IN THE SUPREME COURT OF THE STATE OF ALASKA

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

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

PETITIONERS' REPLY BRIEF

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Filed in the Supreme Court of
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day of August, 2013.

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INTRODUCTION

In this appeal, parties to an arbitration clause made a tactical decision to litigate their disputes in court and obtained a resolution on the merits from a judge of issues that easily could have been decided by the arbitrator. Later, when the court system looked increasingly inhospitable, those same parties decided to try and shift fora—from court to arbitration. As Petitioners' Opening Brief and this Reply make clear, courts generally take quite a dim view of this kind of gamesmanship. The general rule—that courts across the country have endorsed—is that parties who themselves litigate issues covered by an arbitration agreement in court have waived their right to insist upon arbitration later. That rule carries the day—even in cases where waiver arises in a separate but closely related proceeding—because it ensures that all parties are able to present their related claims in the same type of forum, under the same rules.

Nothing in Respondents' bulky responses changes this rule, or its application to this case. Together, Respondents have produced a host of arguments—some addressed to the main issues in the case, others not—that are, on the whole, unpersuasive. They argue that the question of waiver in this case should have been decided by an arbitrator, not a court; that the existence of a "no-waiver" clause in their cardholder agreement frees them to litigate in court without ever triggering waiver; that waiver applies only to identical claims already litigated by the allegedly waiving party, not to any other parties' related claims; that waiver can only apply to claims in a single action; and that prejudice is both required to establish waiver and unmet by an actual court judgment on the merits. These arguments all fail, not only because they all require this Court to simply ignore the

governing law and rules that apply in circumstances like this case, but also because, as explained below, they lack compelling support in the caselaw and are misguided as a matter of policy.

Nevertheless, even if Respondents did not waive their right to arbitrate Ms. Hudson's and Ms. Stewart's claims, the arbitration agreement is unenforceable for a separate and independent reason: Petitioners seek a non-party public injunction provided for by Alaska law that cannot be granted in arbitration. Respondents admit that an arbitrator cannot award a non-party public injunction but nevertheless contend that the arbitration agreement is enforceable. That is wrong. The FAA does not permit such a result and this Court need look no further than the U.S. Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S. Ct. 2304 (2013) to see why. There, the Supreme Court reaffirmed the well-settled principle that an arbitration clause that would "forbid[] the assertion of certain statutory rights" is unenforceable. *Id.* at 2310. This is precisely the situation here: Respondents' arbitration clause categorically eliminates the right, under Alaska's UTPA, to prospective injunctive relief. Whatever else, that fact alone establishes that the arbitration clause is unenforceable. Try as they might, Respondents cannot reconcile their concession that the arbitration agreement prospectively eliminates a statutory right with the effective vindication of rights doctrine rooted in the FAA and just reaffirmed by the Supreme Court.

I. RESPONDENTS WAIVED ARBITRATION.

Respondents argue that the Superior Court's waiver ruling should be reviewed for clear error, that the waiver issue should be sent to arbitration, that they contracted around waiver, and that even if not, their waiver does not encompass Ms. Hudson's and Ms. Stewart's claims, and Petitioners must but cannot show prejudice. Each of these arguments is without merit.

A. The Standard of Review Is De Novo.

The Superior Court's waiver ruling should be reviewed de novo because the Superior Court decided waiver as a matter of law on an undisputed record. *Contra* Citibank Br. 8; Midland Br. 8 (arguing for clear error review).[1] As this Court explained in *Airoulofski v. State*, 922 P.2d 889 (Alaska 1996), waiver is "[n]ormally" a question of fact reviewed for clear error, but waiver is a legal question reviewed de novo when, as here, it is decided without trial on undisputed facts. *Id.* at 894 n.5; *cf. Karpuleon v. Karpuleon*, 881 P.2d 318, 320 n.3 (Alaska 1994) (applying de novo standard to another issue "generally" subject to deferential review because it was decided as a matter of law). *Airoulofski*'s holding on this point is consistent with the hornbook rule that de novo review applies to legal rulings while clear error review is reserved for factual findings, *see, e.g.*, *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979), and many other courts have taken *Airoulofski*'s approach, holding that waiver is subject to de novo review when decided on an undisputed record. *See, e.g.*, *Hoover v. Am. Income Life Ins. Co.*, 142 Cal.

[1] Respondent ALO does not dispute that the proper standard of review is de novo when waiver is decided on undisputed facts. *See* ALO Br. 7–8.

Rptr. 3d 312, 319 (Cal. Ct. App. 2012); *Mora v. Abraham Chevrolet-Tampa, Inc.*, 913 So. 2d 32, 33–34 (Fla. Ct. App. 2005); *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 342 Ill. App. 3d 997, 1001 (Ill. Ct. App. 2003); *Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008). The de novo standard is also particularly appropriate in these cases because arbitrability decisions are reviewed de novo, *Lexington Mktg. Grp. v. Goldbelt Eagle, LLC*, 157 P.3d 470, 472 (Alaska 2007); *Sink v. Aden Enters., Inc.*, 352 F.3d 1197, 1199 (9th Cir. 2003), and because the Superior Court decided waiver on summary judgment, and summary judgment rulings are reviewed de novo. *In re Life Ins. Co.*, 76 P.3d 366, 368 (Alaska 2003).

Blood v. Kenneth Murray Ins. Co., 68 P.3d 1251 (Alaska 2003), cited by Respondents, is not to the contrary. In a brief discussion of the standard of review, *id.* at 1254, *Blood* mentioned that the *default* rule is that waiver is generally a question of fact, but the Court in that case had no reason to address the *exception* to that rule when waiver is decided (like here) as a matter of law—and *Blood*'s silence on that issue cannot reasonably be read as overruling *Airoulofski* or as rejecting the settled rule that legal rulings are reviewed de novo. Moreover, the waiver issue in *Blood* was decided on the eve of trial—long past summary judgment. *Id.* And although Respondents make much of the fact that *Blood* involved a waiver of arbitration, it would make no sense to vary the standard of review for waiver determinations because of the arbitration context.

In any event, the Superior Court's waiver ruling in these cases was plainly incorrect and fails under any standard of review.

B. The Issue of Respondents' Waiver Cannot Be Sent to Arbitration.

In addition to being wrong about the standard of review, Respondents are wrong about their waiver being an issue for arbitration.

The law is fairly simple with respect to the question of who decides—a court or an arbitrator—whether a party has waived its right to arbitrate. When a party has engaged in conduct *inside arbitration* that allegedly waived its right to proceed there (such as not paying the arbitrator's fees), then the normal rule is that the arbitrator—not a court—decides if the party has waived its right to arbitrate. When a party has arguably waived arbitration by litigating *in court*, however, using a court's resources for its own purposes and only later invoking an arbitration clause, then the rule is that a court—not an arbitrator—resolves the waiver issue.

This Court has acknowledged and applied the rule that waiver by litigation conduct is a matter to be decided by a court in *International Brotherhood of Teamsters, Local 959 v. King*, 572 P.2d 1168 (Alaska 1977). There, this Court recognized what courts across the country also understand—that "where the issue of waiver turns on the significance of action taken in a judicial forum, 'the issue is one for the court, rather than the arbitrator, to decide.'" *Id.* at 1174 (quoting *Weight Watchers of Quebec Ltd. v. Weight Watchers Int'l, Inc.*, 398 F. Supp. 1057, 1059 (E.D.N.Y. 1975)).

The U.S. Court of Appeals for the Ninth Circuit has also applied this rule in *ATSA of California, Inc. v. Continental Insurance Co.*, 702 F.2d 172 (9th Cir. 1983). Two different waiver arguments were advanced in *ATSA*. First, there was an argument that a

party had waived its right to arbitrate by refusing to nominate a specific arbitrator after initiating arbitration. With respect to this conduct *inside of arbitration*, the court recognized that "[a] dispute about a waiver of arbitration may properly be referred to the arbitrator." 702 F.2d at 172. Respondents Citi and Midland cite this exact language. *See* Citibank Br. 13; Midland Br. 7. But—consistent with this Court's opinion in *King*—the Ninth Circuit went on to note the existence of a *second* waiver argument. One party had allegedly waived the right to arbitrate by litigating in court, and the Ninth Circuit *itself* resolved this second argument. 702 F.2d at 172. Both Citi and Midland point to *ATSA* as a crucial case on the "who decides" issue, but they both fail to perceive the Ninth Circuit's different treatment of the two types of waiver arguments. That fact alone is reason enough to reject Respondents' position.

Citi and Midland cite the U.S. Supreme Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), to argue that the arbitrator, rather than the court, normally decides waiver. But as with *ATSA*, Citi and Midland fail to note a key aspect of *Howsam*'s analysis: the issue involved in the case was how to resolve a dispute over an *arbitrator*'s rule about a six-year limitations period for filing claims. 537 U.S. at 81. In holding that the arbitrator should decide questions about the arbitrator's own limitations period, the Supreme Court held that "arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it." *Id.* at 85 (citation omitted). It was in this context that *Howsam* also stated the general language relied upon by Citi and Midland that "the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability." *Id.* at 84 (citation omitted).

That approach makes perfect sense—when the waiver question implicates a specific feature of arbitration, as it did in *Howsam*, it is for an arbitrator to decide. But, where the waiver question implicates a feature of litigation, a court decides it.

Indeed, the vast majority of courts have rejected Respondents' mis-reading of *Howsam*. *See, e.g.*, *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005) ("We hold that the Supreme Court in *Howsam* . . . did not intend to disturb the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court to decide."); *see also, e.g.*, *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 394 (6th Cir. 2008); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1120–21 (9th Cir. 2008); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 F. App'x 462, 464 (5th Cir. 2004); *Ocwen Loan Servicing, L.L.C. v. Washington*, 939 So. 2d 6, 14 (Ala. 2006); *Radil v. Nat'l Union Fire Ins. Co.*, 233 P.3d 688, 694-95 (Colo. 2010); *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 551–52 (Ky. 2008); *Perry Homes*, 258 S.W.3d at 587–89; *River House Dev. Inc. v. Integrus Architecture, P.S.*, 272 P.3d 289, 295 (Wash. Ct. App. 2012) (describing this as the "majority" view). Unlike Respondents, these courts understand that *Howsam*'s general comment about arbitrators deciding waiver issues is inapplicable to arguments, like those here, involving allegations of waiver based on conduct *in court*. That is because it would be "exceptionally inefficient" to send waiver claims based on in-court conduct to an arbitrator, whose finding of waiver would just put the case back in court "without making any progress." *Marie*, 402 F.3d at 13–14. This process of bouncing back and forth between fora would create endless opportunities for delay and abuse by litigants who

grow dissatisfied with the course of judicial litigation that is well under way, as were the proceedings below in this case. Contrary to Respondents' suggestion, whether Respondents' waived their right to arbitrate through their litigation should be decided by this Court.[2]

C. The Anti-Waiver Language in Respondents' Agreements Is Unenforceable.

Left with little in the way of actual support for their position that waiver must be decided by an arbitrator, Respondents fall back to an argument never addressed by the lower court: that language in their arbitration clauses permit them to pursue their claims in court and then insist upon arbitration of related claims later. *E.g.*, Midland Br. 11 (asserting that the arbitration clause "expressly permits a party to arbitrate a counterclaim, or new claim asserted in a separate lawsuit, even if that party has previously litigated other claims"). Unfortunately for Respondents, so-called "anti-waiver" clauses that purport to permit parties to litigate claims in court and then later demand arbitration have repeatedly been held unenforceable because it would abuse the court system for a party to litigate in court and then later demand arbitration.

So held the Third Circuit in *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 454 (3d Cir. 2011). There, in evaluating such a "non-waiver provision," the court refused to give it effect, in part on the grounds that "a party may not use arbitration to manipulate the

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[2] Respondents' reliance on *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011), which merely quotes the language in *Howsam* about waiver generally being an issue for the arbitrator is of no help. The Second Circuit in *Ecuador* simply did not address the difference between actions alleged to constitute waiver in arbitration as opposed to actions taken during the course of litigation.

legal process and in that process waste scarce judicial resources." Both the Second and Fifth Circuits share this view as well. *See Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 348 (5th Cir. 2004) (holding that a "no waiver" clause does not override district court's inherent authority to control its own docket and to find that a party, through extensive litigation, has waived its right to arbitrate); *see also Nat'l Union Fire Ins. Co. v. NCR Corp.*, 376 F. App'x 70 at *3 (2d Cir. 2010) (holding that "notwithstanding the non-waiver provision, [one party] would be prejudiced" by another party's litigation conduct, and so "such a provision is not dispositive").

Ultimately, courts refuse to enforce these clauses because they violate general rules of contract law. *Gray*, 654 F.3d at 454 ("The general view is that a party to a written contract can waive a provision of that contract by conduct expressly or surrounding performance, despite the existence of a so-called anti-waiver or 'failure to enforce' clause in the contract.") (quoting Richard A. Lord, *Williston on Contracts* § 39:36 (4th ed. 2000)). The "presence of a 'no waiver' clause does not alter the ordinary analysis undertaken to determine if a party has waived its right to arbitration," so Respondents' reliance on it here has no effect. *Gray*, 654 F.3d at 452 (quoting *S&R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 86 (2d Cir. 1998)); *see also Haddock v. Quinn*, 287 S.W.3d 158, 176 (Tex. App. 2009) ("The presence of such a 'no waiver' clause in an arbitration agreement does not alter the ordinary analysis undertaken to determine if a party has waived its right to arbitration by litigation conduct.").

The alternative, proposed by Midland in its brief, is that a party can draft a contract provision that lets them litigate in court for whatever period they wish, and then

later demand arbitration, without respect to whether this wastes the time of the court or the opposing parties. This Court should reject that view—as have many other courts across the country—because it manipulates the judicial system and wastes the valuable time and resources that courts and litigants devote to finally resolving disputes. In short, "to allow the 'no waiver' clause to preclude a finding of waiver would permit parties to waste scarce judicial time and effort and hamper judges' authority to control the course of the proceedings." *Johnson Associates Corp. v. HL Operating Corp.*, 680 F.3d 713, 717 (6th Cir. 2012) (citations omitted); *see also Seidman & Seidman v. Wolfson*, 123 Cal. Rptr. 873, 878 (Cal. Ct. App. 1975) (a no-waiver provision should not permit a party to seek judicial relief "and later to switch course and demand arbitration").

D. Respondents Waived Arbitration for Ms. Hudson's and Ms. Stewart's Claims.

Equally without merit are Respondents' arguments that they did not waive arbitration for Ms. Hudson's and Ms. Stewart's claims because those claims differ in various ways from Respondents' own claims in the earlier debt-collection actions. *See, e.g.*, Citibank Br. 15–19.

As Ms. Hudson and Ms. Stewart explained in their Opening Brief, Respondents' choice to seek their attorneys' fees in court rather than in arbitration waived arbitration not only for Respondents' own fee claims but for closely related matters as well. Ms. Hudson's and Ms. Stewart's claims *are* closely related, and therefore fall within the scope of Respondents' waiver, because they rest on allegations that Respondents misleadingly sought fees to which they were not actually entitled. *See* Opening Br. 18-21.

The rule that one party's choice to proceed in court waives arbitration for other parties' closely related claims makes sense and furthers the waiver doctrine's equitable goals because it ensures that all parties are able to present their related claims in the same type of forum, under the same rules. *See Midwest Window Sys., Inc. v. Amcor Indus., Inc.*, 630 F.2d 535, 537 (7th Cir. 1980); *Gutor Int'l AG v. Raymond Packer Co.*, 493 F.2d 938, 945 (1st Cir. 1974), *abrogated on other grounds by Travenol Labs., Inc. v. Zotal, Ltd.*, 474 N.E.2d 1070 (Mass. 1985). The closely related rule is also well settled and has been applied by many courts around the country, including in cases much like these.[3]

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[3] *See, e.g.*, *Erdman Co. & Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1118 (8th Cir. 2011) (filing to foreclose liens waived arbitration for other party's related claims); *Midwest Window*, 630 F.2d at 536–37 (debt-collection suit waived arbitration for other party's related claims); *Gutor Int'l*, 493 F.2d at 945–46 (claim for payment waived arbitration for other party's "related" claims); *Schonfeldt v. Blue Cross of Cal.*, No. B142085, 2002 WL 4771, at *1–2, *3–4 (Cal. Ct. App. Jan. 2, 2002) (insurer's reimbursement suit waived arbitration for insureds' related consumer-protection-act and other claims); *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 229 (Mo. Ct. App. 2002) (claims for payment and replevin waived arbitration for other side's related claims); *Blackburn v. Citifinancial, Inc.*, No. 05AP-733, 2007 WL 927222, at *1–2, *4–5 (Ohio Ct. App. March 29, 2007) (Citifinancial's foreclosure action waived arbitration for related consumer-protection and other claims); *Checksmart v. Morgan*, No. 80856, 2003 WL 125130, at *1, *3–4 (Ohio Ct. App. Jan. 16, 2003) (debt-collection suit waived arbitration for consumer's related claims); *Grant & Assoc. v. Gonzales*, 135 Wash. App. 1019, 2006 WL 3004093, at *2–6 (Wash. Ct. App. 2006) (suit for unpaid fees waived arbitration for client's related consumer-protection claims); *see also Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003) (plaintiff's "litigating the merits of his self-initiated lawsuit" waived arbitration for related counterclaims); *Owens & Minor Med., Inc. v. Innovative Mktg. & Distrib. Servs., Inc.*, 711 So. 2d 176, 177 (Fla. Dist. Ct. App. 1998) (breach-of-contract claim waived arbitration for other side's "close[ly] relat[ed]" claims); *Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assocs.*, 610 A.2d 499, 501 (Pa. Super. Ct. 1992) ("initiation of other [related] suits" supported waiver); *G.T. Leach Builders, L.L.C. v. TCMS, Inc.*, No. 13-11-310-CV, 2012 WL 506568, at *4 (Tex. Ct. App. Feb. 16, 2012) (filing earlier lawsuit supported waiver for other party's related claims); *cf., e.g.*, *Belcourt v. Grivel, S.L.R.*, No. 2:08-CV-902-TC, 2009 WL 3764085, at *3 (D. Utah Nov. 9, 2009) (filing counterclaim supported waiver for

Respondents' contrary arguments are unpersuasive and largely unsupported by authority. Respondents begin by urging the Court to reject the closely related rule and to hold that an arbitration waiver encompasses only the "same" claims already litigated by the allegedly waiving party, not any other parties' related claims. *E.g.*, Midland Br. 16. That very narrow view of waiver scope, if accepted, would lead to unfair and inefficient results because it would allow the party that files first to present its claims in court while forcing the other side's related claims into arbitration. Respondents' same-claims argument is also contradicted by all the decisions cited above, which hold that one party's litigation of its own claims waives arbitration for others' related but different claims, *see supra* note 1, including the notably similar case of *Blackburn v. Citifinancial, Inc.*, No. 05AP-733, 2007 WL 927222, at*1–2, *4–5, (Ohio Ct. App. March 29, 2007), in which another Citi entity's foreclosure suit was held to have waived arbitration for related consumer-protection claims filed against it later. Indeed, even the single case Respondents cite for their same-claims theory does not support it: the Fifth Circuit rejected waiver in *Subway Equipment Leasing Corp. v. Forte*, 169 F.3d 324 (5th Cir. 1999), because the earlier litigation conduct at issue was unrelated (or, at best, distantly related), not merely because it involved different claims. *See id.* at 327–29 (finding no waiver because allegedly waiving party did not participate in earlier litigation at all, because earlier claims related to different contracts and contractual relationships, and because those claims were not even arbitrable).

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plaintiff's related claims); *Coastal Sys. Dev., Inc. v. Bunnell Fdn., Inc.*, 963 So. 2d 722, 724 (Fla. Dist. Ct. App. 2007) (filing counterclaims waived arbitration for plaintiff's related claims).

Respondents' next argument also finds no support in waiver caselaw. Respondents argue that they had to know about Ms. Hudson's and Ms. Stewart's claims in advance to waive arbitration for them, *see, e.g.*, Midland Br. 16, but waiver cases are clear that that kind of advance "notice" for each related claim is not required (although Respondents knew their own conduct and the law so Petitioners' claims should not have come as a surprise). It is enough that Respondents knew the broad scope of their arbitration clauses and nonetheless chose to submit their fee claims in court. That was knowing and intentional conduct inconsistent with arbitration, which is all that courts require to waive arbitration for closely related claims. *See Blackburn*, 2007 WL 927222, at *5 (fact that Citi knew its own arbitration clause and nonetheless chose to file in court was sufficient to waive arbitration for other side's related, later-field claims); *Grant & Assoc. v. Gonzales*, 135 Wash. App. 1019, 2006 WL 3004093, at *3–4 (Wash. Ct. App. 2006) (same analysis); *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 229 (Mo. Ct. App. 2002) (same).[4]

[4] *Cf. Gutor Int'l*, 493 F.2d at 945 ("Submission of part of an arbitrable matter to a court waives the submittor's right to insist upon arbitration of the remainder."); *cf. also Midwest Window*, 630 F.2d at 536–37 (holding that one party's filing in court waived arbitration for other party's later, related claims without any apparent consideration of whether first party knew in advance about later claims); *Schonfeldt*, 2002 WL 4771, at *4 (same); *Owens & Minor Med.*, 711 So. 2d at 177 (same); *Checksmart*, 2003 WL 125130, at *4 (same).

ALO alone argues that there "were no issues to arbitrate" in the earlier actions because Respondents' underlying debt claims were undisputed. *See* ALO Br. 10. But whether or not the claims were disputed has no bearing on their arbitrability. The claims fell within the broad scope of Respondents' arbitration clauses, *see, e.g.*, Citibank Br. 3, yet Respondents chose to pursue them in court.

Respondents' notice argument is not only bad law but also bad policy. If the argument were accepted, then every filing of a new related claim or counterclaim would revive the right to compel arbitration no matter how long litigation had already proceeded in court, no matter how close the relationship between the new claim and the existing case, and no matter the extent to which the party seeking arbitration had itself invoked the judicial process. The obvious unfairness and inefficiency inherent in that kind of regime may explain why Respondents cite no authority for their notice argument.

Respondents next argue that even if their waiver might have encompassed Ms. Hudson's and Ms. Stewart's claims had they been filed in the original debt-collection cases, it does not encompass them in these circumstances because Ms. Hudson and Ms. Stewart filed their claims in separate actions. *See, e.g.*, Citibank Br. 17. Respondents cite no case finding the one-action versus two-action distinction dispositive, and it is a distinction that makes no difference in waiver doctrine. Courts considering waiver focus on whether the earlier- and later-filed claims are related, not on whether they are filed under the same case number, as demonstrated by all the cases holding that the litigation of claims in one case waived arbitration for related claims filed later in a different case. *See Midwest Window*, 630 F.2d at 536–37; *Schonfeldt*, 2002 WL 4771, at *1, *4; *Blackburn*, 2007 WL 927222, at *1, *5; *cf. Samuel J. Marranca*, 610 A.2d at 501 (holding that party's litigation conduct in a different case supported waiver ruling,

without having to decide whether it was sufficient standing alone); *G.T. Leach Builders*, 2012 WL 506568 at *4 (same).[5]

Finally, Respondents try and fail to distinguish the cases Ms. Hudson and Ms. Stewart cited in their Opening Brief. For example, Respondents assert that Petitioners' authorities all involve waiver for the same claims already litigated, waiver for claims for which an arbitration motion was already denied, or waiver for claims in a single action (which is an irrelevant fact anyway)—but Petitioners cited cases that do not fall within any of those categories. *See Midwest Window*, 630 F.2d at 536–37 (claims in one action waived arbitration for other side's different claims, not subject to prior arbitration motion, and filed in separate action); *Schonfeldt*, 2002 WL 4771, at *1, *4 (same); *Blackburn*, 2007 WL 927222, at *1, *5 (same).

With respect to the Seventh Circuit's *Midwest Window* decision, in particular, Respondents draw several inaccurate and irrelevant distinctions. For example, Respondents claim that *Midwest Window* involved only a single proceeding when in fact

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[5] ALO alone makes the additional argument that that there should be no waiver because class claims are different from individual suits. *See* ALO Br. 17. ALO ignores, however, that no class has yet been certified; that Respondents knew they were filing thousands of virtually identical fee claims against similarly situated consumers, making a class action easily foreseeable; and that a class action is *not* very different from Respondents' thousands of debt suits, which as a group are the appropriate comparators.

Midland also argues that there should be no waiver because Ms. Hudson's and Ms. Stewart's claims do not relate to the same contracts or course of dealing that gave rise to Respondents' debt-collection actions. Midland Br. 18. But of course both sides' claims relate to Petitioners' credit-card agreements; without those agreements, Respondents would not have had their debt claims, and Petitioners would not have their claims for illegal fees. In any event, if Midland is right, and Ms. Hudson's and Ms. Stewart's claims are unrelated, then the claims are outside the scope of Respondents' arbitration clauses, *see id.* at 3, and Respondents lose this appeal for that reason.

the Seventh Circuit's decision indicates that there were still two cases that had not been consolidated, *see* 630 F.2d at 536, (and regardless, the existence of one versus two proceedings makes no difference). Respondents also assert that the party seeking arbitration in *Midwest Window* included its own, already-litigated claims in its motion to compel, but that does not appear to be true, *e.g.*, *id.*, and, even if it were, would not undermine *Midwest Window* as authority for the proposition that litigating one's own claim waives arbitration for others' related claims as well. *Id.* at 536–37. Respondents point out that the party arguing waiver in *Midwest Window* moved to re-open the judgment against it, *see, e.g.*, Citibank Br. 17 n.12, but Respondents never explain why that factual difference matters, and the Seventh Circuit did not rely on the re-opening in its analysis. *See* 630 F.2d at 536–37.

In sum, Respondents waived arbitration; their waiver encompasses Ms. Hudson's and Ms. Stewart's claims; and none of Respondents' various arguments to the contrary has merit.

E. Prejudice Is Not Required to Show Waiver, and, Even If It Were, Ms. Hudson and Ms. Stewart Were Prejudiced.

Respondents rely heavily on their argument that Ms. Hudson and Ms. Stewart were not prejudiced. But waiver is a matter of state law, and Alaska, like many other states, does not require prejudice to show waiver, even in the context of arbitration. Indeed, even the better reasoned federal decisions do not require prejudice. But even accepting Respondents' position *arguendo*, Ms. Hudson and Ms. Stewart were prejudiced.

1. Waiver Is a Question of State Law, and It Is Undisputed that Alaska Law Does Not Require a Showing of Prejudice to Establish Waiver.

As explained above, Respondents' litigation conduct waived their right to invoke the arbitration clause, and Petitioners need not also show that they were prejudiced by Respondents' conduct for arbitration to be waived. Under Alaska law, a showing of prejudice is not required to find that a party waived its right to arbitration. *Powers v. United Serv. Auto. Ass'n*, 6 P.3d 294, 299 (Alaska 2000); *see* Pet'r's Br. 22–25. Respondents do not—and, indeed, cannot—argue otherwise. Instead, Respondents focus their energies on arguing that federal, not state, law should control the question of waiver, and that prejudice is required under federal law. Citibank Br. 13; Midland Br. 13; ALO Br. 13. But this argument is a nonstarter—Respondents are wrong that waiver is controlled by federal law.

To begin, this Court has consistently looked to state-law principles to determine whether a party waived its contractual right to arbitrate a state-law claim, and there are no Alaska cases to the contrary. *See, e.g.*, *Blood*, 68 P.3d at 1255; *Powers*, 6 P.3d at 298–99.

This Court's precedents are consistent with federal law governing whether state or federal law applies. Waiver is a generally applicable state-contract-law defense to enforceability, and, under the plain terms of the FAA, generally applicable state-law defenses to the enforceability of contracts may invalidate arbitration agreements. *See* 9 U.S.C. § 2; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011); *First Options of Chi. v. Kaplan*, 514 U.S. 938, 944 ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts . . . should apply ordinary state-law principles that

govern the formation of contracts."). Indeed, just a few terms ago, the U.S. Supreme Court affirmed that waiver is an example of the type of generally applicable state-law contract defense that is preserved by § 2 of the FAA. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009). Respondents protest that the FAA governs the contracts here, but because FAA itself provides for the application of state-law contract defenses, that argument does not help them. *See* Citibank Br. 13; Midland Br. 13; ALO Br. 13. It is true, as Respondents point out, that at least one federal court has held that waiver of an agreement to arbitrate is a question of federal common law, not state law. *See Sovak v. Chugal Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002). However, the U.S. Supreme Court has never endorsed that position, and it is contrary to the Supreme Court's drumbeat that § 2 of the FAA preserves generally applicable state-law contract defenses. *See, e.g., Concepcion*, 131 S. Ct. at 1746. Indeed, Alaska is not alone in applying state law to the question whether an FAA-governed arbitration agreement has been waived. *See, e.g., Thompson v. Skipper Real Estate Co.*, 729 So. 2d 287, 290 (Ala. 1999); *St. Agnes Med.Ctr. v. PacifiCare of Cal.*, 82 P.3d 727, 733 (Cal. 2003); *Donald & Co. Secs., Inc. v. Mid-Fla. Cmty. Servs., Inc.*, 620 So. 2d 192, 194 (Fla. Ct. App. 1993); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 344 (Ky. Ct. App. 2001).[6]

[6] Respondents describe the U.S. Supreme Court's decisions in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), as holding that the waiver is a question of federal common law. Citibank Br. 13; Midland Br. 12; ALO Br. 13. But that is not what those cases say. Rather, they explain that waiver questions are subject to the FAA, which, in turn, preserves state-law contract defenses.

It is also true that state-law contract defenses to the enforcement of an arbitration agreement "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" are preempted by the FAA, but waiver is not such a defense. *Concepcion*, 131 S. Ct. at 1746. Indeed, as explained in Petitioners' Opening Brief (at 42), Alaska law applies the exact same waiver test whether or not arbitration is involved—it can hardly be said to be uniquely aimed at arbitration. Nevertheless, Respondent ALO argues that the state-law waiver standard is preempted not because it is aimed at arbitration (it is not), but because it "undermines the goals and policies of the FAA." ALO Br. 13 n.6. ALO, however, does not explain how the Alaska waiver standard is at odds with the policies of the FAA—which itself preserves generally applicable state contract-law defenses—beyond the fact that the agreement to arbitrate may turn out to be waived. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (explaining that § 2 of the FAA permits states to "regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract'" (emphasis in original)). Such a results-oriented approach cannot be the standard.

2. Federal Law Is Unsettled as to Whether Prejudice Is Required, and the Better-Reasoned Decisions Hold that It Is Not.

Even if Respondents are correct that federal common law supplies the standard for whether a party has waived its right to invoke arbitration, it is not at all settled that the federal standard requires the non-waiving party to suffer prejudice, and the better-reasoned decisions are consistent with Alaska law in not requiring prejudice. The U.S.

Supreme Court has never addressed the question of whether prejudice is required, and the federal courts of appeals are divided. *Compare Khan v. Parsons Global Servs., Inc.*, 521 F.3d 421, 425 (D.C. Cir. 2008) (prejudice not required) *and Cabinetree of Wisc., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) (Posner, J.) (same) *with, e.g., Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1012 (9th Cir. 2005) (prejudice required) *and In re Citigroup*, 376 F.3d 23, 26 (1st Cir. 2004). Because waiver, unlike estoppel, is a question of whether the *waiving party* has abandoned its rights, it is appropriate to focus only on the actions of the waiving party. *See* Pet'r's Br. 23–24. Thus, if federal law applies, this Court should follow the reasoning of the D.C. and Seventh Circuits (and Alaska law) and decline to require prejudice to establish waiver. *See* Pet'r's Br. 23–24; *see also Corbin on Contracts* § 753 (1960).

3. Ms. Hudson and Ms. Stewart Were Prejudiced.

Even if federal law applies and even if federal law requires a showing that the non-waiving party was prejudiced, Respondents waived their right to proceed to arbitration because Ms. Hudson and Ms. Stewart were prejudiced. As explained in their Opening Brief, Ms. Hudson and Ms. Stewart were prejudiced because there were judgments entered against them and an adverse judgment is "prejudice enough" to establish waiver in the arbitration context. *Midwest Window*, 630 F.2d at 537; Pet'r's Br. 25–26. Respondents disagree that an adverse judgment is sufficient to show prejudice, but, tellingly, Respondents cite *no* authority that contradicts the adverse-judgment-is-prejudice rule articulated by *Midwest Window*, *Otis Housing Ass'n v. Ha*, 201 P.3d 309,

312 (Wash. 2009), and other cases. *See* Pet'r's Br. 26 (collecting cases); Midland Br. 20; ALO Br. 15.[7]

It makes sense that an adverse judgment is inherently prejudicial—a court judgment cannot be reversed or taken off the books by an arbitrator. Indeed, an adverse judgment falls squarely within the prejudice standard laid out by Midland. According to Midland, "damage to a party's legal position" meets the prejudice requirement. Midland Br. 20 (quoting *Subway Equip.*, 169 F.3d at 327). It is hard to imagine what could do more damage to a party's legal position than having a judgment entered against it as a result of the waiving party's prior decision to litigate the issue at hand.

Further, Ms. Hudson and Ms. Stewart were prejudiced by Respondents' in-court litigation because Respondents used the forum to take advantage of Alaska's Rule 82, which shifts reasonable attorneys' fees to the losing party. *See* Pet'r's Br. 26–27. Citibank dismisses this argument, in part, on the basis that Respondents gained a default judgment and that the debt was undisputed. Citibank Br. 20. *But Rule 82 applies whether or not the judgment is by default* and the dispute Respondents seek to arbitrate—the legality of the Rule 82 fees—does not have anything to do with whether the underlying debt was actually owed. What *is* relevant is that Rule 82's fee-shifting was unquestionably available, and automatically awarded, to Respondents in court, but would, at best, have

[7] Citibank does not argue that a judgment is insufficient to show prejudice. *See* Citibank Br. 19-21.

been at the discretion of the arbitrator had Respondents brought the collection action in arbitration.[8]

F. Respondents' Other Arguments Regarding Waiver Are Wrong and Irrelevant.

Respondents make several additional arguments that are both wrong and irrelevant to waiver. First, Respondents argue that they will prevail on the merits of Ms. Hudson's and Ms. Stewart's underlying claims because Respondents' 10% fees were less than their "actual" fees. *See* ALO Br. 10. But Rule 82(b)(4), which governs fee awards in default cases, provides for the lesser of 10% fees or "*reasonable* actual fees," so reasonableness is a key additional inquiry, and Ms. Hudson and Ms. Stewart contend that Respondents' reasonable fees were much less than what Respondents claimed. *See* Pet'r's Br. 3–4; *see also Valley Hosp. Ass'n v. Brauneis*, 141 P.3d 726 (Alaska 2006) (affirming rejection of fee award similar to that in Ms. Hudson's case because in a "simple default" matter "reasonable" fees "should have been far less"). Respondents' arguments going to the merits also have no bearing on the waiver issue.[9]

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[8] ALO attempts to counter Petitioners' argument that they were prejudiced by offering evidence that Petitioners were served with notice of the default judgments against them. ALO Br. Exh. A. ALO's attachment of the certificates of service to their brief in this Court is too little too late, and even if Petitioners were served, they were prejudiced by Respondents' decision to litigate in court for the reasons explained here.

[9] ALO's argument that it did not have to document its fees is plainly incorrect. *See* ALO Br. 10 n.4. Respondents did not request fees directly under the Rule 82(b)(1) schedule, *contra id.*, but instead under Rule 82(b)(4), which requires analysis of "reasonable actual fees" before the schedule may be applied. Thus, fee documentation is necessary in a default case in order to determine whether resort to the Rule 82(b)(1) schedule is even proper. *Valley Hosp. Ass'n*, 141 P.3d at 730.

Second, Respondents err in suggesting that if Ms. Hudson and Ms. Stewart prevail on waiver, their claims will be barred by res judicata. *See, e.g.*, Midland Br. 12. There is no reason why one issue should decide the other, and Petitioners' claims are not barred by res judicata because, among other reasons, they do not arise from the same "single transaction" as Respondents' earlier debt-collection claims. *Robertson v. Am. Mech., Inc.*, 54 P.3d 777, 780 (Alaska 2002). Ms. Hudson's and Ms. Stewart's claims are of course related to Respondents' earlier suits, but while Respondents' debt claims arose from Petitioners' use of their credit cards, Ms. Hudson's and Ms. Stewart's claims arise from Respondents' misleading conduct in seeking attorneys' fees during the collection process. *Cf. Meyer v. Debt Recovery Solutions of Ohio, Inc.*, No. 1:10-CV-363, 2010 WL 3515663 (N.D. Ohio Sept. 2, 2010) (consumer's unfair collection claim not barred by debt judgment); *Clabault v. Shodeen Mgmt.*, No. 05-C-5482, 2006 WL 87600 (N.D. Ill. Jan. 6, 2006) (same); *Egge v. Healthspan Servs. Co.*, 115 F. Supp. 2d 1126 (D. Minn. 2000) (same). And again, res judicata is a merits issue irrelevant to waiver.

Third, at various points in their briefs Respondents criticize Ms. Hudson and Ms. Stewart for not having appeared in the earlier debt-collection cases. Besides being irrelevant, Respondents' attacks ignore that the vast majority of debt-collection cases result in default judgments—not because all consumers are bad people but because they may not dispute the underlying debt, may not understand the proceedings against them, may not be able to find counsel, or may not have the resources to litigate against a large company. *See generally* Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 Loyola Consumer L. Rev. 355

(2012). That Ms. Hudson and Ms. Stewart may not have disputed the amounts charged on their cards or may not have had the wherewithal to litigate individual cases against major corporations does not justify Respondents' filing misleading affidavits for inflated and unreasonable fees.

* * * * *

For all the reasons given above, Respondents' arguments regarding waiver lack merit, and the Court should hold that Respondents waived arbitration for Ms. Hudson's and Ms. Stewart's claims.

II. THE ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE ALASKA LAW GUARANTEES A PUBLIC INJUNCTION THAT CANNOT BE VINDICATED IN ARBITRATION.

Even if Respondents did not waive their right to arbitrate Ms. Hudson's and Ms. Stewart's claims, the arbitration agreement is unenforceable for a separate and independent reason: Petitioners seek a non-party public injunction provided for by Alaska law that cannot be granted in arbitration. Respondents nevertheless insist that the arbitration agreement is enforceable even though Respondents Citibank and Midland admit that an arbitrator cannot award a non-party public injunction. Citibank Br. 25; Midland Br. 29–32. As explained in Petitioners' Opening Brief, however, when a party cannot effectively vindicate a statutory right in arbitration, the agreement to arbitrate is unenforceable. Pet'r's Br. 29–40.[10]

[10] Unlike Citibank and Midland, ALO contends that an arbitrator *can* issue public injunctive relief. ALO Br. 19-20. Petitioners disagree for the reasons discussed in their Opening Brief (at 36-40).

The U.S. Supreme Court just reaffirmed that the effective vindication exception to the enforcement of arbitration agreements is meant to "prevent prospective waiver of a party's *right to pursue* statutory remedies" and explained that the doctrine "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *American Express*, 133 S. Ct. at 2310 (internal quotations omitted) (emphasis in original). It is true that *American Express* ultimately enforced the arbitration agreement and its class-action ban, but, there, unlike here, the claim was that the plaintiffs would not, as a *practical* matter, be able to afford to bring their claims under an antitrust statute because their claims would be too expensive to prove in individual arbitration. *Id.* at 2308. As the Court explained, "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id.* at 2311 (emphasis in original). Thus, because the arbitration agreement did not outright forbid antitrust actions and because the antitrust statute predated the class-action device—therefore, class actions could not have been envisioned, much less guaranteed, by the antitrust statute—the effective vindication of rights doctrine was not implicated. *Id.* at 2309–11.

American Express's reasoning highlights that enforcing the agreement to arbitrate here would run afoul of the effective vindication of rights doctrine. Here, Petitioners are not arguing that they will be unable to prove their claims once they get to arbitration as the plaintiffs were in *American Express*. Rather, by eliminating the UTPA's public injunction remedy, the Respondents' agreement itself does exactly what the U.S. Supreme Court explained the effective vindication of rights doctrine was meant to

prevent: the "prospective waiver of a party's *right to pursue* statutory remedies." *Id.* at 2310. Further, unlike class actions under the antitrust statute, the remedy at issue here—statewide non-party injunctive relief—is indisputably an integral part of the UTPA, *see* Pet'r's Br. 29–30, and the arbitration agreement expressly forbids the non-party relief outlined by the UTPA, [Exc. 20, 315, 317]. It is incorrect to say, then, as Respondents do, that Petitioners can still vindicate all their statutory rights in arbitration because Petitioners cannot seek the injunctive relief provided for by the statute. Thus, under the effective vindication of rights doctrine, Respondents' arbitration agreement is not enforceable.

Contrary to Respondents' position, the effective vindication of rights doctrine applies equally to state and federal statutes, and the U.S. Supreme Court has never held otherwise. It is true, as Respondents point out, that the Supreme Court has discussed the doctrine in terms of a "congressional command," but that phrase is unsurprising because it comes from a case involving rights under federal statute. Midland Br. 24 (quoting *CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S. Ct. 665, 669 (2012)). Meanwhile, this Court has declined to enforce an FAA-governed arbitration agreement that ran afoul of a state statute. *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1101 (Alaska 2009) ("[A] contract requiring an employee to pay arbitral costs is unenforceable because it is contrary to the policies of the [Alaska Wage and Hour Act]."). The fact that *Gibson* involved a different state statute—an employment statute and not the UTPA—is irrelevant. *See* Citibank Br. 33 (arguing that *Gibson* is irrelevant because it involved an employment statute).

Faced with this conundrum, Respondents argue that, in fact, contrary to what their complaint requests, Ms. Hudson and Ms. Stewart are not actually seeking a public injunction at all. Citibank Br. 36; ALO Br. 18. Respondents Citibank and ALO contend that because the class described by Ms. Hudson and the monetary damages sought only relate to past harm, she is not actually seeking a prospective public injunction. Citibank Br. 36. In making this argument, Respondents ignore what the complaint actually says: Petitioners "seek an injunction against defendants in accord with the UTPA whereby defendants are ordered to cease and desist from their illegal conduct." [Exc. 6] Given the prospective injunctive relief explicitly requested in the complaint, it is, to put it mildly, hard to swallow the argument that the Petitioners are not seeking prospective injunctive relief.

Indeed, the prospective nature of the public injunction sought by Ms. Hudson and Ms. Stewart is highlighted by contrasting it with the relief sought in the Ninth Circuit's recent en banc decision in *Kilgore v. Keybank, Nat'l Ass'n*, ___ F.3d ___, 2013 WL 1458876 (9th Cir. 2013) (en banc). There, the Ninth Circuit held that the plaintiffs' claims did not fall under the California public injunction exception to the enforcement of arbitration agreements—the *Broughton/Cruz* rule—because they sought only backward-looking relief for a small group of plaintiffs. *Id.* at *5. In *Kilgore*, the plaintiffs sought relief against an educational loan lender on behalf of former students who had taken out loans to attend a now-defunct helicopter pilot training school. *Id.* at *1. The Ninth Circuit found that the plaintiffs did not fall under the public injunction doctrine because the only beneficiaries would be the relatively small class of former helicopter school students, not

the general public: The school had closed, and the lender was no longer in the business of making private-school educational loans. *Id.* at *5. The Ninth Circuit declined to declare that the *Broughton/Cruz* rule was preempted by the FAA. *Id.*

Here, in contrast, Ms. Hudson and Ms. Stewart not only seek relief for credit card holders who have already had Rule 82 awards entered against them, they also seek to enjoin Respondents from obtaining fraudulent fee awards in debt collection cases going forward. [Exc. 6] Unlike in *Kilgore*, no one can contend with a straight face that the group of potential beneficiaries of an injunction is small. There are presumably a large number of Citibank credit card holders in Alaska, and neither Citibank nor Midland purport to be getting out of the business of debt collection. *Cf.*, Judith Fox, *Do We Have a Debt Collection Crisis?*, 24 Loyola Consumer L. Rev. at 371–78 (discussion of Midland's large-volume debt collection business).[11]

Respondent ALO takes a different tack, arguing that Ms. Hudson and Ms. Stewart cannot actually get non-party injunctive relief for their claims under Alaska law because, among other things, banks and law firms are supposedly not covered by the private attorney general provision of UTPA. ALO Br. 31–33. But, of course, whether or not Petitioners' claims meet all the criteria for a non-party public injunction under the UTPA—that is, whether or not banks are covered by the Alaska statute—is a merits question reserved for the Superior Court.

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[11] ALO does purport to have ceased engaging in the illegal conduct alleged in the complaint, but ALO cites to nothing in the record supporting that assertion, *see* ALO Br. 31, and, unlike in *Kilgore*, the plaintiffs did not admit that fact in their complaint. *See Kilgore*, 2013 WL 1458876, at *5.

Finally, Respondents improperly lean on *Concepcion*, 131 S. Ct. 1740, arguing that *Concepcion* requires that agreements for individual arbitration always be enforced. Citibank Br. 21–31; Midland Br. 22-28; ALO Br. 24–26. But nothing in *Concepcion* overruled or even addressed the effective vindication of rights doctrine, and the U.S. Supreme Court's later decision in *American Express* confirms that arbitration agreements that forbid the assertion of certain statutory rights—here, the right to non-party injunctive relief—are not enforceable. *See American Express*, 133 S. Ct. at 2310–11. Indeed, as the Supreme Court expressly pointed out in *Concepcion*, nothing in the nature of individual arbitration prevented the Concepcions from getting all the relief they sought. 131 S. Ct. at 1753. Here, in contrast, individual arbitration would categorically preclude the relief guaranteed by the UTPA, and for that reason, the arbitration agreement cannot be enforced.[12]

[12] ALO also relies heavily on the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which held that claims brought under the Age Discrimination in Employment Act were arbitrable. ALO Br. 21-23. ALO argues that *Gilmer* controls this case because *Gilmer* held that agreements requiring individual arbitration of statutory claims were enforceable even though there was a larger public policy concern so long as individual relief was still available. *Id.* at 23. But *Gilmer* is irrelevant—it involved only a claim for individual relief, which could have been awarded in arbitration, and the statute did not guarantee non-party injunctive relief. *Gilmer*, 500 U.S. at 23-24, 27.

CONCLUSION

For these reasons, the decisions of the Superior Court should be reversed.

Respectfully submitted,

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I certify that the typeface used is 13-point Times New Roman. Alaska R. App. P. 513.5(c)(2).

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