While noting the non-Alaska cases cited by the plaintiff, the Alaska Supreme Court passed on the question of whether the change in terms provision rendered the arbitration agreement unconscionable as a matter of Alaska law, holding instead that the arbitration agreement was not subject to the change in terms provision. Id. at 1097. Thus, not only is Gibson inapposite and unavailing, but it does not stand for the proposition that an Alaska fundamental public policy is implicated here.

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This Court recently agreed that "[t]hough *Gibson* does suggest a policy, its discussion is not thorough enough nor its statements firm enough to constitute a fundamental policy stance." Order, Hudson v. Citibank et al., Case No. 3AN-11-9196CI, p. 21-22 (April 30, 2012) (concluding that statements in Gibson regarding whether unilateral change provisions are unconscionable were *dicta*). The mere fact that there may be a difference between South Dakota and Alaska law does not constitute a conflict of fundamental public policy.[3] See Id. ("Because there is no fundamental Alaska policy stance on the issue, the court would not apply Alaska law to the first choice-of-law question [regarding which state's law applies to the addition of an arbitration agreement], even if Alaska law would apply in the absence of a choice-of-law provision.").

B. Uncontroverted Evidence Establishes that Citibank and Stewart did Form a Valid Contract to Arbitrate.

Plaintiff's specious arguments challenging the formation of a contract between Stewart and Citibank have no basis in fact or law. Tellingly, Plaintiff does not dispute that she received the new Card Agreement and Arbitration Agreement and chose not to opt-out, and she fails to offer any evidence whatsoever to contradict the facts, analysis or inescapable conclusion that the Arbitration Agreement is entirely enforceable.

The evidence submitted by Midland establishes that Citibank mailed Plaintiff the "Notice of Change in Terms, Right to Opt Out and Information Update" and the Card Agreement in January 2009, expressly offering Plaintiff the opportunity to opt out by

[3] Moreover, even if Alaska law were applied in this case, the new Card Agreement did not unilaterally change any aspect of the parties' agreement and therefore is not unenforceable under Alaska law. Plaintiff had the opportunity to opt out of the Agreement and chose not to do so.

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calling or writing to Citibank by March 31, 2009. Plaintiff did not opt out, and thus agreed to the terms of the Card Agreement, including the Arbitration Agreement, which allowed her to maintain her account. Neither South Dakota law nor the Federal Arbitration Act require that an arbitration agreement be signed to be enforceable. "Indeed, it is axiomatic that 'parties may become bound by the terms of a contract, even though they do not sign it, where their assent is otherwise indicated.'" Stiles v. Home Cable Concepts, 994 F.Supp. 1410, 1416 (M.D.Ala. 1998) (quoting 17A Am.Jur.2d § 185).

To alleviate any doubt as to whether the documents produced with Mariya A. Kharlamova's Declaration for Records of Regularly Conducted Business Activity are applicable to Plaintiff's account, Midland has filed herewith a copy of the Notice of Records Deposition and Subpoena to which Citibank's Records Custodian responded with her declaration. As reflected in the documents, the business records provided by Citibank (including the Card Agreement and Arbitration Agreement) responded to a request for all agreements relating specifically to Plaintiff's account. Citibank's business records kept in the ordinary course of business are reliable evidence that the Card Agreement and Arbitration Agreement were delivered to Plaintiff and reflect agreements applicable to her account. Plaintiff complains that the prior card agreement has not been provided in support of the Motion, but such agreement is irrelevant because Plaintiff chose to accept the new Card Agreement and that agreement is the one at issue here.

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Plaintiff erroneously contends that she did not receive consideration for the new Card Agreement, ignoring the fact that she was able to maintain an account with Citibank by choosing not to opt-out of the Agreement. See Notice of Change in Terms, Right to Opt Out and Information Update, p. 2 (MID0052) ("If you opt out of these changes, we will close your account, unless it is already closed."). The continuation of a card account is consideration, regardless of whether the consumer actually makes new charges to that account.

Moreover, Plaintiff is wrong when she states that the arbitration provision was a "unilateral" change to the Card Agreement. First, Midland has presented uncontested evidence that an arbitration agreement was included in every card agreement that governed Plaintiff's account since the account was initially created and her credit card issued, so there was in fact no change in that regard. Memo in Support, p. 3, n.1. Second, and more importantly, when the new Card Agreement was provided to Plaintiff in January 2009, she was given approximately two months to opt-out by making a simple telephone call to a toll-free number, or writing to Citibank, which she chose not to do. *Id.* at p. 2–3. Thus, even if the arbitration provision were new (which it was not), there was nothing unilateral about this change because Plaintiff had the opportunity to reject the new Card Agreement, but chose not to.

C. The Arbitration Agreement – Which Was Not Unilaterally Imposed Upon Plaintiff – Must Be Enforced Under South Dakota Law.

Not only has Midland presented uncontroverted evidence of a valid contract to arbitrate, but Plaintiff makes no effort to evaluate the enforceability of the Arbitration

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Agreement under South Dakota law. Indeed, Plaintiff does not cite a single case discussing South Dakota law. Instead, Plaintiff cites Alaska, California, Mississippi, Montana and Virginia authority to argue that the Arbitration Agreement either is unconscionable and/or invalid or, if it does exist, her claims are beyond the agreement's permissible scope. Opp. at 6-7, 11-13, 16-32. As an initial matter, all the cases Plaintiff cites are inapplicable based on the valid South Dakota choice-of-law provision as discussed above. More importantly, the undisputed evidence confirms that the Arbitration Agreement is valid and enforceable under South Dakota law (which Plaintiff completely ignores) and that all of Plaintiff's claims are within its broad scope.

As demonstrated in the Motion, South Dakota has codified the right to add an arbitration agreement to a credit card agreement through a change-in-terms or amendment notice, as Citibank did here. (See Memo in Support, p. 15–17.) Critically, Plaintiff does not, because she cannot, dispute that: Citibank mailed her the Card Agreement and Arbitration Agreement in January 2009, and Plaintiff had the opportunity to, but did not, opt out of the Arbitration Agreement, instead, choosing to maintain her Account thereafter. Id. at p. 1–5. Plaintiff does not dispute that Citibank provided her with the requisite amount of statutory notice prior to amending the Card Agreement, including by providing her with the time and opportunity to reject the proposed amendment required under the applicable South Dakota statute.

Furthermore, Plaintiff agreed to the terms of the Card Agreement, including the Arbitration Agreement, by continuing to maintain her Account after receiving the Card

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Agreement. S.D. Codified Laws § 54-11-09 (1983) ("the issuance of a credit card agreement and the expiration of thirty days from the date of issuance without notice from a card holder to cancel the account creates a binding contract between the card holder and the card issuer"); see also, Stiles, 994 F.Supp. at 1416. Based on the foregoing, there clearly is valid agreement to arbitrate as a matter of fact and law.

Plaintiff's arguments that the arbitration agreement is unconscionable or otherwise unenforceable are belied by the fact that she does not cite a single South Dakota case to that effect. Her heavy reliance on non-South Dakota cases (Opp. at 16–20, n.50–54) is a transparent ruse to divert attention from the operative law, and the cases she cites are otherwise inapposite.[4] Finally, the Attorney General of South Dakota has specifically endorsed the South Dakota change-in-terms procedure as a valid means under South Dakota law to add an arbitration provision to a credit card agreement (see Memo in Support, p. 14–15), something else Plaintiff completely ignores.

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[4] In Long v. Fidelity Water Sys., Inc., No. C-97-20118 RMW, 2000 WL 989914, at * 3-4 (C.D. Cal. May 26, 2000), analyzed under California law, the proposed arbitration agreement was added after case was filed and after claims arose. In Myers v. MBNA Am., No. CV 00-163-M-DWM, 2001 WL 965063, at *4-5 (D. Mont. Mar. 20, 2001), applying Montana law, the dispute arose prior to addition of the arbitration agreement. In Sears Roebuck & Co. v. Avery, 163 N.C. App. 207, 214 (N.C. App. 2004), Arizona law was applied and distinguished from state statutes that specifically authorize the addition of an arbitration agreement through a change in terms notice/procedure. In Badie v. Bank of Am., 67 Cal. App. 4th 779, 800 (1998), applying California law, changes to the original agreement were limited to changes regarding any "term, condition, service or feature." In Stone v. Golden Wexler & Sarnese, P.C., 341 F. Supp. 2d 189, 193 (E.D.N.Y. 2004), Virginia law was distinguished from "statutes that specifically authorize credit card companies to make unilateral changes to the underlying credit agreement." In Kortum-Managhan v. Herbergers NBGL, 349 Mont. 475, 485 (Mont. 2009), Montana law was applied. In Robertson v. J.C. Penny Co., 484 F. Supp. 2d 561, 566-68 (S.D. Miss. 2007), applying Mississippi law, a motion to compel arbitration was denied because defendant did not establish that plaintiff received the arbitration agreement.

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Thus, Plaintiff's failure to refute the evidence submitted by Midland, combined with the clear application of South Dakota law to the parties' relationship, thoroughly defeats any claim of "no agreement."[5] See Order in Hudson v. Citibank et al., 3AN-11-9196CI, p. 23 (April 30, 2012) ("The parties formed a valid and enforceable Arbitration Agreement under South Dakota law [via an opt-out notice].")

D. Midland, as Assignee, has the Right to invoke the Arbitration Agreement.

Plaintiff ignores the relevant facts and applicable law in arguing that Midland cannot invoke the arbitration agreement because it was not a party to it. First, Midland has presented uncontested evidence that Citibank assigned its right to enforce the arbitration provision to Midland when Midland purchased Plaintiff's account in January 2010. Aff. of Kyle Hannan ¶¶ 3, 7–8, Ex. A, C. The Card Agreement specifically permits such an assignment: "[Citibank] may assign any or all of our rights and obligations under this Agreement to a third party." Card Agreement, p. 16 (MID0066). The Arbitration Agreement in the Card Agreement specifically states that the arbitration provision "shall survive . . . any transfer, sale or assignment of your account, or any amounts owed on your account, to any other person or entity." Id. The Bill of Sale from Citibank to Midland provides that Citibank "does hereby transfer, sell, assign, convey, grant, bargain, set over and deliver to [Midland], and to [Midland's] successors and assigns, all of [Citibank's] right, title and interest in and to the Accounts described in

[5] Furthermore, the agreement to arbitrate is likewise valid under Alaska law because an agreement to arbitrate existed from the inception of the Plaintiff's account and no unilateral changes were made to the Card Agreement. Plaintiff agreed to the changes when she chose not to opt out.

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Exhibit 1 and the Final Data File delivered on or about January 20, 2010." Hannan Aff. ¶ 3; see also Ex. A. Additionally, the Arbitration Agreement specifically states that it applies to claims against an assignee. Card Agreement, p. 13 (MID0063). Accordingly, the Arbitration Agreement in the Card Agreement may be enforced by Midland.

Plaintiff cites case law in which there was no assignment to the third party seeking to invoke the arbitration provision and where the plain language of the arbitration provision did not include the claims or parties at issue in the case. Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1044-1047 (9th Cir. 2009) (no assignment of arbitration clause to movant, and dispute not within scope of arbitration agreement with respect to parties or subject matter); Brantley v. Republic Mortgage Ins. Co., 424 F.3d 392, 395–97 (4th Cir. 2005) (mortgage insurance company not party to or assignee of unrelated mortgage lender's arbitration agreement with borrower). The parties tried to avoid these failings and invoke arbitration through equitable estoppel claims. Mundi, 555 F.3d at 1044–47; Brantley, 424 F.3d at 395–97. Here, there is no question that the Card Agreement expressly permits an assignment and permits arbitration of claims against Midland as an assignee.

There is also no question that the Arbitration Agreement covers the subject matter of this dispute. Memo in Support, p. 20-21. The Arbitration Agreement expressly covers "all" past, present or futures claims relating to the account, relations between the parties to the agreement, and claims made by or against anyone connected with those parties. *See* Card Agreement, p. 13-14 (MID0063). The current dispute between plaintiff and

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Midland (a valid assignee of the card agreement) regarding the method of Midland's collection on plaintiff's account is most certainly within the scope of this agreement. See Order in Hudson v. Citibank et al., 3AN-11-9196CI, p. 33–34 (April 30, 2012) (under almost identical circumstances to this case, arbitration required because "[Plaintiff's] claim is based on Citi's previous suit for her breach of the credit card agreement. This is related to Citi's attempt to collect payment on the account.")

Furthermore, the arbitration provision in this case is extremely broad and is entitled to a strong presumption of enforceability. Memo in Support, p. 18–21; see also, Card Agreement, p. 14 (MID0064) ("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"). Thus, Midland is undoubtedly entitled to arbitrate this dispute.

As an aside, Plaintiff argues that ALO and Clayton Walker were not Midland's agents with respect to the debt collection practices underlying Plaintiff's claims in this case. Opp., p. 25–26. If that is the case, then Midland cannot possibly be held liable for the debt collection practices at issue and should surely be dismissed from this action. Nonetheless, this is a matter for the arbitrator to decide, not this Court.

E. Midland Did Not Waive Its Right To Compel Arbitration In This Action.

The question of whether a waiver has occurred is governed by the Federal Arbitration Act ("FAA") and not Alaska law, which Plaintiff erroneously cites. See Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1270 (9th Cir. 2002). Under the FAA, "[a]

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

Under the FAA, arbitration waivers "are not favored." Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185, 1187 (9th Cir. 1986). 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 of 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).

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The Arbitration Agreement expressly permits a party to elect arbitration in a new lawsuit, involving a separate and distinct claim, and there is no legal basis for denying such election. Card Agreement, p. 14 (MID0064) ("At 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."). The cases cited by Plaintiff are inapposite and easily distinguishable. They involve situations 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 in a subsequent action that the movant has already litigated.[6] Here, Plaintiff did not appear in Midland's collection

[6] See, e.g., Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc., 252 F.3d 218, 229 (2d Cir. 2001) (finding no waiver); Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 26 (2d Cir. 1995) (finding waiver by defendant who delayed until the "eleventh hour, with trial imminent" to seek arbitration in order to take advantage of discovery in federal action, thereby causing prejudice to plaintiff); 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."); Nicholas v. KRB, Inc., 565 F.3d 904, 908 (5th Cir. 2009) (finding waiver where plaintiff initiated action, delayed seeking arbitration of her own claim for ten months until after discovery was largely completed and court ruled that plaintiff's primary state-law claim was preempted); 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 eleven months before seeking arbitration without any explanation for delay); Worldsource Coil Coating v. McGraw Constr., Co., 946 F.2d 473, 476-77 (6th Cir. 1991) (finding waiver where plaintiff sought to arbitrate claims that were denied by state court in previous action by plaintiff); Med. Imaging Network, Inc. v. Med. Resources, No. 04 MA 220, 2005 WL 1324746, at *6 (Ohio App. June 2, 2005) (applying Ohio state law, not the FAA, in finding waiver where plaintiff waited two years to assert right to arbitrate "exact issue on which they brought the [previous] federal suit" which was dismissed for lack of venue and jurisdiction); Grumhaus v. Comerica Secs., Inc., 223 F.3d 648, 651 (7th Cir. 2000) (finding waiver where plaintiffs delayed one year after filing suit, and six months after suit was dismissed, to seek to arbitrate claims); Schonfeldt v. Blue Cross of Cal., 2002 Cal. App. Unpub. LEXIS 5223 (Cal. App. Jan. 2, 2002) (applying California law).

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action and her claim for alleged violation of the UTPA was obviously not part of that action. Accordingly, Midland's litigation of its collection claim is not a waiver of Midland's right to arbitrate Plaintiff's new and separate suit.[7] There is no prejudice to Plaintiff under the facts, and the Motion should be granted. See Hudson v. Citibank et al., Case No. 3AN-11-9196CI, Order, p. 58–61 (April 30, 2012) ("Because Citi's decision to address Hudson's debt in court was not inconsistent with the intent to arbitrate other issues, it did not waive its right to arbitrate future disputes.").

F. The Holding in AT&T Mobility is Applicable and Dispositive in this Case.

Plaintiff argues that she could not have waived her claim for public injunctive relief because that claim ultimately belongs to the people of the State of Alaska, not to herself. Opp., p. 30–31. When Plaintiff agreed to the new Card Agreement, including the Arbitration Agreement, she 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, and the arbitrator may award relief only on an individual (non-class, non-representative) basis." Memo in Support, p. 4-5 (citing Card Agreement, p. 13-15). It is irrelevant what rights the Alaska public may maintain - Plaintiff has waived her right to act as a private attorney general.

Additionally, Plaintiff incorrectly cites Alaska law in support of her argument that an arbitration agreement must meet certain conditions to effectively substitute an arbitral

[7] Indeed, to the extent that Plaintiff contends that her claim arsises out of the facts at issue in the collection action, such claims are barred by res judicata (thought that issue is one for the arbitrator to decide).

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forum for a judicial one with respect to her statutory claims. Opp., p. 29. To the extent that Alaska common law establishes requirements for arbitration agreements that might bar enforcement, such law is preempted. The FAA and U.S. Supreme Court holding in AT&T Mobility govern this issue, and Plaintiff is simply incorrect that she cannot be forced to arbitrate her UTPA claims under the Arbitration Agreement at issue here. Kilgore v. KeyBank, Natl. Assn., 673 F.3d 947, 959–65 (9th Cir. Mar. 7, 2012) (holding that California's rule precluding claims for public injunctive relief from arbitration was preempted by the FAA pursuant to AT&T Mobility). In fact, even if Alaska law were to apply, this Court ruled in Hudson v. Citibank et al. that an arbitration agreement essentially identical to the one at issue in this case is enforceable under Alaska law and that the Plaintiff must pursue her UTPA claims in arbitration. Hudson v. Citibank et al., 3AN-11-9196CI, Order, p. 33–34 (Apr. 30, 2012) (agreement validly formed under South Dakota law and encompassed claims at issue).

Moreover, the holding of AT&T Mobility is not limited to state laws that prohibit outright the arbitration of particular claims, as Plaintiff contends (Opp. at 27). AT&T Mobility 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 131 S. Ct. at 1746-48; Kilgore, 673 F.3d at 957. In abrogating the California law at issue in AT&T Mobility, the Supreme Court held that "[b]ecause it [stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" –

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ensuring that arbitration agreements are enforced as written – the law was preempted by the FAA. Id. at 1753. Thus, because the "FAA requires courts to honor parties' expectations," plaintiffs were required to arbitrate their claims on an individual (non-class, non-representative) basis, as required by the parties' contract. See id. at 1752. Similarly, here, the FAA and AT&T Mobility require that Plaintiff arbitrate her claims on an individual basis pursuant to the express terms of the Arbitration Agreement.

It is absolutely "clear that statutory claims may be the subject of an arbitration," as repeatedly confirmed by the Supreme Court. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). 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." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). Importantly, "'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue,'" arbitration agreements embracing statutory claims must be enforced. Gilmer, 500 U.S. at 26 (citation omitted). The "burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987).

Here, the Arbitration Agreement 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

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regulatory provisions, or any other sources of law . . . ." Memo in Support, p. 3-4 (citing arbitration provision of Card Agreement). Put simply, Plaintiff 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. Plaintiff remains free to recover any relief to which she may be individually entitled.

Plaintiff requests precisely the type of state-law policy judgment the United States Supreme Court has specifically declared is "displaced" by the FAA: "[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." AT&T Mobility, 131 S. Ct. at 1747 (italics added). This straightforward analysis leaves no doubt that insofar as Alaska's UTPA can be read as prohibiting the Arbitration Agreement in this case, the UTPA is displaced by the FAA. As the Supreme Court stated, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Id. at 1753. If the Plaintiff is correct that the UTPA does not permit the parties' agreement with respect to the UTPA claims, then the UTPA would be in direct conflict with the FAA and would be preempted.

Plaintiff's claims must proceed on an individual basis not only because the FAA preempts any state law contrary to the parties' agreement in that respect, but also because public injunctive relief 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 would create significant problems with respect to

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