that consumers have a legally enforceable right "to recover damages," even if a "suit in court has to be preceded by an arbitration proceeding."[95] Applied to this case, *CompuCredit* makes clear that the court cannot find a right to litigate UTPA claims based on UTPA's reference to bringing an "action" or "civil action." The court next addresses, more specifically, waiver of private attorney general claims.

The parties' initial briefing cited conflicting California district court cases addressing *Concepcion*'s effect on state rules that prohibit arbitration agreements from waiving a persons' right to litigate a private attorney general claim. The Ninth Circuit has since resolved its internal division and held that *Concepcion* invalidates these rules. Though the Ninth Circuit does not bind Alaska state courts, its reasoning is persuasive and this court agrees that under *Concepcion*, the FAA *would* preempt a right to litigate UTPA private attorney general claims, if the UTPA created this right.

Plaintiff's reply pointed to *In Re DirectTV Early Cancellation Fee Marketing & Sales Prac. Litig.* and *Ferguson v. Corinthian Colleges* as cases harmonizing *Concepcion* with the remaining limits on the enforceability of arbitration contracts.[96] The Ninth Circuit has since reversed these two cases. In *In*

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[95] *Id.*

[96] *See* Pl.'s Reply at 18–19, *citing Ferguson v. Corinthian Colleges*, 2011 WL 4852339 (C.D. Cal. Oct. 6, 2011) and *In Re DirectTV Early Cancellation Fee Marketing & Sales Prac. Litig.*, 2011 WL 4090774 (C.D. Cal. Sep. 6, 2011).

Re DirectTV, the Central District of California found that even post-*Concepcion*, arbitration was not an appropriate forum to resolve private attorney general claims seeking public injunctive relief under the California Consumer Relations Act (CLRA) and that the FAA did not preempt a decisional rule that guaranteed this right.[97] Hudson argues that the UTPA creates the same, un-preempted right. In the time between Hudson's initial reply memoranda and her supplemental brief, though, the Ninth Circuit pulled this support from under her.

a. *Kilgore v. KeyBank.*

In *Kilgore v. KeyBank*, the Ninth Circuit addressed whether an arbitration agreement could validly waive a party's right to pursue a claim for public injunctive relief.[98] It reversed the district court decisions noted above and found that *Concepcion* extends to invalidate state rules that prohibit waiver of the right to litigate claims seeking public injunctive relief because these rules, like the *Discover Bank* rule, frustrate the FAA.

In *Kilgore*, the plaintiff students alleged that defendants, KeyBank, N.A. and a loan servicing center ("KeyBank"), violated California's Unfair Competition Law (UCL) by aggressively and deceptively enticing students to take out

[97] 2011 WL 4090774, at *10 (C.D. Cal. Sep. 6, 2011).

[98] 2012 WL 718344 (9th Cir. Mar. 7, 2012).

KeyBank loans to finance helicopter school tuition.[99] The loan contracts had mandatory arbitration clauses that encompassed all claims, waived class action participation, and notified plaintiffs that they may lose "certain rights" available in court.[100]

The students sought to enjoin KeyBank from, among other things, "engaging in false and deceptive acts and practices" with respect to consumer credit contracts involving purchase money loans."[101] At that time, California state courts followed a decisional rule that arbitration agreements could not prohibit parties from pursuing claims for public injunctive relief (the "*Broughton-Cruz* rule")[102] because the purpose of such claims was not simply to redress an individual but to stop a defendant's unlawful conduct and protect the public in the future.[103] Under the *Broughton-Cruz* rule, an arbitration agreement was unenforceable if it attempted to waive these claims.

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[99] *Id.* at *1.

[100] *Id.* at *2.

[101] *Id.* at *3.

[102] *Id.* at *1, *citing Broughton v. Cigna Healthplans of California,* 988 P.2d 67 (Calif. 1999); *Cruz v. PacifiCare Health Systems, Inc.,* 66 P.3d 1157 (Calif. 2003).

[103] *Id.* at *7.

The *Kilgore* court found, with some difficulty, that the FAA preempted the *Broughton-Cruz* rule. In *Concepcion* the Supreme Court had reversed the Ninth Circuit and made clear that the FAA preempts, broadly, any state law that creates an obstacle to arbitration and, as the *Kilgore* court emphasized repeatedly: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[104]

With this redirection, the Ninth Circuit turned to the *Broughton-Cruz* rule.[105] It noted the district courts' split of authority. Some district courts maintained that the *Broughton-Cruz* rule survived *Concepcion* because the rule does not "'outright' . . . prohibit arbitration of all injunctive relief claims, but only those 'brought on behalf of the general public.'"[106] Other districts found the rule invalid because the FAA preempts state rules that impede arbitration, "notwithstanding 'public policy arguments'" to the contrary.[107]

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[104] *Id.* at *7, *10 *citing Concepcion* at 1753.

[105] *Id.*

[106] *Id.* at *9, *quoting In re Direct TV*, at *10; see also *Corinthian,* at *9.

[107] *Id.* at *9, *quoting Nelson v. AT & T Mobility LLC,* 2011 WL 3651153, at *2 (N.D. Cal. Aug. 18, 2011).

With palpable reluctance, the Ninth Circuit abandoned the *Broughton-Cruz* rule. "We are not blind to the concerns engendered by our holding today," it stated:

> It may be that enforcing arbitration agreements even when the plaintiff is requesting public injunctive relief will reduce the effectiveness of state laws like the UCL. It may be that FAA preemption in this case will run contrary to a state's decision that arbitration is not as conducive to broad injunctive relief claims as the judicial forum. And it may be that state legislatures will find their purposes frustrated. These concerns, however, cannot justify departing from the appropriate preemption analysis as set forth by the Supreme Court in *Concepcion*.[108]

Plaintiff notes that the Ninth Circuit is not the most accurate bellwether for Supreme Court direction. She refers, apparently, to its liberal decisions' low survival rate.[109] But in *Kilgore*, the Ninth Circuit took pains to *follow* Supreme Court precedent.[110]

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[108] *Id.* at *10. The *Kilgore* court also explained that "the motivation of state legislators" is not relevant to the preemption analysis because only federal, not state, statutes may "preclude[] waiver of the right to a judicial forum," but this statement's relevancy to Alaska law is unclear because it relates back to the question of whether *Mitsubishi* and *Gilmer* apply to state statutes—the Ninth Circuit believes they do *not*. *See id.* at *11–*12.

[109] Pl's Combined Reply to Def.'s Supp. Briefs Re: Arbitration, at 5 (Mar. 29, 2012) *citing* Carol J. Williams, *U.S. Supreme Court Again Rejects Most Decisions By the U.S. 9th Circuit Court of Appeals*, L.A. TIMES (July 18, 2011), *available at* http://articles.latimes.com/2011/jul/18/local/la-me-ninth-circuit-scorecard-20110718.

[110] *See Kilgore*, 2012 WL 718344, at * 8.

b. The FAA Would Preempt a Right to Litigate UTPA Claims.

The *Concepcion* decision and its progeny (particularly *Kilgore*) suggest that if the UTPA creates a right to litigate private attorney general claims, as Hudson argues it does, the FAA would preempt this law.

Plaintiff argues that the FAA does not preempt a right to litigate UTPA claims because this right to litigate would not apply only to arbitration or derive its "meaning from the fact that an agreement to arbitrate is at issue."[111] To read *Concepcion* this broadly, she argues, "writes the savings clause of the FAA completely out of existence."[112] But *Concepcion* and its progeny suggest that court *must* take a narrow interpretation of the § 2 savings clause because *Concepcion* instructs courts to consider whether a state law would tend to impede arbitration agreements, even if the state did not intend the law to do so.[113]

Plaintiff argues that her case is distinguishable from decisions invalidating state rules that "prohibit[] outright the arbitration of a particular type of claim."[114] Here, a guarantee that consumers may litigate UTPA claims would not on its face

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[111] Pl's Supp., at 7.

[112] *Id.*

[113] *Concepcion*, 131 S.Ct at 1747.

[114] Pl.'s Supp., at 8, *quoting Marmet*, 132 S.Ct at 1747.

frustrate arbitration agreements, but it would frustrate them nonetheless by exposing parties to litigation after they have contracted out of that exposure.

The Ninth Circuit looked to recent Supreme Court edicts on FAA preemption and invalidated a state law rule that rendered arbitration agreements unenforceable if the agreements waived the right to litigate private attorney general claims. Ninth Circuit decisions do not bind Alaska courts, but do provide persuasive authority.[115] The *Kilgore* decision persuades this court that the FAA would preempt the UTPA's anti-waiver provision if that provision created a right to litigate the claim. The court finds instead that the UTPA creates a right to pursue the public injunctive *relief* and that Hudson must pursue this relief in an arbitral forum. For reasons explained in section IV.F.3, *Concepcion* does not preclude this conclusion.

3. Hudson May Receive Public Injunctive Relief in an Arbitral Forum.

Citi emphasizes repeatedly that the arbitration agreement does not prevent Husdon from vindicating her statutory rights. Instead, it says, she retains "the substantive rights afforded by the statute [but] submits to their resolution in an

[115] *E.g.*, *Totemoff v. State*, 905 P.2d 954, 963 (Alaska 1995) ("[T]his court is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law."); *see also Heffle v. State*, 633 P.2d 264, 272 (Alaska 1981) (explaining that federal decisions interpreting federal statutes are persuasive authority).

arbitral . . . forum."[116] It *also* states that she is "free . . . to pursue all the same remedies (including injunctive relief) she would have in court—albeit on an individual basis."[117] Citi is correct only if Hudson is able to obtain public injunctive relief in an arbitral forum. For reasons explained below, the court finds that she is.

The UTPA provides in AS 45.50.535 that a person may pursue a private attorney general claim "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." Further, UTPA provides in AS 45.50.542 that "[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." These provisions mean that Alaska law will not recognize an agreement to give up public injunctive relief as a possible remedy, *regardless* of the claim's forum. If Hudson prevailed in court, she would be able to obtain injunctive relief enjoining Citi's unlawful actions and an injunction of this nature would have a broad impact for consumers.

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[116] Citi's Reply, at 13, *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 728 (1985).

[117] Citi's Reply, at 13.

Citi claims that that the Arbitration Agreement does not "'prohibit[] [Hudson] from seeking injunctive relief on her UTPA claim."[118] But several provisions of the Agreement evince this intent.[119] The Agreement states that, "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." It states that the arbitration award "shall determine the rights and obligations between the named parties only and only in respect of the Claims in arbitration, and shall not have any bearing on the rights and obligations of any other person, or on the resolution of any other dispute." Finally, it restricts the arbitrator from awarding relief "for or against anyone who is not a party" and states that "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." 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.

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[118] Citi's Reply, at 12.

[119] Walters Aff., Exhibit 2.

Though the Arbitration Agreement is enforceable to require Hudson to arbitrate her claim for public injunctive relief, it is *not* enforceable to the extent that it extinguishes her effective relief on the claim. As plaintiff points out, the Alaska Supreme Court has stated the arbitral forum must allow a claimant to effectively vindicate substantive statutory rights.[120] Defendants contend that the Arbitration Agreement does not deprive plaintiff of any rights available under Alaska law because she may pursue these claims in arbitration. Defendants do not explain how the Agreement preserves plaintiff's right to public injunctive relief if the Agreement permits the arbitrator to award only individual relief.

a. This Case Differs From Both *Concepcion* and *Kilgore*.

In *Concepcion*, the Supreme Court held that California could not force a party to participate in class-wide arbitration because class actions entail numerous, onerous requirements that interfere with the purpose of arbitration of providing fast, efficient, and relatively inexpensive dispute resolution.

The *Concepcion* Court considered that California's rule against class action waivers, in effect, allowed virtually any consumer law claimant to demand class-wide arbitration.[121] It found that imposing class, rather than bilateral, arbitration

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[120] Pl.'s Memo., at 13–14, *citing Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1100 (Alaska 2009).

[121] *Concepcion*, 131 S.Ct at 1750.

caused "fundamental" and "structural" changes to the arbitral process.[122] Class-wide arbitration sacrifices much of the informality that bilateral arbitration allows. It requires an arbitrator to decide whether to certify a class and whether a plaintiff sufficiently represents the class. These decisions are time consuming and require specialized knowledge that an arbitrator may not have.[123] Like class litigation, class arbitration must follow many special procedural rules.[124] The extent to which these differences change the nature of arbitration frustrate the goals and purposes of the FAA.[125]

This case is similar in some ways. By finding an arbitration agreement enforceable but refusing to enforce a waiver of public injunctive relief, this court is exposing Citi to the possibility of an adverse award to which it did not consent. But unlike imposing class-wide arbitration, this result does not fundamentally impede arbitration. Hudson will arbitrate as an individual party. Allowing an arbitrator to decide a private attorney general claim does not require the arbitrator to consider absent parties nor does the arbitrator have to follow class arbitration rules. Citi encourages Hudson to pursue her injunction claim on an individual

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[122] *Id.* (citations omitted).

[123] *Id.* at 1750–52.

[124] *Id.*

[125] *Id.* at 1753.

basis, which demonstrates Citi's faith that the arbitral forum is equipped to decide this *issue*. There is no reason that an arbitrator could not decide the issue and decide to enjoin and correct Citi's alleged unlawful behavior as to *all* consumers. Further, if the arbitrator awards Hudson relief, the court may take responsibility for enforcing the relief.[126]

The *Concepcion* Court also considered that "class arbitration greatly increases risks to defendants" by exposing them to liability for damages to "tens of thousands of potential claimants" with less rigorous review than in a judicial forum.[127] Granted, the stakes here may be higher for Citi than they would be if the arbitral forum limited Hudson's possible relief to redress of her individual alleged wrongs.[128] But UTPA's private attorney general provision creates these higher stakes and companies doing business in Alaska are, or should be, aware that

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[126] 9 U.S.C. § 13 (a court may enforce a judgment confirming an arbitral award "as if it had been rendered in an action in the court in which it is entered."); ALASKA STAT. §§ 09.43.490 (A person may request judicial confirmation of arbitral award), 09.43.520 (A court may enforce an order confirming an arbitration award "as any other judgment in a civil action.").

[127] *Id.* at 1752.

[128] The higher stakes result is not a foregone conclusion because if Hudson is successful on her claim individually, other similarly situated consumers who learn of the arbitral award may argue that the Hudson award collaterally estops Citi from arguing a position different from the Hudson award. *See State Farm Mut. Auto. Ins. Co. v. Dowdy*, 111 P.3d 337, 343 (Alaska 2005).

private citizens may hold them accountable in this manner and that UTPA makes this right non-waivable.

This case also differs from *Kilgore*. In *Kilgore*, the plaintiffs argued that an arbitration agreement's waiver of a private attorney general claim rendered the agreement *unenforceable*. The *Kilgore* plaintiffs invoked a state decisional rule that *prohibited arbitration* of public injunctive relief claims and required a judicial forum for those claims.[129] Here, the court finds that the UTPA does not prohibit arbitration of a private attorney general claim under the UTPA. It finds the Arbitration Agreement *enforceable*. Unlike the Ninth Circuit, this court believes that the arbitral forum is equipped to hear Hudson's private attorney general claim and award public injunctive relief if warranted.[130]

A California Court of Appeal case supports this conclusion by distinguishing class action and private attorney general claims and finding that even post-*Concepcion* the FAA does not preempt the latter. In *Brown v. Ralph's Grocery Company*, a plaintiff employee brought a class action against her employers as well as a state Private Attorney General Act (PAGA) claim—despite

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[129] *Kilgore*, 2012 WL 718344, at *10.

[130] *See id.* at *7 (expressing skepticism that the arbitral forum is equipped to handle public injunction relief).

waiving these claims per an arbitration agreement.[131] The trial court denied the employer's motion to compel individual arbitration. On appeal, post-*Concepcion*, the California Court of Appeal found that *Concepcion* mandated reversal of the trial court's invalidation of the class action waiver but *not* the court's ruling on the PAGA waiver. The *Brown* court reasoned that while class actions primarily seek monetary damages, private attorney general claims allow an individual to act as a proxy for the state to reform illegal conduct.[132] Though policy considerations are not material to FAA preemption, the court also explained that private attorney general claims are less procedurally demanding than class actions.[133]

The *Brown* court found that *Concepcion* did not address private attorney general claims and that these claims do *not* frustrate the FAA. It resolved to maintain this position under California law "[u]ntil the United States Supreme Court rules otherwise."[134] (The California Court of Appeal differs from the Ninth Circuit on this issue).[135] This court differs from the California Court of Appeal by

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[131] 197 Cal. App. 4th 489, 494 (Cal. Ct. App. 2011).

[132] *Id.* at 499–500.

[133] *Brown*, 197 Cal. App. 4th at 499.

[134] *Id.* at 503.

[135] *See Kilgore*, 2012 WL 718344.

maintaining that public injunctive relief cases are arbitrable but that the *relief* is not waivable under state law.

Citi may hold Hudson to the parties' Arbitration Agreement. The arbitral forum, though, may not limit Hudson's rights and remedies unless *allowing* a right or remedy would fundamentally interfere with the arbitration. For reasons explained above, this case differs from the situation the *Concepcion* court confronted. Hudson's UPTA claim for public injunctive relief may proceed in arbitration.

b. The AAA Rules Give the Arbitrator Broad Discretion in Awarding Relief.

The Arbitration Agreement states that it follows the American Arbitration Association (AAA) rules and procedures.[136] The AAA rules further convince the court that arbitral forum is equipped to award public injunctive relief in this case if warranted. The Arbitration Agreement states that the arbitrator "will follow procedures and rules of the arbitration firm . . . unless those procedures and rules are inconsistent with this Agreement, in which case this Agreement will prevail." Because the Agreement is not enforceable to the extent that it attempts to extinguish Hudson's statutory rights, the court considers the AAA rules in full.

[136] The Agreement also lists JAMS and the National Arbitration Forum (NAF) as allowable arbitration firms, but in 2005 Citi removed JAMS as an option and NAF does not conduct consumer arbitration any longer. Consent Judgment, *Minnesota v. Nat'l Arbitration Forum*, No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009).

The AAA applies the Commercial Arbitration Rules and Mediation Procedures to consumer disputes such as the pending case.[137] It *also* applies the Supplementary Procedures for Consumer-Related Disputes to this type of case, at the arbitrator's discretion.[138] While the Supplementary Procedures are not *mandatory* in any particular case, the AAA applies these procedures to arbitration agreements "between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices."[139] This provision describes the agreement between Citi and Hudson. The court therefore considers whether an arbitrator could award public injunctive relief under the Commercial Arbitration Rules *and* the Supplementary Procedures.

The Commercial Arbitration Rules provide that an "arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific

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[137] *See* Consumer Arbitration, http://adr.org/aaa/faces/aoe/gc/consumer.

[138] *Id.*

[139] AAA Consumer-Related Disputes Supplementary Procedures, Introduction.

performance of a contract."[140] This broad discretion means that the arbitrator could award the injunctive relief Hudson requests. Though the rule limits the relief to "the scope of the agreement," the court has already found that the Agreement cannot extinguish Hudson's UTPA remedies.

The Supplementary Procedures, which the AAA crafted for specifically the type of arbitration agreement at issue here, state the arbitrator's discretion even more broadly: "The arbitrator may grant any remedy, relief or outcome that the parties could have received in court."[141] This rule lacks the "scope of the agreement" caveat of the Commercial Arbitration Rules. Further, the AAA states that when the Commercial Dispute Resolution Procedures and the Supplementary Procedures conflict, the arbitrator should follow the Supplementary Procedures.[142]

The AAA rules suggest that Hudson could effectively vindicate her private attorney general claim in an arbitral forum. If Hudson prevails in arbitration and the arbitrator awards public injunctive relief, this court could enforce the award.

c. *Barnica v. Kenai Peninsula Borough School District*

Citi cites *Barnica v. Kenai Peninsula Borough School District* for the proposition that arbitration agreements generally "supersede statutory judicial

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[140] Commercial Arbitration Rules and Mediation Procedures, at 37, R-47.

[141] Supplemental Procedures, C-7 (Rules effective Sep. 15, 2005).

[142] Supplemental Procedures, C-1(a).

remedies."[143] The court agrees that *Barnica* does not preclude compelled arbitration of UTPA claims but notes that under *Barnica* an arbitral remedy must be an effective substitute for a judicial remedy.

Before *Barnica*, the Alaska Supreme Court held in *Public Safety Employees Ass'n v. State* ("*Public Safety*") that when a statute expressly made its "rights and remedies" non-waivable, the court would not enforce an arbitration agreement under which a party could not obtain statutory remedies.[144] The *Public Safety* court addressed the Uniform Residential Landlord Tenant Act (URLTA). The URLTA stated that neither a tenant nor landlord could "agree[] to waive or to forego rights or remedies under [the URLTA]"[145] and provided substantial remedies (injunctive relief and special damages) that the arbitration agreement at issue would have foreclosed.

In *Barnica*, the court considered the *Public Safety* holding when it addressed whether a former school employee's binding arbitration agreement precluded his statutory claim under Alaska's Human Rights Act. Unlike the URLTA, the Human Rights Act did *not* contain a non-waiver provision.

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

[144] *Public Safety Employees Ass'n v. State*, 658 P.2d 769, 774–75 (Alaska 1983).

[145] ALASKA STAT. § 34.03.040(a).

The *Barnica* court explained that after the *Public Safety* decision, the U.S. Supreme Court had voiced a stronger arbitration-friendly stance.[146] In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme decided that an arbitration agreement superseded a federal statute "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[147] The Alaska Supreme Court reasoned analogously. It considered that the Human Rights Act, like the statute at issue in *Gilmer* and *unlike* the URLTA, "provides both for administrative and judicial remedies" and seemed generally consistent with arbitral as well as judicial resolution.[148] The *Barnica* court concluded that "a claim subject to an agreement to arbitrate for which an independent statutory judicial remedy is also available must be arbitrated, unless the history and structure of the statute in question indicate that the legislature intended to preclude waiver of the judicial remedy in favor of the arbitral forum."[149]

The UTPA non-waiver clause differs slightly from the URLTA non-waiver clause. While the URLTA prohibits agreements that "waive or to forego rights or remedies" under the Act, the UTPA states that a consumer may not waive "the

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[146] *Barnica*, 46 P.3d at 979–80.

[147] *Id.* at 979, *quoting Gilmer*, 500 U.S. at 26.

[148] *Id.* at 979.

[149] *Id.* at 977.

provisions" of the UTPA. The statements are similar but the UTPA phrasing is less specific and the *Barnica* and *Public Safety* courts made a point of noting that the URLTA's non-waiver provision applies "not only to rights, but to remedies, under the act."[150]

The court notes that *if* UTPA's non-waiver clause precluded arbitration of UTPA claims, then the FAA would supersede *Barnica* and preempt Hudson's UTPA claim. As discussed in section IV.F.2, the fact that UTPA refers to the right to bring a "civil action" or "action"[151] does not necessarily mean that the statute guarantees a right to litigate UTPA claims.[152]

The court interprets UTPA's non-waiver provision in a manner that attempts to give meaningful effect to the provision without contravening federal law. As discussed in section IVF, it finds that UTPA's non-waiver clause does not preclude waiver of a judicial remedy but rather guarantees the ability to effectively vindicate UTPA's provisions. Accordingly, Hudson must be able to pursue public injunctive relief in an arbitral forum. This conclusion is consistent with the *Barnica* court, which stated that when an arbitration agreement waives statutory

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[150] *Id.* at 978, *citing Public Safety Employees Ass'n*, 658 P.2d at 774.

[151] ALASKA STAT. §§ 45.50.531, .535.

[152] *CompuCredit Corp.*, 132 S. Ct. at 670–72.

remedies, the "substitute remedies" must be "fair, reasonable, and efficacious."[153] If the court enforced the Arbitration Agreement restrictions that limit Hudson to individual relief, Hudson would have no chance to "efficacious[ly]" resolve her private attorney general claim.

4. Justice Thomas' Concurrence and FAA Application in State Court.

Justice Thomas's separate concurrence in *Concepcion*, a 5-4 decision, suggested that he may have maintained his skepticism about whether the FAA applies in state court. If this were the case, Hudson argues, the Court would have decided *Concepcion* differently if the case had arisen in state rather than federal court. The court requested further briefing on this issue.[154]

As Citi points out, the *Marmet Health Care* decision resolves this issue because it is a *per curiam* decision and begins, "State and federal courts must enforce the Federal Arbitration Act (FAA)."[155] In *Marmet*, the Court vacated a West Virginia Supreme Court of Appeals decision as inconsistent with *Concepcion*. Justice Thomas did not concur separately or dissent. Though Justice Thomas has not specifically revisited his earlier statements about the FAA's

[153] *Barnica*, 46 P.3d at 981 (quotation omitted).

[154] Order, at 5–10 (March 1, 2012).

[155] 132 S.Ct 1201, 1202 (2012).

applicability in state court, the fact the Court's post-*Concepcion* decision on FAA preemption was unanimous convinces this court that it would not be useful to contemplate the hypothetical question of how the Court would treat Hudson's case differently in light of its state court roots.

G. Defendants Did Not Waive the Right to Arbitrate.

Citi did not waive its right to compel arbitration of the pending case. Hudson argues that by choosing to litigate its debt collection claim against her in Kenai District Court, Citi waived its right to compel arbitration of her subsequent claim that it overcharged her attorney fees for the litigation.[156] Citi does not appear to dispute that it waived arbitration on the debt collection claim it litigated.[157] Accordingly, Hudson contends that her claim is an extension of Citi's debt collection claim. Citi, she argues, demonstrated "direct, unequivocal conduct that indicated its purpose to abandon [its] right to demand arbitration" of issues directly related to Citi's prior claim.[158] Despite Citi's claim to the contrary, the court, not the arbitrator, should determine whether Citi waived arbitration.[159]

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[156] Pl.'s Memo., at 10–11.

[157] *See* Citi's Reply, at 19–20.

[158] Pl.'s Reply at 21, citing *Powers v. United Servs. Auto Ass'n*, 6 P.3d 294, 299 (Alaska 2000).

[159] Pl.'s Reply, at 23 n. 70; *see also Blood v. Kenneth A. Murray Ins., Inc.* 151 P.3d 428, 430 (Alaska 2006) (deciding a party's arbitration waiver argument).

The court will find that a party impliedly waived its right to arbitrate if the party's actions demonstrate "clear and unambiguous" intent to give up the right. This can occur through actions "inconsistent with any other intention than a waiver, or where neglect to insist upon the right results in prejudice to another party." However, if the court finds waiver based on prejudicial neglect, it must still find "conduct indicating a purpose to abandon the right."[160]

Hudson argues that Citi waived its right to arbitrate because it sued her in state court and obtained a default judgment for her credit card debt.[161] Though Citi waived its right to arbitrate the specific dispute—Hudson's debt—by litigating it,[162] the more difficult question is whether Citi's decision to sue Hudson for her debt waived its right to arbitrate her *countersuit* based on a dispute *about* the debt collection claim.

A party may waive the right to arbitrate issues substantially related to those it litigated. For instance, Hudson cites a Seventh Circuit decision addressing a situation in which plaintiffs re-filed and moved to arbitrate the *same* substantive

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[160] *Powers v. United Services Auto. Ass'n*, 6 P.3d 294, 299 (Alaska 2000).

[161] Pl.'s Memo., at 10.

[162] *E.g. Nicholas v. KBR, Inc.*, 565 F.3d 904, 907 (5th Cir. 2009) ("[W]aiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.") (citation omitted); *see also* Pl.'s Memo. at 11–12 n. 38 and cases therein.

claims that a court had already dismissed. The court explained that when a party has "litigate[d] substantial issues going to the merits of [its] current claims" it cannot "restly[e]" the claim and "present[] it for arbitration."[163] But that is not the case here. Citi is not re-filing a claim against Hudson. Further, neither the parties nor the court substantively addressed the attorney fees issue in the debt collection case. Hudson points out that the arbitration agreement states that either party may elect arbitration of a claim "unless a trial has begun or a final judgment has been entered."[164] Again, though, this supports her waiver argument only if her pending claim is *the same as* Citi's claim against her. Citi points out that Hudson "waited until after [the Kenai case] was completed" to bring her claim, rather than appearing and contesting the fees during Citi's case.[165] Had she raised this issue earlier, Hudson would have a stronger argument that Citi waived arbitration in this case.[166] As Citi says, it had no notice of the attorney fees issue during its debt collection litigation. Because Citi's decision to address Hudson's debt in court

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[163] *See Grumhaus v. Comerica Securities, Inc.*, 223 F.3d 648, 652 (7th Cir. 2000).

[164] Pl.'s Reply at 23, citing Arbitration Agreement (Walters Aff., Exhibit, p. 2, column 2).

[165] Citi's Reply, at 20–21.

[166] Hudson does cite one case that is more on point, but it is an unpublished opinion. *See Schonfeldt v. Blue Cross of California*, 2002 WL 4771, at *4 (Cal. Ct. App. 2d Dist. 2002).

was not inconsistent with the intent to arbitrate other issues, it did not waive its right to arbitrate future disputes.

H. The Court Grants ALO's Motion to Compel Arbitration and Stays Hudson's Claims against ALO.

ALO moves to join Citi's Motion to Compel Arbitration. The court grants ALO's motion because ALO is Citi's representative in relation to this claim. The Arbitration Agreement states that claims against Citi are subject to arbitration *as well as* "Claims made by or against anyone connected with [Citi] or [the cardholder] . . . such as . . . an employee, agent, representative . . . ."[167] ALO was acting as Citi's attorney, and therefore representative, in the debt collection claim against Hudson. The Agreement therefore encompasses a claim against ALO.

Hudson argues that the ALO is not a representative of Citi but instead an independent contractor. She argues that as a non-signatory to the Agreement and a non-representative, ALO cannot invoke the arbitration provision.[168] Further, she argues that ALO's conduct—seeking the allegedly excessive attorney fees—is not related to Citi and Hudson's agreement. This argument is not persuasive. An

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[167] Walters Aff., Exhibit 2.

[168] Pl.'s Memo. at 15.

attorney working as a debt collector for a credit card issuer is the issuer's representative.[169]

Hudson further protests that Citi and ALO have produced no proof (e.g., an explicit contract) of their agency relationship.[170] That "proof" is not necessary. An attorney's representative role is inherent to the attorney-client relationship.[171]

Further, as ALO discusses in its supplemental brief, Hudson supports her argument on this issue with cases that address a non-signatory party's attempt to enforce an arbitration agreement on *estoppel* grounds.[172] ALO does not, and does not *need* to, argue estoppel; the Arbitration Agreement expressly encompasses ALO. The court grants ALO's request for relief.

V. CONCLUSION

For the reasons explained above, the court grants Citi's Motion to Compel Arbitration and to Stay Action and denies Hudson's Cross-Motion for Summary Judgment. Citi validly added the Arbitration Agreement under South Dakota law

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[169] ALO's Reply to Pl.'s Opp. to Mot. to Compel Arbitration & Opp. to Cross-Mot. P.S.J., at 2–3 (Oct. 25, 2011), *citing Hodson v. Javitch, Block & Rathbone, LLP*, 531 F. Supp. 2d 827, 831 (N.D. Ohio 2008), *Morrow v. Soeder*, 2006 WL 2855024 (E.D. Mo. Oct. 3, 2006).

[170] Pl.'s Reply, at 28.

[171] *See* ALO's Supp. Brief, at 3 (Dec. 6, 2011); *see also* Aff. Clayton Walker ¶ 4 (Oct. 25, 2011).

[172] *Id.* at 2.

and the Agreement encompasses Hudson's claims and is largely enforceable under Alaska law. However, the court grants Citi's motion with the important caveat that the Arbitration Agreement's restriction on Hudson's right to request public injunctive relief under AS 45.50.535 is unenforceable. Under Alaska law, Hudson cannot waive this right. Under *Concepcion*, though, the Arbitration Agreement's class action waiver is valid and Hudson must proceed in arbitration individually. Hudson also must arbitrate her claim for damages under AS 45.50.531(a).

Regarding the parties' other arguments, the court finds that Citi did not waive its right to compel arbitration in this case because its debt collection action against Hudson in Kenai District Court was a separate action in which it had no notice of the claims Hudson now raises. Finally, the court grants ALO's request for relief. Hudson's claims against ALO are stayed and must proceed to arbitration in the Hudson/Citi arbitration.

Dated this 30th day of April, 2012, at Anchorage, Alaska.

FRANK A. PFIFFNER
Superior Court Judge

I certify that on 4-30-12 a copy of the above was mailed to each of the following at their address of record:

J. Davis
J. Dawson
M. Wilhelm

B Cavanaugh
B. Cavanaugh, Judicial Assistant

Jon S. Dawson
David M. Hymas
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Attorneys for Midland Funding, LLC

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

CYNTHIA STEWART, on behalf of herself and all others similarly situated, Plaintiffs, vs. MIDLAND FUNDING, LLC, ALASKA LAW OFFICES, INC; and CLAYTON WALKER, Defendants.	Case No. 3AN-11-12054 CI

NOTICE OF FILING NOTICE OF RECORDS DEPOSITION AND SUBPOENA

Defendant Midland Funding, LLC, gives notice that it is filing a copy of the Subpoena for Taking Records Deposition (of Citibank) in support of its Consolidated Reply in Support of Motion to Compel Arbitration and to Stay Action; and Opposition to Plaintiff's Cross-Motion for Partial Summary Judgment.

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DATED this 21st day of June, 2012.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Midland Funding, LLC

By: _____
Jon S. Dawson
Alaska Bar No. 8406022

Certificate of Service

On the 21st day June, 2012, a true and correct copy of the foregoing document was sent by U.S. Mail, postage paid, to the following parties:

James J. Davis, Jr.
Northern Justice Project, LLC
310 K St., Suite 200
Anchorage, AK 99501

Marc Wilhelm
Richmond & Quinn
360 K Street, Suite 200
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Janet Eastman

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IN THE ~~DISTRICT~~/SUPERIOR COURT FOR THE STATE OF ALASKA
AT ANCHORAGE

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

Plaintiff(s),

vs.

MIDLAND FUNDING, LLC, ALASKA LAW OFFICES, INC., AND CLAYTON WALKER,

Defendant(s).

CASE NO. 3AN-11-12054 CI

SUBPOENA FOR TAKING DEPOSITION

To: Records Custodian, Citibank
Address: 701 E. 60th St. North, Sioux Falls, SD 57117-6034

You are commanded to appear and testify under oath in the above case at:
Date and Time: February 17, 2012 at 10:00 a.m.
Offices of: Davis Wright Tremaine LLP
Address: 701 W. 8th Avenue, Anchorage, AK 99501

Notice, as required by Civil Rule 45(d), has been served upon Marc Wilhelm and James Davis on January 31, 2012. You are ordered to bring with you See Exhibit A, attached. This deposition is solely in aid of Midland's enforcement of its right to compel arbitration in this matter and is not a waiver of that right.

1-31-12
Date

Deputy Clerk

Subpoena issued at request of
Jon S. Dawson
Attorney for Midland Funding, LLC
Address: 701 W. 8th Ave., Suite 800
Telephone: (907) 257-5300
If you have any questions, contact the person named above.

Before this subpoena may be issued the above information must be filled in and proof must be presented to the clerk that a notice to take deposition has been served upon opposing counsel.

RETURN

I certify that on the date stated below, I served this subpoena on the person to whom it is addressed, _____, in _____, Alaska. I left a copy of the subpoena with the person named and also tendered mileage and witness fees for one day's court attendance.

Date and Time of Service

Signature

Service Fees:
Service $_____
Mileage $_____
TOTAL $_____

Print or Type Name

Title

If served by other than a peace officer, this return must be notarized.

Subscribed and sworn to or affirmed before me at _____, Alaska on _____.

(SEAL)

Clerk of Court, Notary Public or other person authorized to administer oaths.
My commission expires_____

CIV-115 (8/96)(st.3)
SUBPOENA FOR TAKING DEPOSITION

Civil Rule 45(d)

EXHIBIT A TO SUBPOENA FOR TAKING DEPOSITION

You are required to bring with you the following documents:

For the period January 2008 to the present,

(1) All account notes for the Account (defined below);
(2) All credit oard agreements sent to the Cardholder (defined below);
(3) All changes in terms ("CIT") sent to the Cardholder; and
(4) All account statements sent to the Cardholder.

As used above, "Acoount" means Account No. 5121 0797 0407 3235, and "Cardholder" means Cynthia Stewart.

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Attorneys for Midland Funding, LLC

IN THE SUPREME COURT FOR THE STATE OF ALASKA

CYNTHIA STEWART, on behalf of herself and all others similarly situated, Petitioner, vs. MIDLAND FUNDING, LLC, ALASKA LAW OFFICES, INC, and CLAYTON WALKER, Respondent.	Supreme Court Case No. S-14826 Superior Court Case No. 3AN-11-12054CI

RESPONSE TO PETITION FOR REVIEW

The Petition for Review offers nothing more than a bare disagreement with the Superior Court Order that Petitioner must abide by the terms of the parties' written agreement to arbitrate ("Arbitration Agreement"). Petitioner does not and cannot demonstrate sufficient grounds for an immediate appeal under Rule 402(b), making only cursory reference to the standards set forth in 402(b)(1) and (2) in the final paragraphs of her Petition. There is no reason to disregard the sound policy behind the usual appellate process. Petitioner should simply arbitrate her claims on an individual basis and then

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appeal any confirmation of the arbitration award as a matter of right – a process which can be concluded within a matter of months.

Moreover, Petitioner's arguments as to why the Superior Court's Order is erroneous are simply wrong. Tellingly, Petitioner does not include in her "issues presented" the fundamental question at the heart of the Superior Court's Order: whether the Superior Court properly granted Midland's Motion to Compel Arbitration. The reason for this is clear. The recent rulings by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct.1740, 179 L.Ed.2d 742 (Apr. 27, 2011), and its progeny are dispositive of the Motion to Compel Arbitration. Instead, Petitioner attempts to focus on other issues, such as Petitioner's incorrect interpretation and application of this Court's decision in *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091 (Alaska 2009), none of which have merit, as explained below.

"A petition will be denied where the issue is simply not important or urgent enough to warrant a departure from the usual appellate procedure." *Wolff v. Arctic Bowl, Inc.*, 560 P.2d 748, 763 (Alaska 1977). The instant Petition fails in this regard and should therefore be denied.

I. Factual Background

A. The Arbitration Agreement

Petitioner's "Statement of Facts" either misstates or omits several important facts. Petitioner was the owner of a Sears Gold MasterCard credit card issued in 2002 and administered by Citibank (South Dakota), N.A. ("Citibank"), a national bank located in

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South Dakota. *See* Petition for Review ("Petition"), Ex. 3, MID0007. During the years that Petitioner held her credit card, her credit card account was governed by a succession of card agreements, each of which included an arbitration agreement. The form of arbitration agreement at issue in this case became effective when Petitioner accepted the "Notice of Change in Terms, Right to Opt Out and Information Update" included with her January 2009 account statement. *See* Petition, Ex. 5, MID0093-95 (Petitioner's January 2009 Account Statement); *see also* Petition, Ex. 4, MID0051-68 (Change in Terms and Card Agreement).

Contrary to Petitioner's contentions, Citibank did not "unilaterally" add the Arbitration Agreement to the Card Agreement. Not only did every one of Petitioner's prior card agreements include an arbitration agreement, but the Notice of Change in Terms expressly offered Petitioner the opportunity to opt out by calling or writing to Citibank. *See* Petition, Ex. 4, p. 2 (MID0052). Petitioner did not opt out, and thus agreed to the terms of the Card Agreement, including the Arbitration Agreement, which allowed her to maintain her account. Petitioner continued making regular payments on her account for some months thereafter. *See, e.g.*, Ex. A, MID0096–107 (Plaintiff's Account Statements from February-May 2009) (authenticated by Decl. for Records of Regularly Conducted Bus. Activity, filed in Super. Ct. Apr. 9, 2012).

On or around January 22, 2010, Citibank sold Petitioner's account (along with many others) to Midland Funding, LLC ("Midland") and assigned to Midland its right to enforce the Card Agreement, including the Arbitration Agreement. *See* Petition, p. 2.

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B. The Instant Action and The Motion To Compel Arbitration

In November 2011, Petitioner filed this putative class action lawsuit, claiming that, in a prior collection lawsuit that had concluded approximately nine months earlier (Final Default Judgment issued February 2011), Midland's collection attorneys supposedly obtained an excessive attorneys' fees award. Petitioner alleges that such conduct of the collection attorneys violates Alaska's Unfair Trade Practices and Consumer Protection Act ("UTPA") AS 45.50.471, *et seq*. In the prior collection lawsuit, Midland obtained a default judgment against the Petitioner based on her failure to pay her account. Petitioner did not challenge the attorneys' fee motion or order in the prior collection lawsuit.

The Arbitration Agreement permits Petitioner to pursue any and all claims against Midland, but (upon election of either party) she must do so on an individual basis in arbitration. Petition, Ex. 4, p. 13 (MID0063). In response to Stewart's new claims, Midland filed the Motion to Compel Arbitration. *See* Petition, Ex. 1. The Superior Court granted Midland's Motion to Compel Arbitration, staying the action pending completion of arbitration, "according to the same terms ordered by this court in *Hudson v. Citibank*, Case No. 3AN-11-9196 (Order, April 30, 2012)." *Id.*; *see also* Petition, Ex. 2 (Order in *Hudson v. Citibank*, Superior Court Case No. 3AN-11-9196 CI (April 30, 2012)).

Petitioner claims that the court's order in this case was "without any analysis" (Petition, p. 4), but given the extensive arguments in the Petition alleging errors in the court's analysis, Petitioner obviously understood, as did Midland, that the extensive analysis provided in *Hudson v. Citibank* was applied by the Court to this case. The

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Court's reliance on that ruling was appropriate given that even Petitioner expressly acknowledged the issues in this case are virtually identical to those in *Hudson v. Citibank*, 3AN-11-9196 CI. *See* Ex. B, Plaintiff's Motion for Extension of Time (Apr. 23, 2012).

II. Law and Argument

A. The Superior Court Properly Enforced the Parties' Arbitration Agreement Pursuant to the Federal Arbitration Act by Requiring Petitioner to Arbitrate Her Claims on an Individual Basis.

The Arbitration Agreement is governed by the Federal Arbitration Act (the "FAA"), which (like Alaska law) "evinces a strong policy in favor of the arbitration of disputes." *Gibson,* 205 P.3d at 1096 (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). As noted by the U.S. Supreme Court in *Concepcion,* the FAA was designed to overcome the "judicial hostility towards arbitration ... [that] had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." 131 S. Ct. at 1747. Thus, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.*

While Section 2 of the FAA preserves "generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748. *Concepcion* makes clear that the FAA precludes state law impediments to enforcing arbitration agreements according to their terms, whether under the guise of generally applicable contract principles or state

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law specifically targeting arbitration. *See id.* at 1746-48; *Kilgore v. KeyBank, Nat. Ass'n.*, 673 F.3d 947, 957 (9th Cir. Mar. 7, 2012). In abrogating the California law at issue in *Concepcion,* the U.S. Supreme Court held that "[b]ecause it [stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" – ensuring that arbitration agreements are enforced as written – the law was preempted by the FAA. *Concepcion*, 131 S.Ct. at 1753.

Thus, because the "FAA requires courts to honor parties' expectations," plaintiffs in *Concepcion* were required to arbitrate their claims on an individual (non-class, non-representative) basis, as required by the parties' contract. *Id.* at 1752. Similarly, here, the FAA requires that Petitioner arbitrate her claims on an individual basis pursuant to the express terms of the Arbitration Agreement. *See also Kilgore,* 673 F.3d 947 (holding that, pursuant to *Concepcion,* the FAA preempted California's rule excluding claims for public injunctive relief from arbitration).

B. The Factors in Rule 402(b) do NOT Support a Decision to Disregard the Usual Appellate Process.

Alaska R. App. P. 402(b) identifies four factors that should be considered before the court disregards the sound policy behind requiring a petitioner to follow the usual appellate process. Petitioner apparently seeks to rely only on the factors stated in Rule 402(b)(1) and (2) (Petition, p. 15), but she fails to make any real showing under those factors, choosing instead to focus almost entirely on the merits (or lack thereof) of her attempted appeal. A close evaluation of each 402(b) factor confirms that interlocutory review is inappropriate and unnecessary in this case.

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First, there is no reason to think that proceeding in the normal fashion will result in injustice by impairing a legal right, or because of unnecessary delay, expense, hardship, and the like. Petitioner argues, in wholly conclusory fashion, that "full relief" to the supposed class (which has not been certified) "will be delayed for years." Petition, p. 15. This argument is unsupported by any facts. It is Petitioner who unnecessarily seeks to delay these proceedings by prematurely appealing the Order, thus defeating the very purpose of arbitration. *See Concepcion,* 131 S. Ct. at 1749 (instructing that the "point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."). Indeed, the Expedited Procedures of the American Arbitration Association ("AAA") provide that a hearing take place within 30 days of confirmation of the arbitrator's appointment. AAA Expedited Procedures, Rule E-7.

Second, Petitioner fails to demonstrate that the Order involves an important question of law with a substantial ground for difference of opinion, or that immediate review of the Order would materially advance the ultimate termination of the litigation. As discussed above, the U.S. Supreme Court already has provided clear authority for both federal and state courts to follow with respect to the enforcement of arbitration agreements. This Court has previously taken the position that "[t]he FAA evinces a strong policy in favor of the arbitration of disputes" and that Alaska state laws "reflect the same policy at the state level." *Gibson,* 205 P.3d at 1096. This Court also has

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properly followed the rulings of the Supreme Court with respect to arbitration agreements governed by the FAA. *See Lexington Marketing Group, Inc. v. Goldbelt Eagle, LLC,* 157 P.3d 470,475 (Alaska 2007) (following U.S. Supreme Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 126 S. Ct. 1204, 1207, 163 L. Ed. 2d 1038 (2006), on FAA arbitration issue). Other than conclusions drawn on a mis-reading of *Gibson* (see Section C below), Petitioner has not identified any question of law, much less "an important question of law with a substantial ground for difference of opinion" as required by Rule 402(b)(2).

Moreover, Petitioner's conclusory statement that granting an immediate appeal would materially advance the ultimate termination of this litigation defies logic and common sense. Allowing the case to proceed to arbitration, and then addressing Petitioner's arguments following issuance of an arbitration award, advances the ultimate termination of the litigation just as much as, if not more than, Petitioner's proposal. Accordingly, the second factor in Rule 402(b) does not support an immediate appeal.

Third, Petitioner does not challenge the Superior Court's Order as being so improper that it requires appellate intervention. Nor can she. In enforcing the Arbitration Agreement and requiring Petitioner to arbitrate according to the terms of such Agreement (i.e., on an individual basis), the Court properly followed U.S. Supreme Court precedent. Accordingly, this factor plainly does not weigh in favor of an immediate appeal.

Finally, Petitioner does not, and cannot, contend that the ultimate issue presented (whether the Arbitration Agreement is enforceable) is an issue that will otherwise evade

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review, or is needed for the guidance of lower courts. Petitioner has every right to appeal the Superior Court's Order following entry of a final judgment, and there are no facts presented to establish urgency for an immediate appellate decision now.

Because none of the factors under Rule 402(b) support the grant of review, the Petition should be denied, and Petitioner allowed to proceed per the usual appellate procedure.

C. The Order Compelling Arbitration Does Not Raise Issues Requiring Immediate Review.

Midland offers the following legal analysis to further demonstrate that Petitioner has not raised issues justifying consideration of the petition under Rule 402(b)(2).

1. Petitioner's Proffered Application of Gibson is Wrong.

Petitioner maintains (incorrectly) that, in *Gibson,* this Court "held that clauses in adhesion contracts that give the stronger party unilateral authority to change the contract's terms are unconscionable and unenforceable." Petition, p.1. *Gibson* contains no such language. In *Gibson,* the plaintiff challenged changes to an arbitration agreement contained in an employment manual, arguing (based on non-Alaska cases) that an arbitration agreement was unconscionable and unenforceable because a provision authorizing the employer to change the terms of the manual could have allowed the employer to change the terms of the arbitration agreement. 205 P.3d at 1096–97. This Court did *not* hold that the arbitration agreement was unconscionable and unenforceable. Rather, this Court held that, "given the strong public policies favoring arbitration, an

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interpretation that permits arbitration is to be preferred over one that would frustrate arbitration." *Id.* at 1097.

Had this Court mandated in *Gibson* that all adhesion contracts containing one-sided change-in-term provisions are unconscionable and unenforceable, this Court obviously would have struck down the agreement in *Gibson.* The fact is, however, that it did not do so. This Court enforced the arbitration agreement, striking out certain terms (that are not present in the Arbitration Agreement at issue here). *Id.* at 1097–1101. Accordingly, the fundamental premise underlying Petitioner's position – that *Gibson* stands for a certain proposition that is a fundamental public policy of Alaska – is completely wrong.

Moreover, regardless of Petitioner's incorrect assessment of *Gibson,* the fact remains that Citibank did *not* unilaterally add the arbitration provision to the Card Agreement. Rather, as discussed above, Petitioner had a meaningful choice to reject the Card Agreement, including the Arbitration Agreement, but did not do so. She chose to accept the Agreement and continued to maintain the account. The Agreement is not unconscionable in that regard.

And finally, if Petitioner is arguing that the *entire* Card Agreement is unconscionable and unenforceable under Alaska law because it contains a provision that authorized Citibank to change the terms, such an argument *must* be referred to the arbitrator (and should not be decided by the Court) because it is an argument directed to the entire agreement and not solely the Arbitration Agreement. *See Buckeye,* 546 U.S.

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440 at 445-46 ("We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."); *Lexington*, 157 P.3d at 475 ("The *Buckeye* decision makes it clear that courts may consider challenges of illegality to arbitration agreements but not to the underlying contracts.").

2. *Petitioners Choice-Of-Law Analysis is Incorrect.*

The Card Agreement contains a choice-of-law provision applying federal law and the law of South Dakota. Petition, Ex. 4, p. 16. In Alaska, a choice-of-law clause "will generally be given effect unless (a) the chosen state [e.g., South Dakota] has no substantial relationship with the transaction . . . or (b) the application of the law of the chosen state would be contrary to a fundamental public policy of a state that has a materially greater interest in the issue and would otherwise provide the governing law." *Peterson v. Ek*, 93 P.3d 458, 465 n.11 (Alaska 2004) (applying Section 187(2) of the Restatement (Second) of Conflict of Laws). Critically, the "issue" before the Court currently is the formation of the Arbitration Agreement—not the determination of Petitioner's claims on the merits (which would be subject to a separate choice-of-law analysis to be determined by an arbitrator). Petitioner's argument incorrectly focuses on Alaska's interest in the merits of her claims, despite that her intent is to contest the valid formation of an enforceable Arbitration Agreement.

Petitioner cannot avoid the choice-of-law clause under the first exception. She does not, and cannot, dispute that South Dakota has a substantial relationship to the

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parties' agreement because Citibank is, and has been, a national bank located in South Dakota. *See* Petition, Ex. 2, p. 15; Restatement § 187 cmt. f (reasonable basis for a choice-of-law exists "where one of the parties is domiciled or has his principal place of business" in chosen state).

Nor can Petitioner avoid the choice-of-law clause under the second exception because Alaska, which had no relationship to the parties at the time the contract was formed, would not provide the governing law in the absence of a choice-of-law provision. Thus, this Court need not evaluate any conflict of fundamental public policy or whether Alaska has a materially greater interest than South Dakota. In the absence of an effective choice-of-law provision, Restatement § 188 determines the applicable law and the Court must apply the principles of Restatement § 6 to determine which state has the most significant relationship. *Long v. Holland Am. Line Westours, Inc.*, 26 P.3d 430, 432–33 (Alaska 2001) (citing Restatement (Second) of Conflict of Laws § 188). Evaluating these factors as of the time of contracting (because the issue is the valid formation of an arbitration agreement), it is clear that South Dakota, and not Alaska, has the most significant relationship to this case.

Alaska had no relationship to the parties' contractual relationship at the time they entered into the relevant agreement because Petitioner was not even located in Alaska when she accepted the Card Agreement. Petition, p. 2. With respect to the place of performance, the place of performance at the time of the formation of the Agreement was South Dakota because that is where Citibank agreed to extend credit under the Card

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Agreement. The agreement was also entered into under the assumption it would be governed by South Dakota law. Looking at the domicile, residence, nationality, place of incorporation, and place of business of the parties, Alaska again has no relevance as of the time of the Agreement's formation. Accordingly, because Alaska is not the law that would apply in the absence of a choice-of-law provision, this Court need not evaluate any conflict of fundamental public policy or whether Alaska has a materially greater interest.

3. Whether an Arbitrator Can Properly Issue a Statewide Injunction Can be Evaluated Following Issuance of the Arbitration Award.

Although Midland disputes the portion of the Superior Court's Order apparently authorizing an arbitrator to issue an arbitration award for public injunctive relief, that dispute does not warrant the necessity of an immediate appeal. Petitioner clearly can proceed with her individual claim in arbitration. As a part of that claim, Petitioner requests injunctive relief. While the Superior Court concluded that the arbitrator can issue injunctive relief beyond Petitioner's transaction, any ruling by the arbitrator in that regard (whether favorable or unfavorable) can be evaluated by this Court on appeal following confirmation of the award and entry of a final judgment.

4. The Superior Court's Ruling on Waiver Does Not Raise Rule 402(b) Issues.

Petitioner has not contested the legal principals upon which the Superior Court decided the issue of waiver, nor has she identified an important legal question on which there is a substantial ground for difference of opinion. Because the question of waiver is a question of fact, "[a] trial court's finding of waiver will ... be set aside on review only if it is clearly erroneous." *Blood* v. *Kenneth Murray Ins., Inc.*, 68 P.3d 1251, 1254 (Alaska

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2003) (citing *Miscovich v. Tryck*, 875 P.2d 1293, 1302 (Alaska 1994)). Here, the Superior Court's ruling on the waiver issue was not clearly erroneous because Petitioner's lawsuit is a separate and distinct lawsuit brought *after* Midland obtained a final judgment in a prior lawsuit to recover the balance owed on Petitioner's account.

As previously instructed by this Court, "[t]he law favors arbitration" and "waiver is not to be lightly inferred . . ." *Id.* at 1255; *see also Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986) (under the FAA, arbitration waivers "are not favored."). Indeed, "courts should resolve doubts concerning whether there has been a waiver in favor of arbitration." *Blood*, 68 P.3d at 1254; *see also Creative Telecomm., Inc. v. Breeden*, 120 F. Supp. 2d 1225, 1232 (D. Haw. 1999) ("If there is any ambiguity as to the scope of the waiver, the court must resolve the issue in favor of arbitration.").

Under the FAA, to prove that a waiver of arbitration exists, a party opposing arbitration bears a 'heavy burden of proof' and must demonstrate all of the following: "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Letizia*, 802 F.2d at 1187; *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (federal law applies to disputes regarding waiver of arbitration agreement).

Here, the Arbitration Agreement expressly permits a party to elect arbitration in a new lawsuit, involving a separate and distinct claim, and there is no legal basis for denying such election. Petition, Ex. 4, p. 14. The cases cited by Plaintiff are inapposite

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and easily distinguishable. They involve situations where either the movant seeks to arbitrate claims filed by the movant in a pending action, or where the movant seeks to arbitrate the same claims in a subsequent action that the movant has already litigated.

Midland has done nothing inconsistent with its right to invoke arbitration. Midland obtained a final judgment in the prior lawsuit long before Petitioner brought suit against it, and collection efforts after a final judgment do not establish that the lawsuit was continuing. Accordingly, Midland's litigation of its collection claim is not a waiver of Midland's right to arbitrate Plaintiff's new and separate suit. Indeed, if, as Petitioner contends, her claim is merely an extension of the debt collection lawsuit, then her claim plainly would be barred by res judicata because she failed to raise the claim in the prior lawsuit.

Moreover, Petitioner does not establish any grounds for prejudice. The Superior Court's decision was not clearly erroneous and the Order should stand with respect to any supposed waiver of arbitration.

III. CONCLUSION

For the foregoing reasons, Midland respectfully requests that this Court deny the Petition.

DATED this 20th day of August, 2012.

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Certificate of Service

On the 20th day August, 2012, a true and correct copy of the foregoing document was sent by U.S. Mail, postage paid, to the following parties:

James J. Davis, Jr.
Northern Justice Project, LLC
310 K St., Suite 200
Anchorage, AK 99501

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

And a courtesy copy sent to :

The Honorable Frank A. Pfiffner
825 W. 4th Avenue
Anchorage, AK 99501-2004

By: 
Janet Eastman

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INDEX OF ATTACHMENTS

RESPONSE TO PETITION FOR REVIEW

Stewart v. Midland Funding, LLC et al.
Case No. S-14826

EXHIBIT	DATE	DESCRIPTION
A	February – May, 2009 MID0096-107	Plaintiff's Account Statements (Authenticated by Decl. for Records of Regularly Conducted Business Activity by Mariya Kharlamova) filed April 9, 2012
B	4/23/12	Plaintiff's Motion for Extension of Time

Exhibit A