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.'" AT&T Mobility, 131 S.Ct. at 1749 (quoting Hall Street Assoc., LLC v. Mattel, Inc., 552 U.S. 357–58).

Not only does the prospect of public injunctive relief greatly expand the scope of any litigation (i.e., to consider the impact on parties and events other than those involved in the immediate dispute), but such relief opens the door to ongoing enforcement by parties who are not party to the arbitration in the future, involves higher stakes, and could create confidentiality issues. The potential impact of an arbitrator's ruling would be much greater, and thus the informal procedures of arbitration potentially less acceptable, where public relief is available. These are just the type of concerns raised by the Supreme Court in AT&T Mobility, 131 S.Ct. at 1750–52. Like the class-wide arbitration analyzed in AT&T Mobility, permitting a party to obtain public injunctive relief would fundamentally impede the informality, speed, efficiency and relatively inexpensive nature of a bilateral arbitration and enforcement of a bilateral arbitration. Thus, a claim for public injunctive relief in arbitration may not be required by Alaska law any more than class-wide arbitration could be required by California law in AT&T Mobility. Kilgore, 673 F.3d at 957 ("Just as the FAA guarantees that contracting parties 'may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate,' . . . so too does it allow them to agree to limit in what capacity they arbitrate. . .") (quoting AT&T Mobility, 131 S.Ct. at 1748-51).

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G. Plaintiff's Cross-Motion For Partial Summary Judgment Must Be Denied.

Plaintiff's Cross-Motion for Partial Summary Judgment must be denied as a matter of fact and law. Importantly, "[w]hen considering a motion to compel arbitration [under the FAA], a court applies a standard similar to the summary judgment standard of Fed. R. Civ. P. 56." Hadlock v. Norwegian Cruise Line, Ltd., No. SACV 10-0187 AG (ANx), 2010 WL 1641275, at *1 (C.D. Cal. Apr. 19, 2010) (citation omitted). Here, Alaska R. Civ. P. 56 tracks Fed. R. Civ. P. 56 regarding when summary judgment is warranted. Compare Ak. R. Civ. P. 56(c) (summary judgment warranted based on a showing "that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law") with Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

Here, Plaintiff has not, because she cannot, meet her burden under Rule 56. Critically, Plaintiff has submitted ***no*** evidence whatsoever opposing the Motion and, as discussed above and demonstrated in the supporting documents submitted with the Motion, the validity of the Arbitration Agreement is clear and unrebutted. Plaintiff's complete lack of evidence opposing the making of the Arbitration Agreement is critical because "it is not sufficient for the party opposing arbitration to utter general denials of the facts on which the right to arbitration depends." Grabowski v. Robinson, No. 10cv1658-WQH-MDD, 2011 WL 4353998, at *6 (S.D. Cal. Sept. 19, 2011) (citation omitted). Rather, to create a genuine issue of fact, "the party opposing [arbitration] may

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not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried." Oppenheimer & Co., Inc. v. Neidhardt, 56 F.3d 352, 358 (2d Cir. 1995) (citations omitted); Bhatia v. Johnston, 818 F.2d 418, 421-22 (5th Cir. 1987) (stating that self-serving affidavits do not amount to the type of evidence required to call the "making of the arbitration" agreement into question). Further, and critically, the "mere denial of receipt of [an arbitration change-in-terms notice] is insufficient to create a genuine issue of material fact to defeat summary judgment." Daniel v. Chase Bank USA, N.A., 650 F. Supp. 2d 1275, 1290, 1289 (N.D. Ga. 2009) (enforcing arbitration change-in-terms notice where defendant submitted undisputed evidence that notices were mailed, plaintiff continued to use the account and plaintiff "presented no evidence to contradict defendant's proof" but merely denied receiving the notice).[8]

Here, Plaintiff does not claim she did not receive the Arbitration Agreement. Her silence in the face of Midland's evidence effectively kills any argument that there is genuine issue of fact regarding the making of the Arbitration Agreement that could entitle her to summary judgment. As a matter of law and fact, Plaintiff cannot overcome the showing made by Midland by remaining silent. See, e.g., Tuers v. Chase Manhattan

[8] See also Tinder v. Pinkerton Security, 305 F.3d 728, 735-36 (7th Cir. 2002) (holding summary judgment not overcome where plaintiff's only evidence was affidavit denying receipt of change-in-terms notice); Walters v. Chase Manhattan Bank, No. CV-07-0037-FVS, 2008 WL 3200739, at *3 (E.D. Wash. Aug. 6, 2008) (holding that "self-serving declaration" denying receipt of arbitration change-in-terms notice was insufficient to defeat summary judgment); Sanders v. Comcast Cable Holdings, LLC, No. 3:07-cv-918-J33HTS, 2008 WL 150479, at *6 (M.D. Fla. Jan. 14, 2008) (holding that plaintiffs' affidavits denying receipt of arbitration notices failed to create genuine issue of fact where notices were mailed in same envelope as account bills, which were paid); Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909, 919 (N.D. Tex. 2000) (holding that it is "incumbent upon Plaintiffs to negate the presumption of receipt" and affidavits "in which they simply deny receipt . . . are insufficient").

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Bank USA, No. 07-6120-TC, 2008 WL 5045946, at *2-3 (D.Or. Nov. 24, 2008) (declaration confirming that Chase's records showed that change-in-terms notice was mailed and Chase did not receive either returned mail or an opt out was evidence of proper mailing); Battels v. Sears Nat. Bank, 365 F. Supp. 2d 1205, 1213-14 (M.D. Ala. 2005) (presuming agreements received based on defendant's declaration "indicat[ing] that the cardmember agreements and change-of-term notices were mailed . . . to the same address to which Plaintiffs' billing statements were sent, and Plaintiffs' have made payments in response to the billing statements, thereby indicating that the mail reached the intended recipients").

Plaintiff is not entitled to partial summary judgment for the reasons discussed above and in the Motion – the Arbitration Agreement is valid and enforceable under South Dakota, as well as under the United States Supreme Court's controlling and dispositive decision in AT&T Mobility. Accordingly, the Motion should be granted and Plaintiff's Cross-Motion for Partial Summary Judgment denied.

DATED this 21st day of June, 2012.

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Attorneys for Midland Funding, LLC

By: _____
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FILED
STATE OF ALASKA
THIRD DISTRICT

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2012 JUL 12 PM 3:19

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CLERK TRIAL COURTS
BY: _____
DEPUTY CLERK

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

REPLY RE: PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Midland Funding, LLC ("Midland") and Alaska Law Offices, Inc. and Clayton Walker (together "ALO") (collectively "Defendants") engage in extensive rehashing of earlier arguments in opposing plaintiff Cynthia Stewart's ("Stewart") motion for partial summary judgment. In attempting to defeat Stewart's motion for partial summary judgment, though, Defendants not only fail to address Stewart's motion for partial summary judgment but also lay bare the weaknesses of their own arguments to compel arbitration. In addition, Defendants rely heavily upon the decision in *Hudson v.*

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Citibank, 3AN-11-9196CI[1] and urge this Court not to relitigate these issues. The Court's decision in *Hudson* is not binding on this Court, and indeed the situation for Stewart is distinguishable from the case as presented in *Hudson*.

I. STEWART'S RIGHT TO SEEK PUBLIC INJUNCTIVE RELIEF CANNOT BE WAIVED

It is a bit ironic that Defendants ask this Court to rely upon the decision in *Hudson*, given the arguments advanced in their briefing. Midland argues extensively that Stewart is required to assert her claims individually in arbitration and cannot seek public injunctive relief.[2] Indeed, Midland contends that "any public injunctive order issued by an arbitrator 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."[3]

However, the Court's decision in *Hudson* compelled arbitration only because Hudson could pursue a public injunction through arbitration.[4] Midland is thus effectively arguing against the very decision it asks this Court to adopt. Midland,

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1 Order [on Motion to Compel Arbitration and to Stay Action] ("*Hudson* Order"), issued April 30, 2012, in Case No. 3AN-11-9196CI.

2 Consolidated Reply [of Midland] in Support of Motion to Compel Arbitration and to Stay Action; and Opposition to Plaintiff's Cross-Motion for Partial Summary Judgment ["Midland Opposition"], filed June 21, 2012, at 21-22.

3 *Id.*

4 *Hudson* Order, at 44 ("If Hudson prevailed in court, she would be able to obtain injunctive relief enjoining Citi's unlawful actions and an injunction of this nature would have a broad impact for consumers.").

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though, does have a point in the sense that there would be substantial enforcement problems if public injunctive relief were granted through arbitration.[5] As the California Supreme Court has explained, arbitration, as an institution, is not equipped to issue and enforce public injunctive relief.[6] Arbitrators, unlike judges, lack continuing jurisdiction to ensure enforcement of their decisions.[7] Thus, even if an arbitrator granted public injunctive relief, "another consumer plaintiff also seeking to enjoin the practice would have to relitigate it. In other words, only the parties to the injunction would be able to enforce it, although the injunction is public in scope."[8]

Because the arbitration agreement at issue effectively extinguishes Stewart's nonwaivable right to obtain public injunctive relief under the Alaska Unfair Trade Practices Act (the "UTPA"), it is unenforceable under Alaska law, as argued in previous briefing[9] and accepted by the Court in *Hudson*.[10] This fatal defect in the arbitration agreement cannot be fixed by imagining that a private arbitrator has the same

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5 Midland Opposition, at 22.

6 *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1081 (Cal. 1999).

7 *Id.*

8 *Id. See also Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1080 (9th Cir. 2007) ("'public injunctions' are incompatible with arbitration"); *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal. 4th 303, 319 (Cal. 2003).

9 Plaintiff's Opposition to Motion to Compel Arbitration and Memorandum in Support of Cross-Motion for Summary Judgment ["Stewart Memo."], filed May 30, 2012, at 7-8 et seq.

10 *Hudson* Order, at 44.

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continuing jurisdiction and power as a sitting judge. The only way to preserve Stewart's right to sue for public injunctive relief is to hold that this fundamental policy is effectively extinguished if Stewart is forced into arbitration and as a result to hold that Stewart cannot be compelled to arbitrate her claims.

It should be noted that this interpretation of the necessity of preserving public injunctive relief under the UTPA does not contravene the decision in *AT&T Mobility LLC v. Concepcion.*[11] Defendants interpret *Concepcion* as overruling any state law that thwarts any aspect of an arbitration agreement.[12] This clearly over-reaches. *Concepcion* holds that state laws that prohibit arbitration of a particular type of claim are "displaced" by the FAA.[13] Nothing in Alaska's UTPA addresses, let alone prohibits, arbitration; the California rule struck down by *Concepcion* specifically did.[14] Defendants effectively want to carve out arbitration agreements from the protections of the UTPA. Not only does *Concepcion* not support this interpretation, but Defendants' interpretation is contradicted by the FAA's savings clause, which expressly preserves state laws, like

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[11] 131 S. Ct. 1740 (2011).

[12] Midland Opposition, at 21; Reply [of ALO] to Plaintiff's Opposition to Motion to Compel Arbitration and Opposition to Cross-Motion for Partial Summary Judgment ["ALO Opposition"], filed June 21, 2012, at 15-16.

[13] 131 S. Ct. at 1747.

[14] 131 S. Ct. at 1746.

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Alaska's UTPA, that "exist ... for the revocation of any contract."[15]

Indeed the post-*Concepcion* Supreme Court held in *Marmet Health Care Ctr. v. Brown*[16] that state law unconscionability arguments can *still* be raised in cases that involve arbitration agreements because the defense of unconscionability is not "specific to arbitration" and therefore not preempted by the FAA.[17]

II. *GIBSON* ESTABLISHES ALASKA'S FUNDAMENTAL POLICY THAT UNILATERAL CHANGE CLAUSES IN ADHESION CONTRACTS ARE UNENFORCABLE

In *Gibson v. Nye Frontier Ford, Inc,.*[18] the Alaska Supreme Court noted and agreed with "the prevalence of the view that arbitration clauses that may be changed unilaterally are unconscionable . . . ."[19] Defendants try to distinguish *Gibson* from the present case by contending that this statement is either dicta[20] or that it does not state a fundamental Alaska policy.[21] Defendants, though, misread *Gibson*.

The Court in *Gibson* did not "pass[] on the question of whether the change in terms provision rendered the arbitration agreement unconscionable as a matter of

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15 9 U.S.C. § 2.

16 132 S. Ct. 1201 (Feb. 21, 2012).

17 132 S. Ct. at 1204.

18 205 P.3d 1091 (Alaska 2009).

19 205 P.3d at 1097.

20 Midland Opposition, at 7; ALO Opposition, at 9. The Court in *Hudson* reached a similar conclusion. *Hudson* Order, at 22.

21 Midland Opposition, at 7; ALO Opposition, at 9.

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Alaska law."[22] Quite the contrary. The *Gibson* plaintiff argued that the at-issue agreement was unconscionable because it was subject to unilateral change. The Alaska Supreme Court upheld the agreement because — and only because — the Court held that "the agreement is not subject to unilateral change."[23] The Court reached this conclusion after observing the axiom that contracts should be interpreted so as to avoid rendering them unlawful or of no effect.[24] The Court then noted that "arbitration clauses that may be changed unilaterally are unconscionable" and consequently interpreted the salient paragraph allowing unilateral changes to the contract could not apply to the arbitration clause.[25] If arbitration clauses could be changed unilaterally, the Court would not have needed to interpret the contract as it did because it could have applied the unilateral change paragraph to the arbitration clause. In other words, the only reason the Court offered the interpretation it did was because it recognized and endorsed the principle that "arbitration clauses that may be changed unilaterally are unconscionable."[26]

It is clear, then, that the Alaska Supreme Court has already in *Gibson* ruled that adhesion contracts which permit one party to make unilateral changes to material terms

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22 Midland Opposition, at 7.

23 *Gibson*, 205 P.3d at 1093.

24 *Id.* at 1097 (citing RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981)).

25 *Id.*

26 *Id.*

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are unconscionable. And, the commentary to Restatement (Second) of Contracts § 187, states that 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."[27] Application of law from another state – such as South Dakota – that would allow unilateral change clauses is not permitted under Restatement (Second) of Conflicts of Laws § 187.[28] Stewart cannot be compelled to arbitrate her claims.

III. DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN FOR SUMMARY JUDGMENT

Defendants claim that Stewart has failed to meet her burden of proof for summary judgment because she has not presented any evidence supporting her motion for partial summary judgment.[29] This misses the point. The standard for summary judgment is whether there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law when interpreting all reasonable inferences of fact in favor of the non-moving party. *See* Alaska R. Civ. P. 56(c); *Safeway, Inc. v. State*, 34 P.3d 336, 339 (Alaska 2001). Stewart should prevail on summary judgment because, even interpreting the facts in favor of the Defendants, this

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[27] 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.").

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

[29] Midland Opposition, at 23.

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Court should hold that Stewart cannot be compelled to pursue her claims through arbitration.

Moreover, Defendants' evidentiary support for their own motion for summary judgment is woefully inadequate to grant summary judgment. Defendants have failed to provide any credit card agreement signed by Stewart. Defendants have failed to provide any evidence that Stewart was mailed a "bill stuffer" imposing new arbitration requirements on her. All Defendants have provided is a generic notice but no indication of if or when it was ever mailed to Stewart.[30]

And, Defendants have provided no evidence for why either Midland or ALO have a substantial connection to South Dakota law such that it would be more appropriate to apply South Dakota law instead of Alaska law. When Midland purchased Stewart's account, Stewart was living in Alaska.[31] Stewart was then sued in Alaska by

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[30] *See* Notice of Filing of Declaration of Regularly Conducted Business Activity ("Kharlamova Decl."), filed April 9, 2012, at MID0051-68. It is not sufficient to assert that a flier has been mailed without some proof that this has actually happened. *Kennedy v. Conseco Fin. Corp.*, 2000 U.S. Dist. LEXIS 17704, *9-10 (N.D. Ill. Nov. 30, 2000) ("What Conseco fails to recognize, however, is the method of establishing that proper mailing took place. The presumption of delivery can be invoked either by presenting evidence of actual mailing such as an affidavit from the employee who mailed the letter, or presenting proof of procedures followed in the regular course of operations which give rise to a strong inference that the letter was properly addressed and mailed. Conseco has failed to present evidence of either sort.") (internal punctuation and citations omitted).

[31] Affidavit of Kyle Hannan, dated April 3, 2012, at Exhibit C. This, incidentally, differs from the situation in the *Hudson* Order, where the contract between Hudson and

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ALO and had a final judgment entered against her by an Alaska judge. It is this order, and the attorney's fees contained therein, that is the subject of Stewart's present suit. In essence, Defendants seek to apply South Dakota law so that an arbitrator can interpret Alaska law on the awarding of attorney's fees in default collection actions. This makes no sense. Alaska courts clearly have a stronger connection to and are better situated to interpret and enforce the issues at hand than does South Dakota.

Defendants have thus failed to present adequate evidence to support their claim for summary judgment. Indeed, even interpreting all of the facts in favor of Defendants, Stewart should prevail in her motion for partial summary judgment for the reasons stated in this and in Stewart's prior brief.

IV. DEFENDANTS WAIVED THEIR RIGHT TO ARBITRATE

Defendants argue that they have not waived their right to arbitrate because the present lawsuit allegedly involves "a separate and distinct claim" from the lawsuit filed against Stewart and because Stewart should have brought her claim within the original debt collection action.[32] Both of these arguments lack merit.

Effectively, Defendants seek to play arbitration as a trump card whenever a case takes a turn with which Defendants disagree, such as when a debtor like Stewart files a

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Citibank was entered into while Hudson was living outside of Alaska. Here, Stewart was living in Alaska when Midland purchased and took possession of her account.

[32] Midland Opposition, at 17-18; ALO Opposition, at 12-13.

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counterclaim. Contrary to Defendants' assertions,[33] Stewart's counterclaim is related directly to the actions taken by Defendants in Alaska courts and should be resolved in Alaska courts – if Defendants had not used the court process to illegally collect attorney's fees in default collection actions, Stewart would not have her present suit. Stewart's present lawsuit is thus not separate from the lawsuit filed by Defendants but derivative from it.

It also does not make sense to argue that Stewart should have brought her claims in the collection action. As Defendants noted, Stewart is not challenging the validity of the debt against her.[34] But a debtor facing default cannot be expected to know that the debt collector will seek and be awarded illegal attorney's fees on that default and enter the case preemptively. Indeed, Stewart's claims did not arise until a final judgment was entered against her, so the suggestion that Stewart could have brought her claim as a part of the debt collection action simply does not make sense from a procedural standpoint.

The fact, though, that Stewart could not bring her claim until after final judgment had been entered against her does not make her claim "separate and distinct" from the debt collection action. Nor does it protect Defendants from waiver. By ignoring the arbitration clause that they now claim is binding when they sued Stewart in state court

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33 *Id.*

34 *Id.*

regarding her debt, they waived their right to arbitrate any dispute arising from the use of the Alaska courts to pursue collecting on Stewart's debt.

It must be remembered that Stewart is challenging how attorney's fees are awarded pursuant to the Alaska Rules of Civil Procedure in default collection actions. If Stewart is forced into arbitration, then an arbitrator will decide not an underlying factual dispute between the parties but rather how to apply the Alaska Rules of Civil Procedure in default collection actions. Indeed, if this is styled as public injunctive relief, then the arbitrator will be deciding a fundamental rule of awarding attorney's fees that applies to thousands of debtors other than Stewart. This is a decision best left to Alaska courts.

V. CONCLUSION

For the reasons stated above and in Stewart's prior briefing supporting her motion, Stewart's motion for partial summary judgment should be granted.

DATED: July 12, 2012

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CERTIFICATE OF SERVICE

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

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Counsel for Midland Funding, LLC

Signature 7/12/12 Date

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

~~[PROPOSED]~~ **ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY ACTION**

This matter having come before the Court on Defendant Midland Funding, LLC's ("Midland") Motion to Compel Arbitration and Stay Action, and the Court having considered the motion, any opposition thereto, and being otherwise advised,

IT IS HEREBY ORDERED:

1. Midland's Motion to Compel Arbitration is **GRANTED**.

2. This Action is **STAYED** pending completion of Arbitration according to the same terms ordered by this court in Hudson v. Citibank, Case No. 3AN-11-9196CI (Order, April 30, 2012

DATED this 25th day of July, 2012.

Frank A. Pfiffner

Hon. Frank A. Pfiffner
Superior Court Judge

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Certificate of Service

On the 9th day of April, 2012, a true and correct copy of the foregoing document was sent by U.S. Mail, postage paid, to the following party:

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By: Karina Chambers
Karina Chambers

I certify that on 7-25-12 a copy was mailed to each of the following at their address of record: J. Dawson, R. Fontaine, M. Wilhelm

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MAY 30 2012

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

DENYING

ORDER ~~GRANTING~~ PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff having moved for partial summary judgment;

Defendants having opposed;

This Court being fully advised;

DENIED.

The motion is ~~GRANTED for the reasons stated in plaintiff's accompanying memoranda.~~

DATED: 7/25/2012

FRANK A. PFIFFNER
Superior Court Judge

DENYING

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

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Signature 5/30/12 Date

I certify that on 7-25-12
a copy was mailed to each of the following
at their address of record: J. Dawson, R. Fontaine, M. Wilhelm

Judicial Administrative Assistant

DENYING
ORDER GRANTING PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT
Stewart v. Midland Funding, LLC, et al., Case No. 3AN-11-12054 CI