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IN THE SUPREME COURT OF THE STATE OF ALASKA

JANET HUDSON, on behalf of herself and all others similarly situated, Petitioners, v. CITIBANK (South Dakota) NA, ALASKA LAW OFFICES, INC., and CLAYTON WALKER, Respondents.	
CYNTHIA STEWART, on behalf of herself and all others who are similarly situated, Petitioners, v. MIDLAND FUNDING LLC, et. al., Respondents.	Supreme Court Case No. S-14740 Trial Court No. 3AN-11-09196 CI *Consolidated with:* Supreme Court No. S-14826 Trial Court Case No. 3AN-11-12054 CI

RESPONSE TO PETITION FOR REVIEW
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE FRANK A. PFIFFNER, PRESIDING

BRIEF OF RESPONDENTS ALASKA LAW OFFICES, INC. AND CLAYTON WALKER

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United States Constitution

Art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

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

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is preferable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Alaska Statutes

Sec. 09.43.010. Arbitration agreements valid; application of article

(a) A written agreement to submit an existing controversy to arbitration or a provision in a written contract to submit to arbitration a subsequent controversy between the parties is valid, enforceable, and irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract. However, AS 09.43.010 - 09.43.180 do not apply to a labor-management contract unless they are incorporated into the contract by reference or their application is provided for by statute.

(b) Notwithstanding (a) of this section, AS 09.43.010--09.43.180 do not apply to an agreement or a contract unless the agreement or contract is entered into before January 1, 2005 and is not otherwise subject to AS 09.43.300--09.43.595. A person may not waive the effective date of this subsection, and a waiver of the effective date of this subsection is void.

Sec. 09.43.030. Appointment of arbitrators by court

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. If no method of appointment is provided, or if the agreed method fails or for any reason cannot be followed, or when before the hearing an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

Sec. 09.43.340. Application to compel arbitration; stay of related proceedings

(a) On application of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate under the agreement,

(1) if the refusing party does not appear or does not oppose the application, the court shall order the parties to arbitrate; and

(2) if the refusing party opposes the application, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On application of a person alleging that an arbitration proceeding has been initiated or threatened but that there is not an agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, the court shall order the parties to arbitrate.

(c) If the court finds that there is not an enforceable agreement, the court may not, under (a) or (b) of this section, order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or because grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, an application under this section shall be made in that court. Otherwise, an application under this section may be made in any court as provided in AS 09.43.540.

(f) If a party makes an application to the court to order arbitration, the court shall, on just terms, stay a judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court shall, on just terms, stay a judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

Sec. 09.43.440. Validity of agreement to arbitrate

(a) An agreement contained in a record to submit to arbitration an existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract, and except as provided by (b) of this section.

(b) To the extent an agreement that contains an arbitration provision is invalidated on the grounds that a party was induced into entering into the agreement by fraud, the arbitration provision in the agreement is not enforceable, and the party is not required to prove that the party was induced into entering into the arbitration provision by fraud.

(c) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(d) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled.

(e) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

Sec. 45.50.501. Restraining prohibited acts

(a) When the attorney general has reason to believe that a person has used, is using, or is about to use an act or practice declared unlawful in AS 45.50.471, and that proceedings would be in the public interest, the attorney general may bring an action in the name of the state against the person to restrain by injunction the use of the act or practice. The action may be brought in the superior court in the judicial district in which the person resides or is doing business or has the person's principal place of business in the state, or, with the consent of the parties, in any other judicial district in the state.

(b) The court may make additional orders or judgments that are necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of an act or practice declared to be unlawful by AS 45.50.471.

Sec. 45.50.531. Private and class actions

(a) A person who suffers an ascertainable loss of money or property as a result of another person's act or practice declared unlawful by AS 45.50.471 may bring a civil action to recover for each unlawful act or practice three times the actual damages or $500, whichever is greater. The court may provide other relief it considers necessary and proper. Nothing in this subsection prevents a person who brings an action under this subsection from pursuing other remedies available under other law, including common law.

(b) Repealed.

(c) Upon commencement of an action brought under this section the clerk of the court shall mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of an order or judgment in the action, shall mail a copy of the order or judgment to the attorney general.

(d) Repealed.

(e) A permanent injunction or final judgment against a person against whom an action was initiated under AS 45.50.501 is prima facie evidence in an action brought under this section that the person used or employed an act or practice declared unlawful by AS 45.50.471.

(f) A person may not commence an action under this section more than two years after the person discovers or reasonably should have discovered that the loss resulted from an act or practice declared unlawful by AS 45.50.471.

(g) Repealed by SLA 1998, ch. 96, § 6, eff. Sept. 10, 1998.

(h) If the basis for the action is the fault of the manufacturer or supplier of the merchandise, the manufacturer or supplier who is at fault is liable for the damages awarded against the retailer under this section.

(i) If a person receives an award of punitive damages under (a) of this section, the court shall require that 50 percent of the award be deposited into the general fund of the state under AS 09.17.020(j). This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

Sec. 45.50.535. Private injunctive relief

(a) Subject to (b) of this section and in addition to any right to bring an action under AS 45.50.531 or other law, any person who was the victim of the unlawful act, whether or not the person suffered actual damages, may bring an action to obtain an injunction prohibiting a seller or lessor from continuing to engage in an act or practice declared unlawful under AS 45.50.471.

(b) A person may not bring an action under (a) of this section unless

(1) the person first provides written notice to the seller or lessor who engaged in the unlawful act or practice that the person will seek an injunction against the seller or lessor if the seller or lessor fails to promptly stop the unlawful act or practice; and

(2) the seller or lessor fails to promptly stop the unlawful act or practice after receiving the notice.

Sec. 45.50.542. Provisions not waivable

A waiver by a consumer of the provisions of AS 45.50.471 - 45.50.561 is contrary to public policy and is unenforceable and void.

Alaska Rules of Civil Procedure

Rule 82

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

(b) Amount of Award.

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

Judgment and, if Awarded, Prejudgment Interest	Contested With Trial	Contested Without Trial	Non-Contested

First	$ 25,000	20%	18%	10%
Next	$ 75,000	10%	8%	3%
Next	$400,000	10%	6%	2%
Over	$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

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

(c) Motions for Attorney's Fees. A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) Determination of Award. Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) Equitable Apportionment Under AS 09.17.080. In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

(f) Effect of Rule. The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

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***Hudson v. Citibank, et al.*, Supreme Court No. S-14826**

JURISDICTIONAL STATEMENT

Respondents Alaska Law Offices and Clayton Walker concur with Petitioner's Jurisdictional Statement.

PARTIES TO THE CASE

Petitioners Janet Hudson and Cynthia Stewart were plaintiffs in separate lawsuits making claims under the Alaska Unfair Trade Practices and Consumer Protection Act (UTPA).

Respondent Citibank (South Dakota) NA (hereinafter "Citibank") was a defendant below in the Janet Hudson lawsuit. It is a bank that issued credit cards to Hudson and Stewart. Respondent Midland Funding, LLC (hereinafter "Midland") was a defendant below in the Cynthia Stewart lawsuit. Midland is the assignee of Cynthia Stewart's credit card debt to Citibank.

Respondent Alaska Law Offices, Inc. represented Citibank and Midland in prior lawsuits brought against Hudson and Stewart, respectively, for unpaid credit card debt. Clayton Walker is the owner of Alaska Law Offices and appeared on behalf of Alaska Law Offices. Alaska Law Offices and Clayton Walker were named defendants in the Hudson and Stewart lawsuits. Alaska Law Offices and Walker are referred to together as ALO or Alaska Law Offices in this brief.

STATEMENT OF ISSUES PRESENTED

1. Whether Respondents waived their right to arbitrate Petitioners' Alaska Uniform Trade Practices and Consumer Protection Act ("UTPA") claims by bringing suit against Petitioners for undisputed credit card debt in Alaska District Court?

2. If there was a waiver, did the scope of the waiver extend to the claims Petitioners brought against Respondents in Superior Court?

3. Whether an arbitrator has the authority to issue statewide injunctions under the UTPA?

4. Whether the authority of the arbitrator is relevant in this matter because the claim is one for damages, not injunctive relief?

STATEMENT OF THE CASE

Hudson and Stewart owned Citibank credit cards. Exc. 448; Exc. 681-82. Both failed to pay money they borrowed on their credit cards and defaulted on their credit card loans. Because they failed to correct the defaults, their accounts were referred to Alaska Law Offices for collection. When Hudson and Stewart did not respond to ALO's initial letters regarding their debts, Citibank and Midland, through ALO, brought separate suits against Hudson and Stewart. *See* Exc. 2, 270. Citibank sued Hudson directly. Citibank assigned the Stewart debt to Midland, who brought suit against Stewart. Exc. 727-28. Neither ever disputed the amount of the debt. *See* Exc. 2, 270.

ALO served Hudson and Stewart with complaints in their respective lawsuits. Neither appeared in or answered the lawsuits against them. ALO, on behalf of Citibank and Midland, moved for default on the undisputed debt. Exc. 2, 270. ALO requested

attorney's fees under Civil Rules 55(h) and 82(b)(4), and sought the lesser of actual fees or the fee schedule contained in Rule 82(b)(1), as provided for by the civil rules. Exc. 2-3, 270-71. The requests for default were served on Hudson and Stewart, but neither disputed the entry of judgment, or otherwise responded or contacted ALO. The court entered default against Hudson and Stewart and awarded the lesser of actual fees and fees under the fee schedule in accordance with the rules. Exc. 3, 271.

Hudson and Stewart first challenged Respondents' attorney fee methodology in separate, collateral lawsuits, claiming that Respondents violated Alaska's Unfair Trade Practices and Consumer Protection Act, AS 45.50.471 et seq. (hereinafter UTPA). Citibank and Midland demanded arbitration of Hudson's and Stewart's claims under the arbitration provisions of their respective Citibank credit card agreements. *E.g.*, Exc. 678. When this demand was resisted, Citibank and Midland moved to compel arbitration. Exc. 10, 296, 421, 555. ALO joined the motions in both cases. Exc. 31, 329.

The arbitration agreements in both Hudson's and Stewart's card agreement are identical for purposes of this suit. The Card Agreement included an Arbitration Agreement, which states:

> **What Claims are subject to arbitration?** All Claims relating to your account, a prior related account, or our relationships are subject to arbitration, including Claims regarding the application, enforceability or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on Contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other source of law; Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise; and Claims made independently or with other claims. A party who initiates a proceeding in court may elect

arbitration with respect to any Claim advanced in that proceeding by any other party. Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis.

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

. . . .

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

How does a party initiate arbitration? . . . .

At any time you or we may ask an appropriate court to compel arbitration of Claims, or to stay the litigation, unless a trial has begun or a final judgment has been entered. Even if a party fails to exercise these rights at any particular time, or in connection with any particular Claims, that party can require arbitration at a later time or in connection with any other Claims.

Who can be a party? Claims must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party. If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claim in arbitration as a class action, private attorney general action or other representative action, nor may such Claim be pursued on your or our behalf in any litigation in any court. . . .

Exc. 19-20, 460-61 (Hudson agreement); Exc. 315-17 (Stewart Agreement).

The trial court granted the motions to compel arbitration in both the Hudson and Stewart cases. Exc. 205, 417. The trial court held, first, that the Federal Arbitration Act

preempted any state statutes, rules, or policy providing for class action litigation. The court stated that

> The parties' Arbitration Agreement waives Hudson's right to pursue or participate in a class action. In *Concepcion*,[1] the Supreme Court found that the FAA preempted state rule that invalidated class action waivers in arbitration agreements. Though UTPA allows a party to pursue private or class actions, *Concepcion* directs that the court may not force Citi into class-wide arbitration when the consumer claimant has waived that right. A finding that the class action waiver rendered the Agreement unenforceable would similarly frustrate the FAA.

Exc. 239.

The trial court did not fully apply the holding of *Concepcion* to the question of Hudson's ability to bring a private attorney general action. The court first agreed, however, the *Concepcion* holding barred Hudson and Stewart from bringing private attorney general claims in court, even where Alaska's anti-waiver provision would otherwise render the arbitration agreements unenforceable. It found that the state's policy creating a non-waivable right to bring private attorney general claims "would render some arbitration agreements unenforceable under state law and would frustrate the purposes and objective of the FAA," and therefore would be preempted. Exc. 240.

In discussing the initial opinion in *Kilgore*, the court found the Ninth Circuit's holding to be that "*Concepcion* extends to invalidate state rules that prohibit waiver of the right to litigate claims seeking public injunctive relief because those rules, like the *Discover Bank* rule, frustrate the FAA." Exc. 242. The court adopted this holding, and concluded that "the *Kilgore* decision persuades this court that the FAA would preempt

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[1] *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011.

the UTPA's anti-waiver provision if that provision created a right to litigate the claim." *Id.* at 247. *See also* Exc. 260 ("If UTPA's non-waiver clause precluded arbitration of UTPA claims, the FAA would supersede *Barnica*[2] and preempt Hudson's UTPA claim.").

Although the trial court found that the FAA preempted the *court* from deciding Hudson's and Stewart's claims for public injunctive relief under the UTPA, it concluded there were no obstacles to the *arbitrator* deciding those claims. It thus required Hudson and Stewart to pursue their public injunctive relief claims in the arbitral forum. Exc. at 247-61, 417. To reach this result, the court held that the portion of the arbitration agreement that precluded public injunctive relief claims from being arbitrated was void under Alaska law. The court held that, while the FAA preempted Hudson and Stewart from pursuing their public injunctive relief claims in court, Alaska's public policy, as contained in the UPTA, trumped the arbitration agreements' prohibition against *arbitrating* public attorney general claims, and requiring the parties to arbitrate these claims would not frustrate the purposes of the FAA. Exc. 254-255.[3] Thus, Citibank (and its assignee Midland) would be required to arbitrate the public injunctive relief claim, contrary to the terms of the arbitration agreement. *See* Exc. at 251 ("this court is exposing Citi to the possibility of an adverse award to which it did not consent."). The

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[2] *Barnica v. Kenai Peninsula Borough School District*, 46 P.3d 974, 979 (Alaska 2002).

[3] The court found that the "arbitration agreement clearly intends to limit plaintiff's remedies by foreclosing the type of injunctive relief that she could obtain in court under AS 45.50.535." Exc. 249.

court further found that there were no structural impediments to the arbitrator addressing claims for public injunctive relief. Exc. 255-57.

STANDARD OF REVIEW

Whether the parties' arbitration agreement should be enforced is controlled by the Federal Arbitration Act (FAA). *See* 9 U.S.C. § 2. In applying the FAA, courts have developed a "liberal federal policy favoring arbitration agreements." *CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665, 669 (2012) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927 (1983)). A court's role in enforcing arbitration agreements is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. If the response is affirmative on both counts, the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp. v. Ortho Diagnostic Systems,* 207 F.3d 1126, 1130 (9th Cir. 2000) (citations omitted). The FAA leaves no place for the exercise of discretion by a trial court; the court must direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. *Dean Witter Reynolds v. Byrd,* 470 U.S. 213, 218, 105 S.Ct. 1238 (1985). The Supreme Court has emphasized that courts should refer a matter for arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582–83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). "In the absence of any express provision excluding a particular grievance from arbitration ... only the most forceful evidence of a purpose to exclude the claim from arbitration can

prevail." *Id.* at 584–85. Thus, any doubt about the applicability of an arbitration clause must be "resolved in favor of arbitration." *Id.* at 589.

The application of the FAA to undisputed facts is a matter of de novo review. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011), but requires the application of the strong policy embodied in the FAA favoring arbitration. *See also Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1096 (Alaska 2009); *Lexington Mktg. Grp., Inc. v. Goldbelt Eagle, LLC*, 157 P.3d 470, 472 (Alaska 2007).

The question whether there was a waiver of the right to arbitrate is governed by federal, and not state, law. *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270, *opinion amended on denial of reh'g*, 289 F.3d 615 (9th Cir. 2002); *Eshagh v. Terminix Int'l Co. L.P.*, 2012 WL 1669416 (E.D. Cal. May 11, 2012). A finding of the waiver of the right to arbitrate is disfavored. *Cnty. of Butte v. Travelers Cas. & Sur. Co. of Am.*, 2012 WL 3283477 (E.D. Cal. Aug. 10, 2012). The burden to show waiver is a heavy one, and waiver is not to be lightly inferred. *Sovak*, 280 F.3d at 1270. The question of waiver thus must be addressed in light of the strong policies favoring arbitration. Courts should resolve doubts concerning whether there has been a waiver in favor of arbitration. *Id; Blood v. Kenneth Murray Ins., Inc.*, 68 P.3d 1251, 1255 (Alaska 2003). Factual findings are subject to the clear error standard of review, but the application of the Federal Arbitration Act to undisputed facts is reviewed de novo. *Sink v. Aden Enterprises, Inc.*, 352 F.3d 1197, 1199 (9th Cir. 2003).

ARGUMENT

While the merits of this dispute are for the arbitrator, Hudson and Stewart nevertheless argue the merits of their claim in an attempt to castigate Respondents Citibank, Midland, Alaska Law Offices, and Clayton Walker for allegedly inappropriate behavior. ALO will briefly respond to Petitioners' merits argument prior to addressing the issues before this Court.

This case arises out of lawsuits filed by Citibank and Midland, through their attorneys, Alaska Law Offices and Clayton Walker, against Hudson and Stewart, respectively, for credit card debt. Exc. 2, 270. Hudson and Stewart failed to pay undisputed credit card debts, as they themselves admit. *See* Petitioners' Opening Brief at 2. Neither has ever disputed that they owed the debt at question, either before or after the lawsuits against them. *See id.* Respondents brought suit to reduce these undisputed debts to judgment. Exc. 68, 376. Hudson and Stewart chose not to respond to the complaints, work out a payment plan, compromise the debt, or otherwise dispute the claims brought against them. *See* Exc. 72, 376-77. Nor did they respond to the requests for entry of default judgment and requests for attorney's fees, which were served on them. *See* Exhibit A. As a result, they were defaulted and judgment entered against them. Exc. 83; 376.

There are admittedly numerous suits brought on credit card debt in the Alaska courts each year resulting from defaulting card holders. *E.g.,* Petitioner's Opening Brief at 3. Whether or not judgment is entered by default or after trial depends on whether the debtors, such as Hudson and Stewart, decide to respond to the lawsuit. That the majority

of debtors decide not to dispute the debt they owe is not a "crisis," as Petitioners now claim. In the great majority of cases, the issue is not the amount of the debt, but the ability of the debtor to make payments on the debt. Hudson and Stewart nevertheless seek to create guilt by association, citing to cases from other jurisdictions to falsely suggest that there is something "sinister" about seeking a default judgment on an undisputed credit card debt where the card holder chooses not to answer.

Petitioners also fault Citibank, Midland, and ALO for not arbitrating the claims foreclosing on the debt, as opposed to filing suit. With respect to both claims, there was no disagreement or dispute to arbitrate. The purpose of the litigation was to reduce undisputed debts to judgment. There were no disagreements or issues for an arbitrator to address.

Citibank and Midland, through their attorney, ALO, requested and received Rule 82 attorney's fees as part of the default judgment, as provided for by Alaska statutes and rules. Exc. 2-3, 270-71. The fees Respondents requested – 10% under the Rule 82 fee schedule – were entirely correct. Under Rule 82(b)(4), a plaintiff is entitled to the lesser of 10% or reasonable actual fees. "Actual" fees under Rule 82 are the fees a client ***agrees to pay its attorney***. *Municipality of Anchorage v. Gentile*, 922 P.2d 248, 263 (Alaska 1996) (emphasis added). Citibank and Midland compensated ALO under contingency fee agreements. Exc. 3, 271. Fees payable under contingency fee agreements are

"actual" fees for purposes of Rule 82. *Korean Air Lines Co., Ltd. v. State*, 779 P.2d 333, 340 (Alaska 1989).[4]

Rule 82's purpose is to partially reimburse the client (here Citibank and Midland) for the fees it has incurred in bringing and prevailing in the lawsuit. *Ursin Seafoods, Inc. v. Keener Packing Co., Inc.*, 741 P.2d 1175, 1181 (Alaska 1987), quoting *Malvo v. J.C. Penney Company, Inc.*, 512 P.2d 575, 587 (Alaska 1973). The Alaska Court recently discussed this purpose at length in *Alaska v. Native Village of Nunapitchuk*, 156 P.3d 389 (Alaska 2007). The Court explained there that

> [T]he rule creates a right to partial attorney's fees, and the attorney's fees awarded under the rule, as *Ware*[5] recognized, can be quite substantial in terms of value. On the other hand, the rule is part of a method for enforcing rights external to court proceedings that are vindicated by the judgment in favor of the prevailing party. If fees were not allowed, the prevailing party would suffer a loss in spite of its victory. A Rule 82 award of partial fees mitigates this effect.

Id. at 397-98. The rule that actual fees are what the client owes the attorney follows from this purpose.

There was no "manipulation" of the default process, nor any improper affidavit, nor inflated fees, but an adherence to court rules and this Court's precedent. Moreover, contrary to Hudson's and Stewart's brief, they were served with the fee requests.

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[4] Where attorney's fees are awarded pursuant to the Rule 82 schedule, no itemization of hourly fees is required. *See, e.g., Capolicchio v. Levy*, 194 P.3d 373, 581 (Alaska 2008); *Hayes v. Xerox Corp.*, 718 P.2d 929, 939 (Alaska 1986) (records of the hours need only be submitted where counsel requests fees not based on the Rule 82(b)(1) schedule); *Korean Air Lines Co., Ltd. v. State*, 779 P.2d 333, 340 (Alaska 1989) (noting that the court had affirmed a number of awards of attorney's fees without an itemization of such costs in the record).

[5] *Ware v. City of Anchorage*, 439 P.2d 793 (Alaska 1968).

Petitioners speculate to this Court that this did not occur. The record in the underlying cases, however, shows that Respondents in fact served Petitioners with the request for default judgment and application for attorney's fees. See Exhibit A.

A. Respondents did not Waive Their Right to Arbitrate Petitioners' Alaska Uniform Trade Practices and Consumer Protection Act ("UTPA") Claims by Reducing a Claim for Undisputed Debt to Judgment in Alaska District Court.

The arbitrability of these disputes, including waiver, is governed by federal law. The Supreme Court has made clear that "Federal law in the terms of the Arbitration Act governs [the issue of arbitrability] in either state or federal court." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983). Section 2 of the Federal Arbitration Act (FAA) creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Id.* As such, under the Supremacy Clause of the Constitution, federal law controls the issue.

In the *Mercury Construction* case, the Supreme Court addressed the applicability of federal law to the question of arbitrability. The Court held that federal law was controlling, stating that it agreed with prior Appeals Court decisions reaching the same holding:

> The issue before us [in *Prima Paint*] was whether the issue of fraud in the inducement was itself an arbitrable controversy. We held that the language and policies of the Act required the conclusion that the fraud issue was arbitrable. . . . Although our holding in *Prima Paint* extended only to the specific issue presented, the courts of appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself *or an allegation of* ***waiver****, delay, or a like defense to arbitrability.*

Id., 460 U.S. at 24-25, 103 S. Ct. at 941 (emphasis added). Indeed, one of the Appeals Court decisions the *Mercury Construction* Court referred to with approval (see note 31) specifically held question of waiver of the right to arbitrate to be a matter of federal law. *See Germany v. River Terminal Ry. Co.*, 477 F.2d 546, 547 (6th Cir. 1973).

Since *Mercury Construction*, the courts have repeatedly reconfirmed that issue of waiver is an issue of federal law. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S. Ct. 588, 592 (2002); *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013). The Second Circuit succinctly confirmed this rule as follows:

> Whether the parties have agreed, by virtue of an arbitration agreement covered by the FAA, to submit a dispute to arbitration is governed by federal law. "The [FAA] create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Cone,* 460 U.S. at 24, 103 S.Ct. at 941. See also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404-05, 87 S.Ct. 1801, 1806-07, 18 L.Ed.2d 1270 (1967).

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Belco Petroleum Corp., 88 F.3d 129, 133 (2d Cir. 1996).[6]

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[6] The Alaska Court has acknowledged the supremacy of the Federal Arbitration Act. *See Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1096 (Alaska 2009). The statement in *Gibson* that "[t]he state arbitration act also applies to this case to the extent that its provisions *do not contradict* those of the FAA" is an incomplete statement of the law, however. The FAA requires that state law give way when it would undermine the goals and policies of the FAA, *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 1255 (1989), or "stand as an obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). *Gibson* in fact agrees with this standard in the supporting footnote. *See Gibson*, 205 P.3d at 1096, n.15. *Cf. Lexington Mktg. Grp., Inc. v. Goldbelt Eagle, LLC*, 157 P.3d 470, 473 n.9 (Alaska 2007)(addressing but not deciding issue whether the FAA preempts state law).

Under federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the issue is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. Because waiver of the right to arbitration is disfavored, "any party arguing waiver of arbitration bears a heavy burden of proof." *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). A party seeking to prove waiver of a right to arbitration must demonstrate: (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 Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 720-21 (9th Cir. 2012)(same). Petitioners bear the burden of proof to show waiver, and the courts have held this burden to be a "heavy" one in light of the FAA's policy favoring arbitration. *E.g., United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009); *Fisher*, 791 F.2d at 694. Moreover, any examination of whether the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements. *Fisher*, 791 F.2d at 694.

Petitioners Hudson and Stewart did not meet their burden of proof of showing either that Respondents took any act inconsistent with the right to arbitrate, or that the Petitioners were prejudiced. The purpose of the underlying District Court lawsuits was to reduce an undisputed debt to judgment. Hudson and Stewart fail to show there was a dispute as to any factual or legal matter until they themselves subsequently filed suit. Given the absence of any dispute or controversy, Respondents cannot be said to have

taken any action "inconsistent" with their right to arbitrate. Indeed, there were no issues to arbitrate until the underlying suits were filed. Courts have held that "inconsistent behavior" only occurs where there is lengthy litigation of the very claims at issue, substantially invoking the trial court's litigation machinery. *E.g., Eshagh v. Terminix Int'l Co. L.P.*, 2012 WL 1669416 (E.D. Cal. May 11, 2012).

Moreover, the arbitration agreements provide that "even if a party fails to exercise those rights [to seek arbitration] 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 other claims." [Citibank Brief at 4; Midland Brief at 4]. This Court is required to enforce the arbitration agreement under section 2 of the FAA. The parties agreed to a definition of waiver. Under this definition, as well as under waiver law generally, a decision not to arbitrate a claim, where that claim is not disputed, is not a waiver of the right to arbitrate an entirely separate claim, based on distinct legal theories, in subsequent and separate suits.

Nor do Petitioners show prejudice from the timing of the arbitration demands. The demands were made at the outset of the UTPA litigation, even before answers were filed. Prejudice, of course, means more than mere discontent with the choice of forum.

Petitioners claim prejudice, however, from the fact that a judgment was entered against them in the underlying debt collection cases which contained a Rule 82 attorney's fee award. But this is not the type of prejudice the courts had in mind in creating a prejudice requirement. Rather, the courts look at prejudice resulting from the costs or expenses resulting from the other side's decision to litigate. Here, Respondents did not

switch courses in midstream, after Hudson and Stewart had incurred time and expenses in litigation. Because arbitration was demanded at the very outset of the UTPA litigation, there is no prejudice. Rather, the only extra costs to them are the expenses of resisting the arbitration demand.

The *Midwest Windows* case Petitioners cite is distinguishable. In *Midwest Windows*, one party, Amcor, fully aware of a dispute between the parties over a window distributorship agreement, raced to the courthouse in Pennsylvania and obtained default judgments on two notes that were given to secure performance that Amcor had in fact not provided. Having litigated and obtained judgment on the dispute at issue, the court found sufficient prejudice to support a finding of waiver. The court found Amcor's use of court in an attempt to obtain an undue advantage constituted unfair gamesmanship, and such use of the court created sufficient prejudice. *See Midwest Window Sys., Inc. v. Amcor Indus., Inc.*, 630 F.2d 535, 537 (7th Cir. 1980). Central to the court's decision was Midwest Window's prior notice to Amcor that it disputed the amount of the second note. *Id.* at 536. This placed Amcor on notice that the very note on which it sought and obtained default judgment was disputed, but Amcor nevertheless filed for summary default without notice in an attempt to gain a procedural advantage.

B. If There was a Waiver, did the Scope of the Waiver Extend to the Claims Petitioners Brought Against Respondents in Superior Court?

As stated above, ALO believes no waiver occurred regarding any issue raised in the current complaints. The right to demand arbitration did not arise until Hudson and Stewart brought suit against Respondents. Until that time, there was no notice of any

claim or controversy, and hence there could not have been a waiver. While Hudson and Stewart now argue that they were prejudiced by the outcome of the underlying debt collection suits, that prejudice is entirely their own doing. They had the right to appear and contest any issues they wished to contest, including the attorney fee issue, but chose not to. For Hudson and Stewart to now claim prejudice from a proceeding in which they intentionally did not participate turns the concept of prejudice on its head. To the contrary, Respondents were prejudiced by Petitioners' failure to raise their complaints about the methodology in the original suits. Had Hudson and Stewart done so, there would have been a prompt resolution of the issues, and there would be no basis for the current collateral attack on the judgment.

There are tremendous differences between a default collection action and a class action/public injunctive relief claim seeking treble or statutory damages under the UTPA. The decision to bring the former claims in court, which was a necessity given that the purpose of the suits were to reduce undisputed debts to judgment, is not a waiver of the right to arbitrate the latter claims, which substantially differ in scope and theory.

If Hudson and Stewart had brought the current UTPA claims as a counterclaim in the underlying lawsuits, there would still be no waiver. Once Hudson or Stewart filed an answer disputing the claims, Respondents would have had the right to request arbitration at the point claims were placed at issue. *E.g., United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 765 (9th Cir. 1992). Because Respondents would have had the right to arbitrate, had Petitioners appeared and answered in the underlying suits, Respondents

cannot have lost the right to arbitrate because Hudson and Stewart did not appear, but allowed default to be entered against them.

C. An Arbitrator has the Authority to Issue Statewide Injunctions under the UTPA when he is Granted Such Authority by Agreement.

This issue has two parts. First, is there any prohibition regarding claims for statewide public injunctive relief being addressed by an arbitrator in the first instance? Second, where the parties have agreed to arbitrate claims on an individual, non-representative basis, does the FAA preempt the public attorney general provisions of the UTPA?

Initially, ALO would respectfully suggest the Court is asking the wrong question. The Hudson and Stewart suits are fundamentally suits for damages, and in particular statutory damages on a class basis, and not claims for public injunctive relief. Petitioner's challenge to the court's public injunction ruling – given that the trial court ruled they were entitled to arbitrate their public injunctive relief claims – is a thinly disguised backdoor effort to return this entire matter to court so they can pursue class action damages.[7] Public injunctive relief is not a real issue in this litigation, however. Respondents stopped the actions complained of after the filing of the suits. Thus public injunctive relief is neither appropriate nor available. In addition, Hudson and Stewart do

[7] A class action of course is advantageous, because defendants will be pressured into settling questionable claims, and the attorneys can increase their recovery. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750, 1752 (2011). Despite the advantages of a class action, *Concepcion* holds that Hudson and Stewart are required to arbitrate their claims on a non-class action basis.

not have a right to public injunctive relief under AS 45.50.535, which does not apply to banks or lawyers.

With respect to whether arbitrators have the authority to address claims for public injunctive relief, there is no bar to an arbitrator deciding such claims. Neither the FAA, Alaska Uniform Arbitration Act, or the Alaska Revised Uniform Arbitration Act contains any such limitation. Rather, whether a claim is subject to arbitration depends on whether the parties entered into an agreement to arbitrate such a claim. *See* 9 U.S.C. § 2; AS 09.43.010(a); 09.43.330(a); *Univ. of Alaska v. Modern Const., Inc.*, 522 P.2d 1132, 1137 (Alaska 1974)("The powers of arbitrators are confined to those conferred upon them by the arbitration agreement . . . .").[8]

Courts have held that arbitrators have the authority to issue injunctive relief in a proper case. *See generally* 70 A.L.R.2d 1055 (1960). *See also Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 924 (N.D. Tex. 2000)(an arbitrator may order injunctive relief if allowed to do so under the terms of the arbitration agreement). While some courts have held that courts are better suited than arbitrators to deciding public injunctive relief claims, no court has held that arbitrators are without authority to address public injunctive relief claims. For example, the California Supreme Court in *Broughton* did not hold that

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[8] Arbitration is a matter of consent, not coercion. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, ____, 130 S. Ct. 1758, 1773 (2010). This is because "an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Id.*, 559 U.S. at ___, 130 S. Ct. at 1774.

arbitrators were without authority to issue a public injunction, but rather that arbitration was not a "suitable forum" for decisions on such injunctions. It maintained, "[t]he CLRA plaintiff in this case is functioning as a private attorney general, enjoining future deceptive practices on behalf of the general public. We hold that under such circumstances arbitration is not a suitable forum, and the Legislature did not intend this type of injunctive relief to be arbitrated." *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 1079-80, 988 P.2d 67, 76 (1999).[9] In contrast, the *Broughton* dissent raises substantial arguments discussion why – ***if the parties agree to arbitrate public injunctive relief claim*** – the arbitrator may decide, and indeed should decide such claims. *See id.* at 1100, 988 P.2d at 90 (Chin, J., dissenting)("the majority's reliance on the purported institutional shortcomings of arbitration merely resurrects the judicial hostility toward arbitration that we long ago abandoned . . . .").

The California Court upheld and extended the *Broughton* rule in *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 66 P.3d 1157 (2003). The *Cruz* case is most applicable to the current case, however, in its determination that, where a claim contained both arbitrable and inarbitrable claims, the inarbitrable claims should be severed, and the arbitrable claims nevertheless sent to arbitration:

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[9] The *Broughton* case, together with the case of *Cruz v. PacifiCare Health Systems*, 133 Cal. Rptr. 2d 58, 66 P.3d 1157 (Cal. 2003), created what was known at the *Broughton/Cruz* rule in California, which provided that arbitration agreements that precluded litigation of public arbitration claims were not enforceable. The Ninth Circuit, relying on *Concepcion*, held the FAA preempted the *Broughton/Cruz* rule in *Kilgore v. KeyBank, Nat. Ass'n*, 673 F.3d 947, 951 (9th Cir. 2012), *on reh'g en banc*, 2013 WL 1458876 (9th Cir. Apr. 11, 2013). The en banc Ninth Circuit affirmed the decision of the original panel, but on narrower grounds.

> Finally, we note that when there is a severance of arbitrable from inarbitrable claims, the trial court has the discretion to stay proceedings on the inarbitrable claims pending resolution of the arbitration. (Code Civ. Proc., § 1281.4; *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 714, 131 Cal.Rptr. 882, 552 P.2d 1178.) We agree with the Court of Appeal in *Coast Plaza Doctors Hospital v. Blue Cross of California, supra,* 83 Cal.App.4th at page 693, 99 Cal.Rptr.2d 809, that such a stay is generally in order under these circumstances.

Id. at 320, 66 P.3d at 1168.

Despite the ability of arbitrators, as a matter of authority, to hear claims for public injunctive relief where the parties confer that authority on the arbitrator, an arbitrator does not have authority to hear such claims where the arbitration agreement provides that such claims are beyond the scope of the arbitration.

The FAA applies to Hudson's and Stewart's statutory claims, even with the claimed public interest component. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647 (1991), the Court addressed the arbitrability of a claim under the Age Discrimination in Employment Act (ADEA). It confirmed that statutory claims are subject to arbitration, stating "It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." 500 U.S. at 26, 111 S. Ct. at 1652. The Court in fact *required* that statutory claims be arbitrated, even where the claims were not appropriate for arbitration. The Court stressed:

> Although all statutory claims may not be appropriate for arbitration, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id.[10] The Court continued:

> As Gilmer contends, the ADEA is designed not only to address individual grievances, but also to further important social policies. . . . We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. . . . "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."

500 U.S. at 27-28, 111 S. Ct. at 1653.

Moreover, *Gilmer* held that, where the parties have agreed to arbitrate a statutory claim on an individual, non-representative basis, the FAA enforces the parties' agreement to limit the scope of arbitration. In reaching this result, the *Gilmer* Court addressed the exact argument Hudson and Stewart raise here, i.e., that arbitration should be precluded because the arbitrator could not grant broad public relief. In *Gilmer*, appellants argued, as do Petitioners here, that arbitration procedures could not adequately further the purposes of the ADEA because they did not provide for broad equitable relief and class actions. 500 U.S. at 32, 111 S.Ct. at 1655.

The Court rejected this argument on two alternative grounds. First, it questioned the premise of the argument, that arbitrators could not grant broad equitable relief. It noted that there was nothing in New York's arbitration rules that limited the authority of the arbitrator to fashion equitable relief. *Id.* It decided the issue, however, on the separate ground that any inability of the arbitrator to grant broad *public* relief was not an

[10] Because of the application of the Supremacy Clause, no similar deference is given to state rules or statutes that stand as an obstacle to arbitration.

obstacle to arbitration, so long as the arbitrator could grant all *individual* relief to which the claimant was entitled. The Court explained:

> But "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." . . . . Finally, it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief.

500 U.S. at 32, 111 S. Ct. at 1655.

In so holding, the Court affirmed the Fourth Circuit's ruling below that the FAA required enforcement of an arbitration agreement, so long as *individual* relief was available. The circuit court held that FAA's policy favoring arbitration allowed for parties to agree to arbitrate claims on an individual basis, even if doing so had the effect of superseding a statute that provided for collective, injunctive relief:

> So long as arbitrators possess the equitable power to redress individual claims of discrimination, there is no reason to reject their role in the resolution of ADEA disputes. That arbitrators may lack the full breadth of equitable discretion possessed by courts to go beyond the relief accorded individual victims does not deny the utility of this alternative means of resolving disputes. In enacting the FAA and the ADEA, Congress must have been aware of the respective spheres of judicial and arbitral authority and it expressed no intention that the latter be displaced.

Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 199 (4th Cir. 1990), *aff'd*, 500 U.S. 20, 111 S. Ct. 1647 (1991).

Thus, while the *Gilmer* Court provided that the litigant must be able to vindicate her prospective cause of action in arbitration, the cause of action requiring vindication are her claims for individual relief. It clarified that the litigant should be entitled to all

individual relief, but the claimant's required statutory cause of action did not encompass statutory claims for *public* relief. *Accord Meyers v. Univest Home Loan, Inc.*, 1993 WL 307747 (N.D. Cal. Aug. 4, 1993)(that agreement precludes broad injunctive relief does not render it unenforceable under *Gilmer*). Stated differently, where the parties have agreed to arbitrate on an individual basis, the FAA requires enforcement of that contract and preempts any state statute providing for collective relief, such as a class action or public injunctive relief. [11]

A number of state and lower courts sought to circumvent *Gilmer*, however. The Supreme Court was again forced to address the issue of the right of parties to limit or preclude public remedies as part of an arbitration agreement in *Concepcion.*[12] Similar to the California's *Broughton/Cruz* rule invalidating arbitration agreements that included waivers of public injunctive relief, California had a parallel rule invalidating agreements containing class action waivers, called the *Discover Bank*[13] rule. In *Concepcion*, the Supreme Court held that the FAA preempted the *Discover Bank* rule, and confirmed that the FAA required that courts enforce parties' agreements to arbitrate claims on an individual, non-public basis.

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[11] "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S. Ct. 1652, 1655 (1996).

[12] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

[13] Named after *Discover Bank v. Superior Court,* 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005).

The *Concepcion* Court held that "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). Further emphasizing this broad principle, the Court held that the "principal purpose" of the FAA is to ensure that private arbitration agreements "are enforced according to their terms." *Id.* Given this purpose, the Court reinforced the holding in *Gilmer* and other cases, that the parties may set bounds on the issues to be arbitrated. It held:

> In light of these provisions, we have held that parties **may agree to limit the issues** subject to arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), to arbitrate according to specific rules, *Volt*, supra, at 479, 109 S.Ct. 1248, and to limit *with whom* a party will arbitrate **its disputes**, *Stolt–Nielsen*, supra, at ——, 130 S.Ct. at 1773.

Id. at 1748-49 (emphasis added). Allowing such limitations, according to the Court, promoted the purposes of the FAA by allowing for quick and inexpensive resolution of disputes:

> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decision-maker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.

Id. at 1749.

While the *Concepcion* Court discussed at length how class actions were inconsistent with arbitration, the fundamental principle animating the case remains that parties are entitled to place limitations on the arbitration, at least so far as public, non-individual claims for relief are concerned. This is because arbitration's benefits are best achieved where the scope of the claim is limited to the claimant's claims, as opposed to high stakes public relief or class action claims. *See also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1775 (2010)(bilateral arbitration allows parties to "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."). In overruling the Ninth Circuit ruling to the contrary, the *Concepcion* Court was simply reiterating the principle previously established in *Gilmer*: Because the informality of arbitration works best when claims are handled on an individual basis, parties are entitled to exclude non-individual claims from arbitration.

The great majority of post-*Concepcion* cases have confirmed that the FAA preempts state rules and statutes exempting public injunctive relief claims from arbitration, where the parties have contracted to exclude such claims from arbitration. The Ninth Circuit recently addressed and decided this issue in *Kilgore*, in an opinion that was recently affirmed by an en banc Ninth Circuit decision on alternate grounds. The initial *Kilgore* opinion concluded:

> In the end, we circle back to the Supremacy Clause. The FAA is "the supreme law of the land," U.S. Const. art. VI, and that law renders arbitration agreements enforceable so long as the savings clause is not

> implicated. The *Broughton–Cruz* rule "prohibits outright the arbitration of a particular type of claim"—claims for public injunctive relief. *Concepcion,* 131 S.Ct. at 1747. This prohibition cannot be described as a "ground[ ] as exist[s] at law or in equity for the revocation of any contract," 9 U.S.C. § 2, because it "appl[ies] only to arbitration [and] derive[s] its meaning from the fact that an agreement to arbitrate is at issue," *Concepcion,* 131 S.Ct. at 1746. Although the *Broughton–Cruz* rule may be based upon the sound public policy judgment of the California legislature, we are not free to ignore *Concepcion*'s holding that state public policy cannot trump the FAA when that policy prohibits the arbitration of a "particular type of claim." Therefore, we hold that "the analysis is simple: The conflicting [*Broughton–Cruz*] rule is displaced by the FAA." *Concepcion,* 131 S.Ct. at 1747. *Concepcion* allows for no other conclusion.

Kilgore v. KeyBank, Nat. Ass'n, 673 F.3d 947, 963 (9th Cir. 2012), *on reh'g en banc*, 2013 WL 1458876 (9th Cir. Apr. 11, 2013).

The great majority of other courts that have addressed the issue have likewise found no basis for distinguishing *Concepcion's* holding, which allowed arbitration agreements precluding class actions, and parallel provisions precluding private attorney general suits. For example, in *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011), *reconsideration denied*, 2011 WL 6961598 (C.D. Cal. Oct. 31, 2011), the court reasoned:

> For similar reasons, requiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA. A claim brought on behalf of others would, like class claims, make for a slower, more costly process. In addition, representative PAGA claims "increase[ ] risks to defendants" by aggregating the claims of many employees. *See id.* at 1752. Defendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would "go uncorrected" given the "absence of multilayered review." *See id.* Just as "[a]rbitration is poorly suited to the higher stakes of class litigation," it is also poorly suited to the higher stakes of a collective PAGA action. *See id.* The California Court of Appeal's decision in *Franco* shows only that a state might reasonably wish to require arbitration agreements to allow for collective PAGA actions. *See Franco,*

> 90 Cal.Rptr.3d at 558. *AT & T v. Concepcion* makes clear, however, that the state cannot impose such a requirement because it would be inconsistent with the FAA. *See Concepcion,* 131 S.Ct. at 1753.

See also Luchini v. Carmax, Inc., 2012 WL 3862150 (E.D. Cal. Sept. 5, 2012)("state is unable to require a procedure inconsistent with the FAA, 'even if it is desirable for unrelated reasons.'"); *Grabowski v. Robinson*, 817 F. Supp. 2d 1159, 1181 (S.D. Cal. 2011)(California Private Attorney General Act claim found arbitrable, and arbitration agreement's provision barring plaintiff from bringing claim on behalf of other employees enforceable); *Nelson v. AT & T Mobility LLC*, 2011 WL 3651153 (N.D. Cal. Aug. 18, 2011)(FAA preempts *Broughton/Cruz* rule, and precludes arbitration of public injunctive relief claims); *Kaltwasser v. AT & T Mobility LLC*, 812 F. Supp. 2d 1042, 1051 (N.D. Cal. 2011), *reconsideration denied*, 2011 WL 5417085 (N.D. Cal. Nov. 8, 2011)(*Cruz* and *Broughton*, even more patently than *Discover Bank*, apply public policy contract principles to disfavor and indeed prohibit arbitration of entire categories of claims); *Blau v. AT & T Mobility*, 2012 WL 10546 (N.D. Cal. Jan. 3, 2012)(FAA "preempts California's preclusion of public injunctive relief claims from arbitration); *In re Apple & AT & T iPad Unlimited Data Plan Litig.*, 2011 WL 2886407 (N.D. Cal. July 19, 2011)(*Concepcion* preempts California's arbitration exemption for claims requesting public injunctive relief); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712 (N.D. Cal. May 16, 2011)(*Concepcion* held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."); *In re Sprint Premium Data Plan Mktg. & Sales Practices Litig.*, 2012 WL 847431 (D.N.J. Mar. 13, 2012). The trial court's decision enforcing the arbitration agreement, and holding that the

FAA precluded Hudson and Stewart from enforcing AS 45.50.535 in court, was correctly decided for the reasons stated in the above cases.

The trial court further held, however, that allowing the *arbitrator* to address public injunctive relief claims, contrary to the parties' agreement, was nevertheless not contrary to the FAA. While it enforced the parties' agreement to arbitrate, it apparently applied AS 45.50.542 to void the portion of the arbitration agreement precluding arbitration of pubic injunctive relief claims. This portion of the trial court's decision conflicts with Supreme Court precedent by violating the basic rule, set forth above, that the FAA requires the court to enforce the parties' agreement ***as written***.

The trial court found that the parties' agreement required that the parties' claims be arbitrated on a non-representative basis, and the agreement foreclosed public injunctive relief claims under AS 45.50.535. Exc. 249. This finding is not before this Court on this petition for review. The trial court nevertheless relied on AS 45.50.542 to hold that the parties' agreement to arbitrate claims on an individual basis was void to the extent it precluded Hudson and Stewart from arbitrating claims under section .535.

The trial court erred because, contrary to the dictates of the Supreme Court, it relied on state policy to override the explicit arbitration agreement of the parties. As *Concepcion* and *Gilmer* make clear, the FAA mandates that arbitration agreements be enforced as written. State statutes that rewrite and supersede the agreement of the parties are preempted. *See also Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 472, 109 S. Ct. 1248, 1252 (1989)(FAA preempts application of state laws which render arbitration agreements unenforceable).

The holdings of the Supreme Court are clear:

> Section 2 of the FAA establishes "a liberal federal policy favoring arbitration agreements." . . . It requires courts to enforce agreements to arbitrate according to their terms. . . . That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been "overridden by a contrary congressional command."

CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012)(citations omitted). Nor does a statutory non-waiver provision – even in a federal statute – alter the mandate of the FAA that arbitration agreements be enforced according to their terms. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012)(holding that West Virginia statute precluding waiver of arbitration in nursing home claims was preempted).[14]

D. Whether the Arbitrator has Authority to Issue Injunctions Under the UTPA Does Not Affect Respondents' Right to Arbitration Because Complete Relief May Be Granted Without Injunction, Nor Do Plaintiffs Properly State a Claim for Injunctive Relief.

Petitioner Hudson's First Amended Class Action Complaint alleged that Respondents violated the UTPA in the underlying District Court case by filing an attorney fee affidavit in support of the default judgment that based "actual" attorney's fees owed under a fee agreement. *See* Hudson First Amended Complaint, ¶¶ 9-10. Exc.

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[14] In *Greenwood*, the Court addressed whether the inclusion of a non-waiver provision in the relevant federal statute altered the application of the FAA. The Court held it did not. The statute at issue in *Greenwood* contained a provision nearly identical to that found in the UTPA: "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." 132 S.Ct. at 669.

The *Greenwood* Court addressed the issue because a federal statute was at issue, and thus the Court was required to reconcile the expressions of Congressional intent contained in the potentially conflicting statutes. Where, as here, a state statute is at issue, the Supremacy Clause causes the FAA to preempt state non-waiver provisions. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2012).

3. The allegations in the Stewart complaint are substantially identical. Exc. 271. Petitioners claim, however, that "actual" fees should be based on the actual number of hours worked, regardless whether the attorney was working on an hourly basis, *id.* at ¶ 13, [Exc. 3] and thus the default judgments were higher than allowed and they were damaged. In addition to damages, Petitioners sought injunctive relief that Respondents cease and desist from their conduct, file corrected judgments, and "disgorge" all allegedly excessive fees that were obtained. *Id.* at ¶¶ 25, 26. Exc. 6.

While Petitioners argue that they cannot effectively vindicate their rights without injunctive relief under section .535, they have not met their burden of proof on this issue,[15] and the facts speak otherwise. Hudson and Stewart's remedy for past damages is monetary relief under AS 45.50.531. Given that damages are available, "disgorgement" is simply a duplicative remedy. Whereas disgorgement might be an appropriate remedy for the attorney general, who cannot seek damages directly for those that are injured by a trade practice violation, it is not an appropriate remedy for a plaintiff already entitled to damages, nor one that Alaska law generally provides as a remedy for a tort violation. Nor are plaintiffs entitled to a remedy of correcting the judgment. The judgment itself is res judicata, and cannot be corrected via a collateral attack on the judgment.[16] Moreover,

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[15] *E.g., Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91, 121 S. Ct. 513, 522 (2000)(the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co., Inc. (AZ)*, 288 F. Supp. 2d 1033, 1038 (D. Ariz. 2003)(claimant has burden to show need for relief at issue).

[16] There is a disagreement between the parties whether res judicata bars Respondents from pursuing their claim altogether, but that is a decision for the arbitrator.

Hudson's and Stewart's right to damages are designed to compensate them for any harm caused by the allegedly incorrect amount of the judgment.

While the UTPA allows claims for injunctive relief under some circumstances, Respondents are not entitled to UTPA non-individual injunctive relief. First, a person cannot bring a claim under the UTPA for injunctive relief unless:

> (1) the person first provides written notice to the seller or lessor who engages in the unlawful act or practice that the person will seek an injunction against the seller or lessor if the seller or lessor fails to promptly stop the unlawful act or practice; and
>
> (2) the seller or lessor fails to promptly stop the unlawful act or practice after receiving the notice.

AS 45.50.535(b). While Hudson and Stewart claim they cannot effectively vindicate their statutory rights, they have not sustained their burden of proof to show that they cannot do so. They did not show, for example, that Respondents are continuing to engage in the alleged wrongful practice. To the contrary, Respondents ceased requesting attorney's fees in the manner complained of. Because Respondents stopped the conduct at issue, Petitioners are not entitled to injunctive relief under AS 45.50.535.[17]

[17] The en banc Ninth Circuit in *Kilgore* in fact declined to address the issue whether *Concepcion* vitiated the *Broughton/Cruz* rule for this very reason. Because the defendant has stopped the practices complained of, the court found there was "no real prospective benefit to the public at large from the relief sought," and thus the case did not fall within the *Broughton/Cruz* rule, even if it did have continued vitality. The clear basis of this ruling was that the "public injunctive relief" tail should not be allowed to wag the entire arbitration clause dog, where the public injunctive relief claim of enjoining future wrongdoing was peripheral, and not central, to the plaintiff's claim. *Kilgore v. Keybank, Nat. Ass'n*, 2013 WL 1458876 (9th Cir. Apr. 11, 2013).

Under AS 45.50.535, private attorney general injunctive relief is limited to addressing ongoing wrongdoing. AS 45.50.535 provides that a person that was the subject of an unlawful act "may bring an action to obtain an injunction *prohibiting seller or lessor from continuing to engage in an act or practice declared unlawful* under AS 45.50.471." (emphasis added). It does not provide a statutory right to seek equitable relief to redress past damages or for other reasons. The limited scope of AS 45.50.535 becomes clear when compared to the scope of injunctive relief available to the attorney general under AS 45.50.501. The attorney general, for example, has authority to seek restitution via an injunction if "necessary to restore to a person in interest any money or property, real or personal, which may have been acquired by means of an act or practice declared to be unlawful by AS 45.50.471." AS 45.50.501. Section .535 provides no similar grant of authority.

Moreover, under AS 45.50.501, the attorney general may seek injunction relief against any "person" that "has used, is using, or is about to use an act or practice declared unlawful in AS 45.50.471." In contrast, AS 45.50.535 allows a private plaintiff to seek injunctive relief only against a "lessor or seller." Because none of the Respondents are lessors or sellers, AS 45.50.535 cannot be used to obtain an injunction against them. Whereas the state may bring a case against any person, a private plaintiff's right to seek injunctive relief does not include the right to bring injunctive relief claims against attorneys or creditors.

CONCLUSION

The trial court court's order referring Hudson's and Stewart's claims to arbitration should be affirmed. The trial court found the parties' agreement required arbitration on an individual, non-representative basis, a finding that that is binding and not under review. The Federal Arbitration Act requires that the parties' arbitration agreement be enforced as written, i.e., on an individual agreement. State rules and statutes that would act to rewrite the arbitration agreement are preempted. Nor have Hudson and Stewart met their burden of proof to establish they cannot vindicate their statutory rights in arbitration.

If this Court decides, however, that Petitioners' public injunctive relief claim is not preempted, and cannot be arbitrated, it does not follow, as Hudson and Stewart argue, that the entire arbitration clause is void. The claim for public injunctive relief is easily severable from their individual claims for damages. *See Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 66 P.3d 1157 (2003). The relevant statutes allow for, and indeed potentially require, the severance of arbitrable and non-arbitrable claims, and stay of the entire proceeding. *See* AS 09.43.020(d); AS 09.43.340(g); 9 U.S.C. § 3. *See also Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 20, 103 S. Ct. 927, 939 (1983)("relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement")(emphasis in original). This issue of severance should be remanded to the trial court for initial decision.

The Court should affirm the trial court's order, modified to preclude arbitration of claims under AS 45.50.535, and allow this case to proceed to arbitration as the parties agreed.

DATED this _____ day of June, 2013.

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IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KENAI

Citibank (South Dakota) NA **Plaintiff** **v.** **Janet Hudson** **Defendant**	**Case No. 3KN-10-1139 CI**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28 day of January, 2011, a true and correct copy of the PLAINTIFF'S APPLICATION FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT, AFFIDAVIT OF ENTRY OF DEFAULT AND DEFAULT JUDGMENT, AFFIDAVIT OF ACTUAL ATTORNEYS FEES, ENTRY OF DEFAULT, FINAL DEFAULT JUDGMENT, PREJUDGMENT COMPUTATION SHEET, AND A COPY OF THIS CERTIFICATE OF SERVICE was mailed by U.S. Mail to the defendant, unless an attorney is identified below then the items were mailed to the attorney.

Defendant	Attorney
Janet Hudson 104 N GILL ST APT 206B Kenai AK 99611-7415	

By _____
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EXHIBIT A
PAGE: 1 OF 2

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IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Midland Funding LLC **Plaintiff** **v.** **Cynthia Stewart** **Defendant**	**Case No. 3AN-10-12555 CI**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30 day of December, 2010, a true and correct copy of the PLAINTIFF'S APPLICATION FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT, AFFIDAVIT OF ENTRY OF DEFAULT AND DEFAULT JUDGMENT, AFFIDAVIT OF ACTUAL ATTORNEYS FEES, ENTRY OF DEFAULT, FINAL DEFAULT JUDGMENT, PREJUDGMENT COMPUTATION SHEET, AND A COPY OF THIS CERTIFICATE OF SERVICE was mailed by U.S. Mail to the defendant, unless an attorney is identified below then the items were mailed to the attorney.

Defendant	Attorney
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By _____
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