IN THE SUPREME COURT OF THE STATE OF ALASKA

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

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

PETITIONERS' OPENING BRIEF

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this _____ day of _____ 2013.
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By: _____
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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.

Alaska Unfair Trade Practices Act:

AS § 45.50.471 - Alaska Unfair Trade Practices and Consumer Protection Act:

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful.

[(b)-(d) omitted]

AS § 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) omitted]

AS § 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 – Attorney's Fees:

[(a) omitted]

(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%

[(b)(2)-(3) omitted]

(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)-(f) omitted]

JURISDICTIONAL STATEMENT

Petitioner Janet Hudson appeals from the Superior Court's April 30, 2012, order granting Respondents' motions to compel arbitration and stay the action and denying Ms. Hudson's cross-motion for partial summary judgment. [Exc. 266] Ms. Hudson timely petitioned for review on May 14, 2012.

Petitioner Cynthia Stewart appeals from the Superior Court's July 25, 2012, orders granting Respondents' motion to compel arbitration and denying Ms. Stewart's cross-motion for partial summary judgment. [Exc. 417, 419] Ms. Stewart timely petitioned for review on August 6, 2012.

This Court granted Ms. Hudson's and Ms. Stewart's petitions for review on September 17, 2012, and consolidated their cases for briefing, argument, and decision. These cases do not involve appeals from final judgments or partial final judgments. *See* Alaska R. App. P. 212(c)(1)(D). Instead, this Court has jurisdiction under Alaska R. App. P. 402 and AS § 22.02.010(b).

STATEMENT OF THE ISSUES PRESENTED

The issues presented for review are:

(a) Whether Respondents waived their right to arbitrate Petitioners' claims by pursuing their claims in superior court;

(b) If so, what is the scope of the waiver; and

(c) Whether a private arbitrator has the authority to issue statewide injunctions under the Alaska Uniform Trade Practices and Consumer Protection Act ("UTPA").

STATEMENT OF THE CASE

These cases arise from a deceptive debt-collection practice. Ms. Hudson and Ms. Stewart allege that Respondents routinely file misleading affidavits in debt-collection cases to obtain unlawful attorney's fee awards against defaulted Alaska consumers, leaving hundreds of consumers facing inflated judgments for attorney's fees they should not in fact owe. [Exc. 1, 269] The Superior Court never reached the merits of Ms. Hudson's and Ms. Stewart's claims because it incorrectly compelled their cases to private arbitration. [Exc. 266-67, 417] Ms. Hudson and Ms. Stewart then petitioned for review.

I. Factual and Procedural Background

A. Respondents' Wrongful Conduct

Petitioners Janet Hudson and Cynthia Stewart are Alaska consumers who opened credit card accounts in 1999 and 2002 respectively. [Exc. 14, 301] After making payments on their cards for several years, Ms. Hudson and Ms. Stewart fell behind and were sued on their overdue accounts. [Exc. 72, 301, 68-70, 377] Respondent Citibank (South Dakota) NA ("Citi") filed a collection action against Ms. Hudson in Kenai District Court in November 2010, and Respondent Midland Funding LLC ("Midland"), which had purchased Ms. Stewart's account from Citi, filed a collection action against her in Anchorage District Court in December 2010. [Exc. 68-70, 377] Citi and Midland never sought arbitration but instead chose to litigate their affirmative claims against Ms. Hudson and Ms. Stewart in court. *Id.* Respondents Alaska Law Offices, Inc. and Clayton Walker (collectively "ALO") represented Citi and Midland in both cases. *Id.*

As happens in the overwhelming majority of debt collection cases, Citi and Midland obtained default judgments against Ms. Hudson and Ms. Stewart. [Exc. 83, 376]

Indeed, default judgments in debt collection action have reached almost epidemic levels, and in just the last few years, hundreds of Citi's own collection actions against consumers have resulted in defaults. [Exc. 4, 272, 85-119] There is a clear explanation for the increasing number of default judgments in debt collection: As the U.S. Seventh Circuit Court of Appeals recently explained in *O'Rourke v. Palisades Acquisition XVI, LLC*, debt collectors rely on a high volume of default judgments to increase profit by reducing transaction costs, and default procedures also allow collectors to overcome documentation problems that could bar recovery in truly adversarial litigation. 635 F.3d 938, 940 (7th Cir. 2011); *see also McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 947 (9th Cir. 2011) (citing testimony about "rapid growth of debt-collection lawsuits" and "'factory' approach of 'mass producing default judgments'"); Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 Loyola Consumer L. Rev. 355, 371-78 (2012) (study of Indiana's increasing debt-collection default docket, with a "[s]potlight on [Respondent] Midland Funding," which filed more than 1300 cases in three months in Indiana alone).

For Respondents, obtaining default judgments *in court* triggered an additional financial advantage as well—the ability to claim prevailing party attorney's fees. When Citi and Midland moved for default judgments against Ms. Hudson and Ms. Stewart, they sought not only the amounts Petitioners owed on their credit cards but also prevailing party attorney's fees under Alaska Rule of Civil Procedure 82. [Exc. 84, 379] Rule 82 provides that the winner in a default action is entitled to either its "reasonable actual fees" or 10% of the amount at stake in the case, whichever is less. Alaska R. Civ. P. 82(b)(1),

(b)(4). Thus, if a prevailing party's reasonable attorney's fees are more than 10% of the amount at stake, the prevailing party is entitled to 10%; if the prevailing party's reasonable fees are less than 10% of the amount at stake, the prevailing party is entitled to only its reasonable fees. *Id.* Using Rule 82 as their fee vehicle, Respondents successfully obtained judgments that included awards for their fees. [Exc. 83, 376]

Of course there is nothing wrong in the abstract with a rule that provides for prevailing party attorney's fees or with a proper award of fees under that rule. But the combination of Rule 82 with the streamlined procedures governing defaults often mean that claims, including claims for fees, are subject to less scrutiny, creating a real risk of manipulation—which is what Ms. Hudson and Ms. Stewart allege happened here.

In particular, Ms. Hudson and Ms. Stewart allege that Respondents routinely file misleading affidavits claiming they are entitled to 10% fee awards because they have incurred more than 10% in attorney's fees when, in fact, Respondents' reasonable fees are much less than 10% and Respondents are entitled to only their reasonable fees under the Rule. [Exc. 2-4, 270-71] In Ms. Hudson's case, for example, Citi filed an affidavit claiming that it was entitled to 10% of the judgment, or $2,417.02, because it had incurred $4,834.05 in fees. [Exc. 84] But assuming that Citi's lawyers spent the two hours that Ms. Hudson alleges is typical in defaulted debt-collection cases, Citi's reasonable fees were only about $250, [Exc. 3-4, 84], and that is all Citi was entitled to under Rule 82. *See* Alaska R. Civ. P. 82(b)(4). By comparison, in *Valley Hospital Ass'n v. Brauneis*, this Court affirmed the rejection of a $2,038.47 10% award in a default case (very similar to the amount awarded to Citi here) because, *inter alia*, in a "simple default

case," for which "little substantive legal work was necessary," reasonable fees could have been "far less" than the over $2000 claimed under the 10% provision. 141 P.3d 726, 729-30 (Alaska 2006).

Similarly, in Ms. Stewart's case, Midland claimed that it should be awarded 10%, or $363.53 because it had incurred $739.04 in fees. [Exc. 379] But Ms. Stewart alleges that Midland's reasonable fees were much less than either $363.53 or $739.04 and that Midland was entitled to only its reasonably incurred fees under Rule 82(b)(4). [Exc. 271]; *cf. Kojetin v. CU Recovery, Inc.*, No. Civ.97-2273, 1999 WL 1847329, at *2 n.3 (D. Minn. Mar. 29, 1999) (a debtor required to pay his creditor's "*reasonable* collection costs" could not be "held to have agreed to pay whatever percentage fee a debt collection service happened to charge [the] lender") (emphasis added).

Because Rule 82 requires a determination as to the prevailing party's reasonable fees before a court can decide whether a 10% alternative award is proper, *see* Alaska R. Civ. P. 82(b)(4), this Court has held that "accurate records of the hours expended and a brief description of the services reflected by those hours" are "necessary" for determining whether a 10% award is proper. *Valley Hosp. Ass'n*, 141 P.3d at 730 (quoting *Moses v. McGarvey*, 614 P.2d 1363, 1374 n.32 (Alaska 1980)). But Citi and Midland did not provide the courts presiding over their cases with any of the information the courts would have needed to realize that Citi's and Midland's claimed fees were unreasonable and that 10% awards were impermissible. [Exc. 84, 379]

Nor does it appear that Citi and Midland served their fee requests on Ms. Hudson or Ms. Stewart prior to judgment. The version of the default-judgment rule in effect at

the time did not require a party applying for entry of default to serve its application (or accompanying fee request) on the opposing party, *see* Alaska R. Civ. P. 55 (2011), and the record suggests that Ms. Hudson and Ms. Stewart were not served. [Exc. 71-73, 81-82, 376-78] (showing that Ms. Hudson and Ms. Stewart were served with summonses and complaints but containing no similar evidence that Petitioners were served with Respondents' later applications for default judgments and attorney's fee requests).

Ms. Hudson and Ms. Stewart allege that Respondents' wrongful conduct harmed them and has harmed hundreds of others. For example, Citi's misleading affidavit in Ms. Hudson's case convinced the Kenai District Court to award Citi $2417.02 in attorney's fees when Ms. Hudson alleges that she should owe only about $250. [Exc. 83] Similarly, Midland's misleading affidavit convinced the Anchorage District Court to award it inflated fees against Ms. Stewart. [Exc. 376] The damages alleged in Ms. Hudson's and Ms. Stewart's individual cases may seem small, but when inflated attorney's fees are pursued systematically against hundreds of Alaska consumers, the harm quickly adds up.

Indeed, even though these cases are still at an early procedural stage, the record already supports Ms. Hudson's and Ms. Stewart's claims that many other Alaskans have been harmed by Respondents' deceptive practice. Alaska court records show that Citi has appeared as a party in more than 1600 cases in recent years, usually as a plaintiff, and sample docket sheets drawn from those records show Citi obtaining other default judgments and 10% attorney's fee awards for ALO. [Exc. 85-119] In each of those cases, Citi must have claimed to have incurred more than 10% in reasonable and

necessary attorney's fees. *Id.* Even though that 10% amount varies widely from case to case, *compare* [Exc. 84] *with* [Exc. 106], the actual work done by ALO is presumably the same in all these "simple default case[s]." *Valley Hosp. Ass'n*, 141 P.3d at 730.

B. Procedural History

On August 2, 2011, Ms. Hudson filed a first amended complaint against Citi and ALO alleging the wrongful conduct described above, stating a claim for violation of the UTPA, and seeking, among other things, class certification and a statewide injunction that would stop Respondents' wrongful conduct, for the benefit all Alaska consumers. [Exc. 1-9] On November 28, 2011, Ms. Stewart filed a first amended complaint against Midland and ALO alleging the same wrongful conduct and seeking the same relief. [Exc. 269-76]

Citi, Midland, and ALO moved to compel Ms. Hudson's and Ms. Stewart's putative class action and private attorney general claims to arbitration—even though Respondents had decided against arbitrating the issue of their Rule 82 fees and had instead pursued and obtained those fees in court. [Exc. 10, 31, 296, 329] In moving to compel arbitration, Respondents relied on fine-print arbitration clauses that were inserted into Petitioners' contracts via unilateral change-in-terms notices sent with monthly statements. [Exc. 14, 303-04, 328] The notice sent to Ms. Hudson said that she had to accept Citi's new arbitration clause if she wanted to renew her card; the notice sent to Ms. Stewart said that she had to accept the arbitration clause or her account would be closed immediately. [Exc. 19, 304] Both arbitration clauses prohibit class proceedings, non-party relief, and private attorney general actions in arbitration, and both state that an

arbitrator may "award relief only on an individual (non-class, non-representative) basis." [Exc. 20, 315, 317]

Ms. Hudson and Ms. Stewart opposed Respondents' motions to compel arbitration, arguing, among other things, that Respondents waived their right to force Petitioners to arbitrate when Respondents chose to eschew arbitration and seek their Rule 82 fees in court. [Exc. 48-51, 162-66, 353-55, 413-15] Ms. Hudson and Ms. Stewart also argued that Respondents' arbitration clauses are unenforceable because they prohibit private attorney general actions and non-party injunctive relief under the UTPA. [Exc. 51-53, 158-62, 369-71, 406-09]

The Superior Court ordered arbitration. [Exc. 266-67, 417] The Court held that Respondents had not waived their right to force arbitration, notwithstanding their litigation conduct. [Exc. 267] The Court also held that waiver of the UTPA's right to a public injunction would be unenforceable, but that (contrary to the positions of all parties) Ms. Hudson and Ms. Stewart can obtain non-party public injunctions in private arbitration. [Exc. 266-67]

II. Legal Background

This appeal involves two statutes—Alaska's UTPA and the Federal Arbitration Act.

A. The UTPA

Alaska's UTPA is a remedial statute interpreted broadly to protect the state's consumers. *Alaska Interstate Constr., LLC v. Pac. Diversified Invs., Inc.*, 279 P.3d 1156, 1163, 1169 (Alaska 2012); *ASRC Energy Servs. Power & Commc'ns, LLC v. Golden*

Valley Elec. Ass'n, 267 P.3d 1151, 1161-62 (Alaska 2011); *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528 (Alaska 1980) (seminal case applying UTPA in debt-collection context). The UTPA prohibits a wide swath of conduct—unfair practices may violate the Act even if they are not also deceptive or were not previously considered unlawful; deceptive practices may violate the Act even if they do not cause actual injury; and the UTPA's list of 57 prohibited acts is non-exhaustive. *See* AS § 45.50.471(b); *O'Neill Investigations*, 609 P.2d at 534-35; *ASRC Energy Servs.*, 267 P.3d at 1158-59.

In enacting the UTPA, the Legislature sought to further the "overarching goal of encouraging small consumer protection claims," *Compton v. Kittleson*, 171 P.3d 172, 180 (Alaska 2007), by providing prevailing plaintiffs their costs and attorney's fees, treble damages, and a minimum award of $500. AS §§ 45.50.537, 45.50.531(a); *see also Kenai Chrysler Ctr., Inc. v. Denison*, 167 P.3d 1240, 1259-60 (Alaska 2007). The Legislature also made the UTPA's protections non-waivable so that consumers could not be forced to bargain away their rights. *See* AS § 45.50.542. Finally, the Legislature provided that plaintiff-consumers could act as private attorneys general by obtaining public injunctive relief to protect non-parties. AS § 45.50.535(a); *Osbakken v. Whittington*, 289 P.3d 894, 896 n.5 (Alaska 2012).

B. The FAA

Congress enacted the Federal Arbitration Act in 1925 to put arbitration agreements on an "equal footing" with other contracts—not on a different or better footing. *See, e.g.*, *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so")

(quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)). Congress wanted to ensure that arbitration agreements would be as enforceable as other contracts, *id.*, but Congress also made clear that arbitration clauses, like other contracts, are subject to traditional contract defenses. 9 U.S.C. § 2 (arbitration agreements enforceable "save upon such grounds as exist at law or inequity for the revocation of any contract"). In particular, the right to compel arbitration may be waived. *See, e.g.*, *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987) ("The right to arbitration, like any other contract right, can be waived."); *Walt v. State*, 751 P.2d 1345, 1350 (Alaska 1988).

In interpreting the FAA, the U.S. Supreme Court has identified another limitation on arbitration agreements as well: Arbitration clauses are enforceable only if litigants may still "effectively . . . vindicate" their statutory rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985); *see also CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S. Ct. 665, 671 (2012) (arbitration agreement enforceable so long as statutory right to impose liability "is preserved"). In this sense, arbitration agreements are like "forum selection clause[s]," *Waffle House*, 534 U.S. at 295—they allow parties to choose an arbitral rather than a judicial forum, but they do not change the parties' substantive rights. *See Mitsubishi Motors*, 473 U.S. at 637.

STANDARD OF REVIEW

The standard of review for the issues presented is de novo. All questions concern whether Petitioners' claims are arbitrable, and "whether an issue is arbitrable is a question of law subject to de novo review." *Classified Emps. Ass'n v. Matanuska-Susitna*

Borough Sch. Dist., 204 P.3d 347, 352 (Alaska 2009). On de novo review, this Court "adopt[s] the rule of law that is 'most persuasive in light of precedent, reason, and policy.'" *Id.* (quoting *Lexington Mktg. Grp. v. Goldbelt Eagle, LLC*, 157 P.3d 470, 472 (Alaska 2007)).

The first and second questions presented—concerning whether Respondents waived their right to arbitration—are subject to de novo review for another reason as well. Although "[n]ormally, the 'issue of whether a waiver occurred is a question of fact'" subject to review for clear error, this Court applies the summary-judgment, de novo standard of review when the superior court has decided the waiver issue without trial. *Airoulofski v. State*, 922 P.2d 889, 894 n.5 (Alaska 1996) (quoting *Miscovich v. Tryck*, 875 P.2d 1293, 1302 (Alaska 1994)); *see Beilgard v. State*, 896 P.2d 230, 233 (Alaska 1995). In this case, the summary judgment standard is appropriate because there was no trial and because the Petitioners appeal the denial of their motions for partial summary judgment.

SUMMARY OF ARGUMENT

Respondents waived their right to compel arbitration of Ms. Hudson's and Ms. Stewart's claims, and the Superior Court erred in holding to the contrary.

Respondents made a strategic choice to pursue their collection actions and attorney's fees in court, when they could have pursued those claims in arbitration. Respondents evidently felt that it served their interests better to have a court, rather than an arbitrator, determine (among other things) issues relating to the magnitude of their attorney's fees. In these cases, by contrast, Respondents have decided that arbitration

will serve them better, and have sought to change course. This Court should hold Respondents to their initial choice and hold that they have waived arbitration for all claims closely related to their fees, including Ms. Hudson's and Ms. Stewart's claims that Respondents obtained their fees unlawfully by filing misleading affidavits.

This Court, like many others, has repeatedly made clear that a party's decision to file and litigate an action in court waives that party's right to demand arbitration later. As explained below, this type of affirmative conduct constitutes clear and unambiguous evidence of a party's intent to waive its contractual right to arbitration. And that waiver applies not only to a party's right to demand arbitration for the claims *it* decided to pursue in court, but also for any closely related claims that an opposing party might later bring.

But it is not only black letter law that supports a waiver ruling in these cases. This Court should not reward Respondents for their procedural gamesmanship, where they use the courts to maximize their financial interests when doing so serves them, and then demanded arbitration instead when they decide that doing *that* will favor them. The valuable time and resources of Alaska's courts should not be treated by litigants as tools to be used when convenient and then tossed aside when not. Arbitration "may not be used as a strategy to manipulate the legal process," *Khan v. Parsons Global Servs., Ltd.*, 521 F.3d 421, 427 (D.C. Cir. 2008)—a tool with which a party can play "heads I win, tails you lose." *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc*., 50 F.3d 388, 391 (7th Cir. 1995).

Policy concerns aside, Respondents have also proposed a fundamental change to this Court's blackletter waiver law. That effort should be rejected: It squarely conflicts

not only with this Court's own bedrock jurisprudence but also with the FAA itself. Since at least 1996, this Court has refused to require a showing of prejudice to establish that a party waived its right to arbitration. That approach places arbitration agreements on the same footing as other contracts by applying the same waiver test to all contractual rights.

The Superior Court misapplied the law in rejecting waiver, and its decision unfairly forces Ms. Hudson and Ms. Stewart to arbitrate their claims about Respondents' fees after Respondents chose court as the forum in which to adjudicate those fees.

The Superior Court also erred in holding that an arbitrator presiding over Ms. Hudson's and Ms. Stewart's claims award statewide non-party injunctive relief. An arbitrator has only the authority granted by the parties' agreement to arbitrate, and the agreements at issue in these cases explicitly prohibit arbitrators from awarding the kind of statewide non-party injunctive relief guaranteed by the UTPA and sought by Petitioners. Moreover, even if the agreements allowed for non-party relief, Ms. Hudson and Ms. Stewart still could not effectively vindicate their claims in arbitration because limitations inherent in the arbitral forum make it incompatible with the type of non-party injunctive relief contemplated by the UTPA. For both of these reasons, Ms. Hudson and Ms. Stewart cannot vindicate their claims for UTPA injunctive relief in arbitration, and the parties' arbitration agreement is unenforceable.

ARGUMENT

I. Respondents Waived Their Right to Compel Arbitration.

Respondents waived their right to compel arbitration when they chose to seek their attorney's fees in court. That choice waived arbitration not only for Respondents' own

claims for attorney's fees but for closely related claims as well—including Ms. Hudson's and Ms. Stewart's claims that Respondents' fee awards were improper. Under Alaska law, Ms. Hudson and Ms. Stewart did not have to show that they suffered prejudice resulting from Respondents' waiver, but Ms. Hudson and Ms. Stewart were, in fact, prejudiced.[1]

A. Respondents Waived Arbitration By Filing and Litigating Their Claims in Court.

The right to compel arbitration is a contract right that may be waived like any other. *See Int'l Bhd. of Teamsters, Local 959 v. King*, 572 P.2d 1168, 1172 n.9, 1173 (Alaska 1977). The waiver doctrine ensures fairness by holding a party to its initial choice of forum, and the doctrine prevents arbitration from being used as a tool for gamesmanship—something that can be invoked selectively for purposes of delay or disadvantage rather than as a good-faith dispute-resolution mechanism. *See, e.g.*, *In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 46-47 (1st Cir. 2005) (finding waiver when first opposed but then sought to compel arbitration, explaining that "arbitration is 'not meant to be another weapon in the arsenal for imposing delay and costs in the dispute resolution process.'" (quoting *Menorah Ins. Co. v. INX Reins Corp.*, 72 F.3d 218, 222 (1st Cir. 1999)); *see also AXA Versicherung AG v. N.H. Ins. Co.*, 708 F. Supp. 2d 423, 438 (S.D.N.Y. 2010) (waiver prevents "strategic" late invocation of arbitral rights); *Christensen v. Dewor Devs.*, 33 Cal. 3d 778, 783-84 (1983) (waiver prevents parties from

[1] The Court granted review on two issues related to waiver—whether Respondents waived arbitration and, assuming yes, what the scope of Respondents' waiver is. Both issues are addressed in this Part I.

engaging in "procedural gamesmanship"); *Perry Homes v. Cull*, 258 S.W.3d 580, 597 (Tex. 2008) (waiving party is not permitted to "manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage"). Courts will not allow a party to first leverage the court system for its benefit but then later avoid that forum when faced with a less favorable consequence. *See Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 719-20 (6th Cir. 2012).

This Court uses a disjunctive, three-part test to determine whether a party has impliedly waived its rights: Waiver may be found either because (1) a party's "course of conduct pursued evidences an intention to waive a right"; because (2) a party's conduct "is inconsistent with any other intention than a waiver"; *or* because (3) "neglect to insist upon the right results in prejudice to another party." *Airoulofski*, 922 P.3d at 894 (internal quotations omitted). To prove waiver, a party's conduct must show a "clear and unambiguous" intent to waive. *Powers v. United Servs. Auto. Ass'n*, 6 P.3d 294, 299 (Alaska 2000). In these cases, Respondents' affirmative conduct waived its right to arbitrate under both the first and second test.[2]

Voluntarily filing and litigating a claim to judgment in court is the paradigmatic example of conduct that waives arbitration. Unlike a defendant haled into court against its will, a party that chooses the judicial forum makes its intent to waive arbitration clear and unambiguous. *See, e.g.*, *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 160 (2d Cir. 2010) (plaintiff waived arbitration by

[2] As explained in detail below, because the prejudice requirement only applies to the third test, Petitioners need not show that they were prejudiced to prevail.

"filing . . . and litigating" its claims); *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1090 (8th Cir. 2007) (filing a lawsuit inconsistent with right to arbitrate); *Kelly v. Golden*, 352 F.3d 344, 349-50 (8th Cir. 2003) (party waived right to arbitrate by filing and litigating a suit in court); *Midwest Window Sys., Inc. v. Amcor Indus., Inc.*, 630 F.2d 535, 537 (7th Cir. 1980) (party waived arbitration when it "secured judgment in full by resorting to legal action"); *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 229 (Mo. Ct. App. 2002) (party waived arbitration by filing and litigating a suit in court). As these cases reflect, filing a claim and then litigating that claim in court constitutes "direct" and "unequivocal" evidence, *Powers*, 6 P.3d at 299, that the filing party has waived arbitration. *See Louisiana Stadium*, 626 F.3d at 160; *Kelly*, 352 F.3d at 349; *Midwest Window*, 630 F.2d at 537; *Getz Recycling*, 71 S.W.3d at 229.

For purposes of waiver, the key question is whether the waiving party initially brought the claim to the court. Indeed, courts have found that even *defendants* waived their right to arbitrate by affirmatively placing the claim in front of a court. For example, the Washington Supreme Court held that a defendant who raised an arbitrable claim as a defense and litigated it to judgment waived its right to arbitrate that claim: "Simply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate." *Otis Hous. Ass'n v. Ha*, 201 P.3d 309, 312 (Wash. 2009) (en banc). And as the federal Seventh Circuit Court of Appeals has explained, waiver applies when the waiving party—regardless of whether the waiving party is the plaintiff or the defendant—"manifested an intention to resolve the dispute through the processes of the . . . court" because a party's "election to proceed before a nonarbitral tribunal for the resolution of

[its] dispute is a presumptive waiver of the right to arbitrate." *Cabinetree*, 50 F.3d at 390 (holding that a defendant's removal of the plaintiff's claim to federal court waived arbitration).

When the waiving party has raised and litigated its own claim in court, like Respondents here or like in *Otis Housing* and *Cabinetree*, waiver is an easier determination than the typical scenario, when the issue is whether the defendant has waived merely by acquiescing in the plaintiff's forum choice. The latter case often involves the question whether a defendant's mere inaction or delay in seeking to compel arbitration provides a sufficient basis for inferring waiver. Not so when the party charged with waiver has filed its own claim and litigated that claim in court—active, "unequivocal" conduct that provides a much stronger basis for a waiver finding. *See Powers*, 6 P.3d at 299.

Respondents' conduct waiving arbitration could not be any more "clear" or "unequivocal," *see id.*, under this case law: When Respondents filed their collection actions, they sought not only the amounts Ms. Hudson and Ms. Stewart owed on their credit cards but also prevailing party attorney's fees under Rule 82. [Exc. 69, 83, 376] Respondents specifically requested fees from the court, submitted affidavits in support of their fee requests, and obtained judgments containing the Rule 82 fee awards they sought. [Exc. 69, 83, 84, 376, 379] *Cf. Khan*, 521 F.3d at 425 ("[I]rrespective of other indicators of involvement in litigation, filing a motion for summary judgment based on matters outside of the pleadings is inconsistent with preserving the right to compel arbitration[.]"). By placing the underlying collection of Ms. Hudson's and Ms. Stewart's

debt *and* the entitlement to attorney's fees into the court system and obtaining a judgment on both, Respondents relinquished their right to arbitrate these issues.

B. Ms. Hudson's and Ms. Stewart's Claims Fall Within the Scope of Respondents' Waiver.

Just as it is clear that Respondents waived arbitration, it is equally clear that Ms. Hudson's and Ms. Stewart's claims fall within the scope of Respondents' waiver. Filing and litigating a claim in court waives arbitration not only for that claim but for closely related claims as well. *See, e.g.*, *Midwest Window*, 630 F.3d at 537 (filing and litigating collection action waives arbitration of related contract claims); *Gutor Int'l AG v. Raymond Packer Co.*, 493 F.2d 938, 945-46 (1st Cir. 1974) (instructing that "[a]ll related matters" must be litigated in court when the party seeking to compel arbitration initiated the lawsuit), *abrogated on other grounds by Travenol Labs., Inc. v. Zotal, Ltd.*, 474 N.E.2d 1070 (Mass. 1985); *Owens & Minor Med., Inc. v. Innovative Mktg. & Distrib. Servs., Inc.*, 711 So. 2d 176, 177 (Fla. Dist. Ct. App. 1998) (waiver extends to other claims when there is a "close relationship between the claims of the parties"). Ms. Hudson's and Ms. Stewart's claims easily satisfy this standard: They challenge the very fees Respondents successfully claimed in the underlying action.

Midwest Window provides a clear example of how the closely related rule applies. There, the federal Seventh Circuit Court of Appeals held that filing a collection action and litigating that action to judgment waived the filing party's right to arbitrate a related claim brought by the other party in a separate proceeding. *Midwest Window*, 630 F.2d at 536. A dispute arose between Amcor and Midwest under a contract containing an arbitration clause. *Id.* Like Respondents here, Amcor filed a collection action under the

contract and pursued its collection claim against Midwest to judgment. *Id.* Later, Midwest filed its own claim against Amcor in a second proceeding in a different court, and Amcor (again like Respondents here) moved to compel Midwest's claim to arbitration. *Id.*

Given these facts, the Seventh Circuit had little trouble holding that Amcor had waived arbitration and that Amcor's waiver encompassed Midwest's claim. *Id.* at 537. The Seventh Circuit explained that "it was Amcor which initially avoided arbitration . . . by resorting to legal action" and that Amcor's conduct was sufficient to waive arbitration. *Id.* Because Amcor's debt-collection claim and Midwest's later claim were related—they both grew out of the parties' "unsatisfactory business relationship"—Amcor's waiver encompassed Midwest's claim. *Id.*

Many courts around the country have joined the Seventh Circuit in applying the rule that filing a claim in court waives arbitration for related claims as well. For example, in *Gutor International*, the federal First Circuit Court of Appeals held that one party's filing of a lawsuit waived its right to compel arbitration of another party's related claim. 493 F.2d at 945-46. Other cases similarly find waiver for related claims. *See, e.g.*, *PPG Indus., Inc. v. Webster Auto Parts Inc.*, 128 F.3d 103, 109 (2d Cir. 1997) (litigation conduct waived related claims, including claim that waiving party breached state unfair trade practices act); *Owens & Minor*, 711 So. 2d at 177 (waiver of arbitration for another party's claim that was different but "intertwined" with waiving party's claim); *G.T. Leach Builders, L.L.C. v. TCMS, Inc.*, No. 13-11-310-CV, 2012 WL 506568, at *4-*5

(Tex. Ct. App. Feb. 16, 2012) (waiver of arbitration for different, but related, claims based on same contract filed in separate suits).

Moreover, filing and litigating a claim in one case waives arbitration for related claims even if the later, related claims are filed in a separate proceeding—as happened in *Midwest Window* itself. *See* 630 F.2d at 537. In *PPG Industries*, for example, the Second Circuit described it as "irrelevant" that the claims for which arbitration had been waived arose in a separate action. 128 F.3d at 109; *see also Samuel J. Marranca Gen'l Contracting Co. v. Amerimar Cherry Hill Assocs.*, 610 A.2d 499, 501 (Pa. Super. Ct. 1992) (party waived right to arbitrate by substantially participating in litigation, including initiating earlier lawsuits over same contract); *G.T. Leach Builders*, 2012 WL 506568, at *4-*5 (defendant had substantially invoked the judicial process by initiating earlier suit against the plaintiff over related contract dispute even though earlier suit dismissed for lack of jurisdiction).

The rule that filing and litigating one claim waives arbitration for related claims—whether or not in the same action—serves the same purposes as the waiver doctrine generally: It ensures fairness because it guarantees that all aspects of a dispute will be heard in the same type of forum, subject to the same rules and procedures. *See Midwest Window*, 630 F.2d at 537 (finding waiver prevented Amcor from complicating the matter by "partially changing the arena and the rules"); *Gutor International*, 493 F.2d at 945 ("Fairness to [the non-waiving party] dictates that both questions . . . be litigated in the same forum."). And it prevents the gamesmanship that can arise when parties are moving between different fora, asking different decision-makers to rule on related questions. By

contrast, limiting the scope of a party's waiver to a single court action would erect a hyper-technical requirement that would undermine the precise concern that waiver seeks to address: ensuring that the parties "play fair" in their choice of forum.

The scope of Respondents' waiver here includes Ms. Hudson's and Ms. Stewart's claims. Respondents chose to pursue their attorney's fee claims in court, rather than in arbitration, and Ms. Hudson's and Ms. Stewart's claims directly challenge the lawfulness of Respondents' fees: Ms. Hudson and Ms. Stewart allege that Respondents violated the UTPA in seeking their fees by filing misleading affidavits in court claiming more in fees than they were actually were entitled to. [Exc. 1-7, 269-75] Because this allegation about Respondents' fees forms the basis for Ms. Hudson's and Ms. Stewart's claims, their claims are, therefore, closely related. *See id.* Having placed their claims for attorney's fees into court, rather than arbitration, Respondents "should not be permitted to bifurcate the controversy and complicate it by partially changing the arena and the rules." *See Midwest Window*, 630 F.2d at 537.

* * *

In short, because they placed their claim for attorney's fees into the court system, Respondents cannot now force Ms. Hudson's and Ms. Stewart's related claim challenging the legality of those fees into an alternative forum. If the waiver doctrine stands for anything, it is that a party must bear the consequences—favorable or not—of its own choice of forum.

C. Ms. Hudson and Ms. Stewart Did Not Have to Show Prejudice, But Were, in Any Event, Prejudiced.

Respondents incorrectly argued in the Superior Court that Ms. Hudson and Ms. Stewart had to show that they were prejudiced as a result of Respondents' action in order to avoid arbitration and that Ms. Hudson and Ms. Stewart were not prejudiced. [Exc. 138-40, 395-97] In fact, a showing of prejudice by the party opposing arbitration is not required under Alaska law, and, even if it were, Ms. Hudson and Ms. Stewart were prejudiced by Respondents' tactical use of arbitration.

1. Ms. Hudson and Ms. Stewart Do Not Have to Show Prejudice to Prevail on the Waiver Issue.

Whether Respondents waived their right to arbitrate Ms. Hudson and Ms. Stewart's Alaska-law challenge to the legality of the attorney's fees is a question of state law, and Alaska law does not require prejudice for waiver, even in the context of arbitration. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009) (background principles of state contract law, including waiver, govern the enforceability of arbitration agreements); *Powers*, 6 P.3d at 299 (applying Alaska waiver law—which does not require proof of prejudice—in the arbitration context).

This Court has repeatedly made clear that prejudice is not required to find waiver. Waiver may be found either because (1) a party's "course of conduct pursued evidences an intention to waive a right"; because (2) a party's conduct "is inconsistent with any other intention than a waiver"; *or* because (3) "neglect to insist upon the right results in prejudice to another party." *Id.* Only the last test requires prejudice, and Ms. Hudson and Ms. Stewart succeed under the first two: As explained above, Respondents engaged

in an affirmative course of conduct—filing their own claims in court—that is inconsistent with arbitration.

It makes sense that prejudice is not required when waiver results from an affirmative course of conduct but is required when waiver results from neglect. Inferring an intent to waive arbitration from an affirmative course of conduct is likely to be easier than inferring that intent from mere inaction. A party seeking to show waiver on the basis of neglect alone should be held to a higher standard, and the prejudice requirement serves that purpose.

In the Superior Court, Respondents cited authority from other jurisdictions that requires prejudice in every case, but the cases Respondents cited do not draw any distinction between waiver based on intentional conduct and waiver based on neglect. *See* [Exc. 138-39, 395-96] *Contra Carr-Gottstein Foods Co. v. Wasilla, LLC*, 182 P.3d 1131, 1136 (Alaska 2008). The view that waiver always requires proof of prejudice also makes little sense given that the purpose of the waiver doctrine is to determine whether the *waiving party* has "relinquish[ed] [] a known right"—a question that logically must be answered by looking at that party's own conduct and that has nothing to do with whether any other party was injured as a result. *Id.*; *see Best Place, Inc. v. Penn Am. Ins. Co.*, 920 P.2d 334, 353 (Haw. 1996) ("Waiver is essentially unilateral in character, focusing only upon the acts and conduct of the [waiving party]."); *City of Glendale v. Coquat*, 52 P.2d 1178, 1180 (Ariz. 1935) ("[W]aiver depends upon what one himself intends to do, regardless of the attitude assumed by the other party, whereas estoppel depends rather upon what the other party has done. Waiver does not necessarily imply

that the other party has been misled to his prejudice. . . ."); *Farm Bureau Mut. Auto. Ins. Co. v. Houle*, 102 A.2d 326, 330 (Vt. 1954) ("A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position.").

It is true that a number of other jurisdictions (and most federal circuits) have held that the FAA requires a showing of prejudice to establish waiver, even if prejudice is not required outside the context of arbitration. *See, e.g.*, *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1012 (9th Cir. 2005); *compare In re Citigroup, Inc.*, 376 F.3d 23, 26 (1st Cir. 2004) (waiver of arbitration), *with In re Calore Express Co.*, 288 F.3d 22, 38 (1st Cir. 2002) (waiver of non-arbitration right); *compare Perry Homes*, 258 S.W.3d at 593-94 (waiver of arbitration), *with Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003) (waiver of non-arbitration right). But this Court has always applied the same waiver test for arbitration that it applies for other contract rights, *compare, e.g.*, *Carr-Gottstein Foods*, 182 P.3d at 1136 (waiver of lease term), *with Airoulofski*, 922 P.3d at 894 (waiver of arbitration), and requiring prejudice to find waiver of the arbitration right, when prejudice is not required to find waiver of other rights, actually runs counter to the purpose underlying the Federal Arbitration Act.

The core purpose underlying the FAA was to place arbitration agreements on "*equal footing* with all other contracts." *Waffle House*, 534 U.S. at 293 (emphasis added); *see also Prima Paint*, 388 U.S. at 404 n.12 (to same effect); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989) (same). Imposing a heightened burden to show waiver simply because the right at issue is arbitration would

undermine that core purpose because it would place arbitration agreements on a *superior* footing, not an equal one.

Indeed, many jurisdictions, like Alaska, correctly apply the same waiver standard in arbitration cases as in others and reject the notion that a showing of prejudice is required. *See, e.g.*, *Khan*, 521 F.3d at 425 ("A finding of prejudice is not necessary in order to conclude that a right to compel arbitration has been waived[.]"); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 590 (7th Cir. 1992) ("[W]here it is clear that a party has forgone its right to arbitrate, a court may find waiver even if that decision did not prejudice the non-defaulting party."); *JM Fin. Capital, L.L.C. v. Cannon*, No. 1CA-CV-06-0591, 2007 WL 5448148, at *5 (Ariz. Ct. App. Aug. 21, 2007) (showing of prejudice not required for waiver of arbitration) (citing *Bolo Corp. v. Homes & Son Constr. Co.*, 464 P.2d 788, 792-93 (Ariz. 1970)); *Owens & Minor*, 711 So. 2d at 177 ("[A] waiver of arbitration may be demonstrated absent a showing of prejudice to the party opposing arbitration.").

In short, this Court has sensibly declined to require proof of prejudice as an element for establishing waiver whether or not arbitration is involved, and that conclusion should not be disturbed.

2. Even if Prejudice Is Required, Ms. Hudson and Ms. Stewart Prevail Because They Were Prejudiced.

Even if this Court holds that prejudice is required for waiver, Ms. Hudson and Ms. Stewart should still prevail because they were prejudiced by Respondents' actions.

First, Ms. Hudson and Ms. Stewart were prejudiced because Respondents obtained judgments against them in court. A judgment against a party is "prejudice enough" for

purposes of showing that the right to arbitrate was waived. *Midwest Window*, 630 F.2d at 537; *see also Schonfeldt v. Blue Cross of Cal.*, No. B142085, 2002 WL 4771, at *4 (Cal. Ct. App. Jan. 2, 2002) ("Prejudice is presumed . . . where the party seeking arbitration has filed a lawsuit and prosecuted it to final judgment.") (citing *Groom v. Health Net*, 98 Cal. Rptr. 2d 836, 840 (Cal. Ct. App. 2000)); *O'Donnell v. Hovnanian Enters., Inc.*, 29 A.3d 1183, 1189-90 (Pa. Super. Ct. 2011) (court ruling in favor of the waiving party constituted prejudice); *Otis Housing*, 201 P.2d at 312 (finding that a party waived arbitration when it prosecuted an unlawful detainer action to judgment before seeking to arbitrate). *Cf. Getz Recycling*, 71 S.W.3d at 230-31 (prejudice found where court issued preliminary injunction and order of replevin in favor of waiving party).

Second, Ms. Hudson and Ms. Stewart were prejudiced because Respondents gained the benefit of Alaska's Rule 82 by filing in court. Had Respondents pursued their collection action in arbitration, under South Dakota law (as Respondents contend applies), they would not have been able to rely on Rule 82, and the South Dakota Rules of Civil Procedure contain no mandate for prevailing party attorney's fees. *See* [Exc. 129-31, 389-92] And even if Respondents had gone to arbitration under Alaska law, they would have had to contend with the possible application of AS § 09.43.100, which has been interpreted to prohibit the award of Rule 82 attorney's fees incurred in arbitration. *See Integrated Res. Equity Corp. v. Fairbanks N. Star Borough*, 799 P.2d 295, 300 (Alaska 1990). Not only that, but the terms of the arbitration agreements themselves likely bar the recovery of any fees. [Exc. 20, 317] Whether Respondents could have found a basis in South Dakota law for getting their fees, or whether they could have

relied on Alaska's *revised* arbitration act, *see* AS §§ 09.43.300(a), .480(b), raise complicated questions—all of which Respondents avoided by filing in Alaska court and relying on the straightforward fee provision in Rule 82.

Finally, Ms. Hudson and Ms. Stewart were prejudiced because, by filing in Alaska court, Respondents were able to take advantage of the former version of Rule of Civil Procedure 55(a)(1), which permitted a clerk to enter a default judgment without requiring service of the application for that judgment. *See* Alaska S. Ct. Order No. 1771 (Sept. 29, 2011). This allowed Respondents to file their misleading fee affidavits, and obtain their unlawful fee awards, without (it appears) notifying Ms. Hudson and Ms. Stewart in advance of their fee requests—prejudicing Ms. Hudson and Ms. Stewart's ability to defend against those requests.[3]

D. The Superior Court Erred in Rejecting Ms. Hudson's and Ms. Stewart's Waiver Arguments.

The Superior Court did not rely on Respondents' prejudice argument in rejecting waiver, but the two reasons it gave for its decision are also incorrect.

First, the Superior Court held that Ms. Hudson's and Ms. Stewart's claims had to be "*the same as*" Respondents' debt-collection claims to fall within the scope of Respondents' waiver. [Exc. 264] (emphasis in original). That is not the law. Instead, as explained above, Ms. Hudson's and Ms. Stewart's claims need only be related to Respondents' earlier claims—as they are—for waiver to apply. *See Midwest Window*,

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[3] There is no indication in the record that Respondents voluntarily served their fee requests on Petitioners, and given that they were not required to do so, it seems unlikely that they did. *See supra* at 5-6.

630 F.2d at 536-37 (party that brought collection action thereby waived right to arbitrate related breach of contract claim later filed by opposing party as a separate suit); *see also Gutor International*, 493 F.2d at 946 (instructing that the scope of waiver covers "[a]ll related matters").[4]

Second, the Superior Court incorrectly held that Respondents had to be, and were not, "on notice" of Ms. Hudson's and Ms. Stewart's UTPA claims during the initial debt-collection actions. [Exc. 264] As an initial matter, there is no requirement that the party seeking arbitration be "on notice" that the other party will bring a particular claim challenging its actions. A party who chooses litigation for its own claim is on notice, by virtue of applicable case law, that its choice waives arbitration for closely related claims as well. *See, e.g.*, *King*, 572 P.2d at 1174. No authority—and neither the Respondents nor the Superior Court cited any—supports the Superior Court's additional notice requirement.

The Superior Court's notice reasoning is also incorrect because Respondents *were* on notice of Rule 82's requirements and the contents of their own fee affidavits. To be sure, Respondents may not have known that Ms. Hudson and Ms. Stewart would challenge their unlawful practice, but (accepting Petitioners' allegation as true) they knew or should have known that they were asking for fees that were not actually entitled to. In

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[4] The Superior Court stated the correct test at the beginning of its waiver analysis, explaining that a "party may waive the right to arbitrate issues *substantially related* to those it litigated." [Exc. 263] (emphasis added). But the Court went on to apply an incorrect "same as" standard. *See id.* (explaining that "Citi is not re-filing a claim against Hudson" and that waiver would only apply if the "pending claim is *the same as* Citi's claim").

other words, Respondents were on notice of the potential claims against them because they knew the law's requirements and their own conduct.

II. The Arbitration Agreements Are Unenforceable Because an Arbitrator Cannot Award Relief that Would Enable Ms. Hudson and Ms. Stewart to Effectively Vindicate Their Claims for Statewide Non-Party Injunctive Relief.

It is well-settled under federal and Alaska law that an arbitration agreement cannot be enforced if it prevents a party from effectively vindicating her rights. The arbitration agreements at issue in these cases fail under the effective-vindication test: Ms. Hudson and Ms. Stewart seek statewide, non-party injunctive relief that will protect all Alaskans from Respondents' unlawful conduct, but Ms. Hudson and Ms. Stewart cannot effectively vindicate these claims in arbitration because (1) the arbitration agreements expressly prohibit the award of non-party relief, and (2) non-party injunctive relief is incompatible with arbitration. In other words, an arbitrator cannot award the type of non-party injunctive relief guaranteed by the Alaska UTPA. The Superior Court erred in holding to the contrary and in sending Ms. Hudson and Ms. Stewart to an arbitral forum that cannot provide the statutorily guaranteed relief they seek.

A. Statewide Non-Party Injunctive Relief Plays a Key Role in the UTPA's Remedial Scheme.

By way of background, it is important to understand the role that statewide injunctive relief plays in the UTPA's remedial scheme.

The UTPA permits "any person who was the victim of the unlawful act, whether or not the person suffered actual damages, [to] bring an action to obtain an injunction prohibiting a seller or lessor from continuing to engage in an act or practice declared unlawful under [the statute]." AS § 45.50.535(a). This provision is nonwaiveable, *id.*

§ 45.50.542, and provides that individuals may seek, and courts may grant, statewide injunctions that affect not only the parties to the suit, but also other individuals adversely affected by a defendant's behavior. This Court has described the remedy available under § 45.50.535(a) as "non-party injunctive relief" and explained that "the benefit of an injunction broadly prohibiting a seller or lessor from continuing to engage in unfair trade practices would absolutely apply to non-parties." *Osbakken*, 289 P.3d at 896.

Private litigants' right to seek statewide injunctive relief was added to the UTPA in 1998 to remedy a problem of statutory underenforcement. Alaska's Attorney General had always had the authority to seek statewide relief, but budget cuts left the Attorney General without adequate resources to enforce the UTPA and to protect Alaska's citizens from fraud. [Exc. 175-77, 179, 181-82, 190-91, 198-99, 201-02] The Legislature remedied this problem by amending the UTPA to give ordinary citizens many of the enforcement powers previously reserved for the Attorney General—including the power to seek and obtain statewide non-party injunctive relief to protect all Alaskans from a defendant's deceptive conduct. [Exc. 176] ("So what we have done with this bill is to kind of privatize the – and empower public citizens or citizens to perform many of the functions that were – that have been heretofore reserved only to the attorney general's office . . . ."); *see Osbakken*, 289 P.3d at 896 n.5.

As the above makes clear, private litigants' right to obtain statewide injunctive relief—deliberately codified by the Legislature—plays an important role in enforcing the UTPA's mandate and protecting Alaskans from fraud and empowers citizens to carry out those duties traditionally conferred on the Attorney General.

B. An Arbitration Agreement Is Unenforceable if It Prevents a Party from Effectively Vindicating Its Rights.

Although the Superior Court erred in its application of the "effective vindication" test, it was right to adopt that as the test for the arbitration agreements' enforceability: It is well-settled that an arbitration agreement cannot be enforced if it prevents a party from effectively vindicating her rights.

The U.S. Supreme Court has repeatedly held that if an arbitration agreement operates "as a prospective waiver of a party's right to pursue statutory remedies," the agreement is "against public policy" and unenforceable. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (quoting *Mitsubishi Motors*, 473 U.S. at 638). This rule makes sense because arbitration is a choice of forum, not a choice of law: "[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1095 (Alaska 2009) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). As such, arbitration agreements will be enforced only so "long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 637); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009); *Waffle House*, 534 U.S. at 296 n.10; *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987).

The rule that an arbitration agreement is unenforceable if it prevents effective vindication of statutory rights applies to cases involving federal statutory claims and to

cases, like these, involving state statutory rights. *See Gibson*, 205 P.3d at 1095-96 (applying *Mitsubishi Motors* to rights guaranteed by Alaska state statute). The rule also survives the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740 (2011). Just last term, post-*Concepcion*, the Supreme Court reiterated again that an arbitration agreement is enforceable only if it preserves for the litigants the same statutorily guaranteed "*power to impose liability*" that they would have in court. *CompuCredit Corp.*, 132 S. Ct. at 671 (emphasis in original).[5]

Under this settled case law, the Superior Court was right to hold that Ms. Hudson and Ms. Stewart must be able to vindicate their UTPA claims for the parties' arbitration agreements to be enforceable. And because Ms. Hudson and Ms. Stewart will not have the same "*legal power to impose liability*," *id.*, under the UTPA if they cannot obtain the statewide injunctive relief that is guaranteed by the statute, the Superior Court was also right to hold that Ms. Hudson and Ms. Stewart must be able to effectively vindicate their specific claims for non-party injunctive relief.

C. Ms. Hudson and Ms. Stewart Cannot Effectively Vindicate Their Claims for Injunctive Relief in Arbitration.

Although the Superior Court held correctly that Ms. Hudson and Ms. Stewart must be able to vindicate their injunctive-relief claims in arbitration for the parties' arbitration agreements to be enforceable, the Superior Court erred in holding that Ms. Hudson and Ms. Stewart can obtain non-party injunctive relief in the arbitral forum. First, the

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[5] On February 27, 2013, the U.S. Supreme Court will hear argument in *American Express Co. v. Italian Colors Restaurant*, No. 12-133. That case presents the question whether an arbitration agreement is enforceable when it prevents a party from effectively vindicating its rights under federal antitrust law.

arbitration agreements themselves prohibit any arbitrator from awarding that relief, and, second, limitations inherent in the arbitral forum make non-party injunctive relief fundamentally incompatible with arbitration.

1. Petitioners Cannot Obtain a Non-Party Injunction in Arbitration Because the Agreements Prohibit that Relief.

The arbitration agreements in these cases prohibit an arbitrator from awarding statewide non-party injunctive relief, and, therefore, the arbitrator lacks the authority to do so. The Superior Court held that it could re-write the agreements to allow for such an award, but the Federal Arbitration Act does not permit that result. Under the FAA, neither a court nor an arbitrator may re-write an arbitration agreement to authorize non-party relief that the agreement prohibits.

To begin, it is clear and undisputed that the arbitration agreements here prohibit arbitrators from awarding statewide, non-party injunctive relief. The agreements state that "[t]he arbitrator will not award relief for or against anyone who is not a party." [Exc. 20, 317] The agreements also explain that "[a]n award in arbitration shall determine the rights and obligations between the named parties only . . . and shall not have any bearing on the rights and obligations of any other person[.]" *Id.* Petitioners and Respondents agree that this language prohibits arbitrators from awarding statewide non-party injunctive relief, and the Superior Court agreed with that reading as well. [Exc. 132, 249, 400]

The Superior Court nonetheless believed it could re-write the parties' agreements to permit an arbitrator to award statewide injunctive relief, but that result is inconsistent with federal and state law. [Exc. 247-61] In *Stolt-Nielsen, S.A. v. AnimalFeeds*

International Corp., the U.S. Supreme Court explained that under the FAA, and as a matter of binding federal law, "courts and arbitrators must give effect to the contractual rights and expectations of the parties" and that an arbitrator "has no general charter to administer justice for a community which transcends the parties." ___ U.S. ___, 130 S. Ct. 1758, 1774 (2010) (internal quotations omitted). This means that an arbitrator's powers are limited to those provided by the agreement, and an arbitrator may not authorize non-party relief unless such relief is explicitly authorized by the agreement itself. *Id.* at 1774-75 (holding that where a contract is silent as to class arbitration, a party may not be compelled to submit to class arbitration).

In these cases, the arbitration agreements are not merely silent about non-party relief, as in *Stolt-Nielsen*. Instead, the agreements explicitly prohibit that relief. [Exc. 20, 315, 317] Under the FAA, as explained in *Stolt-Nielsen*, the arbitrators chosen under the agreements cannot grant statewide non-party relief in violation of the agreements' terms, and the Superior Court erred in holding that it could re-write the parties' agreements to allow such relief.[6]

Requiring the parties to arbitrate non-party, statewide claims they did not agree to arbitrate is especially problematic in these cases for two reasons. First, the liability risk

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[6] The arbitration agreements stipulate that any arbitrations are governed by the American Arbitration Association arbitration rules and procedures. [Exc. 20, 316] The Superior Court relied on the broad discretion afforded to arbitrators in awarding relief under those rules to support its conclusion that an arbitrator could have awarded UTPA-type public injunctive relief. [Exc. 255-57] However, the rules of a private arbitration forum cannot trump the U.S. Supreme Court's holding that the terms of the arbitration agreement control the scope of relief available in arbitration. *See Stolt-Nielsen*, 130 S. Ct. at 1775.

Respondents face in non-party, non-individual litigation is high, but judicial review is extremely limited. If Ms. Hudson and Ms. Stewart are successful in obtaining statewide, non-party injunctive relief, Respondents will be liable to consumers throughout Alaska, not only to Petitioners. However, "[w]hether the arbitrator's decision on the merits is supported by record evidence is generally not reviewable," and that the relief granted by the arbitrator is inconsistent with the relief that would granted by a court is not grounds for a court to vacate an arbitrator's award. *Wing v. GEICO Ins. Co.*, 17 P.3d 783, 786 (Alaska 2001); *see also* AS §§ 09.43.120, .500(a). Further, an arbitrator's final award can generally not be modified, either by the arbitrator or the court, even in light of changing circumstances. *Id.* §§ 09.43.90, .130, .470, .510. Thus, in rewriting the contract to permit non-party arbitration, the Superior Court saddled Respondents with high-stakes adjudication without the benefit of judicial review or the ability to modify the injunction. *Cf. Stolt-Nielsen*, 130 S. Ct. at 1776 ("And the commercial stakes of class-action arbitration are comparable to those of class-action litigation even though the scope of judicial review is much more limited.") (citations omitted).[7]

Second, as explained above, non-party injunctive relief governs not only Ms. Hudson, Ms. Stewart, and Respondents, who agreed to submit their claims to arbitration, but also other Alaska consumers who are not parties to the arbitration agreements. Those

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[7] The Alaska Revised Uniform Arbitration Act, AS §§ 09.43.300-.595, governs agreements made on or after January 1, 2005, and agreements made prior to that date if the parties so agree. The Alaska Uniform Arbitration Act, AS §§ 09.43.10-.180, applies to agreements made prior to January 1, 2005, if the parties have not agreed that the Revised Alaska Arbitration Act governs their arbitration. *See* AS § 09.43.300(a), (b). Citations to the applicable provisions in each are provided for the Court's convenience.

other Alaska consumers did not necessarily agree to have their rights determined in arbitration, and it is antithetical to the consensual nature of arbitration to arbitrate the claims of parties who did not agree to the arbitral forum. *Cf. Waffle House*, 534 U.S. at 295-96 (individual employee's agreement to arbitrate claims with employer did not govern the EEOC's actions on his behalf, particularly in light of the carefully crafted statutory enforcement scheme).

For all these reasons, the Superior Court erred in re-writing the arbitration agreements to permit non-party injunction claims in arbitration when non-party injunctions are contrary to the agreements' terms.

2. Even if the Arbitration Agreements Could Be Rewritten to Allow for Statewide Injunctive Relief, Ms. Hudson and Ms. Stewart Still Could Not Effectively Vindicate Their Claims.

Even if the arbitration agreements could be rewritten to permit non-party injunctive relief (which they cannot), Ms. Hudson and Ms. Stewart still could not effectively vindicate their claims because limitations inherent in the arbitral forum make non-party injunctive relief incompatible with arbitration.

The California Supreme Court addressed this exact issue with regard to a public injunction provision similar to the one in Alaska's UTPA, and it held (twice) that public injunctions are incompatible with arbitration. *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 21 Cal. 4th 1066, 1079-81 (1999); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1162-64 (Cal. 2003); *see also Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1082 (9th Cir. 2007) (following *Broughton*/*Cruz* rule). As the California Supreme Court explained, public injunctions are antithetical to the decision of private parties to engage in

arbitration because the primary beneficiaries of such an injunction are the non-party members of the public (who may or may not have agreed to arbitration), not the individual who agreed to arbitrate her claim. *Broughton*, 21 Cal. 4th at 1080. Indeed, because public injunctions apply prospectively, they are unlikely to benefit the person bringing the action at all—other consumers are virtually the only beneficiaries of such an injunction. *Id.*

This same reasoning applies here. Public relief is exactly what the UTPA provides: The statute's non-party injunction provision is designed to emulate and take the place of the power of the Attorney General to protect the public at large. [Exc. 176] Arbitration, however, is between the parties who have contracted to do so, and an arbitrator "has no general charter to administer justice for a community which transcends the parties." *Stolt-Nielsen*, 130 S. Ct. at 1774. And if an arbitrator were to decide whether to issue a UTPA public injunction, there would be a disjunction between the parties who agreed to give up their right to go to court in favor of arbitration and those who will actually benefit from the arbitrator's decision.

The guarantee of statewide non-party public injunctive relief cannot be effectively vindicated in arbitration for another reason as well. For a public-injunction remedy to be effective, a court must have continuing jurisdiction over the injunction to oversee, enforce, and modify it as needed. *Broughton*, 21 Cal. 4th at 1081. *Cf.* AS § 45.50.551(a) (providing for continuing jurisdiction of the court to enforce UTPA public injunctions sought by the Attorney General). An arbitrator, unlike a court, does not retain continuing jurisdiction over his or her final awards; after an award is issued, the arbitrator's authority

ends. *Int'l Bhd. of Elec. Workers, Local Union 1547 v. City of Ketchikan*, 805 P.2d 340, 343 n.7 (Alaska 1991) ("It is a fundamental common law principle that once an arbitrator has made and published a final award, the arbitrator's authority is exhausted and he or she can proceed no further."). A party to arbitration may confirm the arbitrator's award in court, but the court's authority in a confirmation proceeding is limited; the court cannot modify the award in light of factors such as changing circumstances. *See* AS §§ 09.43.130, .510. Public injunctions, by their nature, require monitoring and may require modification or even termination, but when an injunction is issued by an arbitrator, the court—and, indeed, the arbitrator—lack authority to alter it. *Id.* §§ 09.43.90, .130, .470, .510.

Further, non-party Alaska consumers, the intended beneficiaries of any public injunction, would likely be unable to enforce it. *See Broughton*, 21 Cal. 4th at 1081. Arbitrators' awards lack precedential value, both for courts and for any subsequent arbitrators. *Id.* Even if an arbitration award is judicially confirmed, it "does not have collateral estoppel effect in favor of nonparties to an arbitration." *Id.*; *see Powers*, 6 P.3d at 297 (declining to give arbitral award preclusive effect in subsequent litigation because the subsequent litigation involved an insurer not party to the arbitration).

In giving citizens the power to act as private attorney generals and seek statewide non-party injunctive relief under the UTPA, the Alaska legislature understood that resulting injunctions would be enforceable long after the initial litigation had concluded and the consumer who had brought the litigation no longer had an interest. [Exc. 182, 194-95] *Cf.* AS § 45.50.551(a). Indeed, as explained above, one of the primary

motivating factors in creating *non-party* injunctive relief was so that *non-parties* could be protected from fraudulent activity. Without the ability of non-parties to enforce the public injunction, that core "*guarantee of the legal power to impose liability*" would not be preserved, and a key component of the UTPA's remedial scheme would fall by the wayside. *CompuCredit Corp.*, 132 S. Ct. at 671 (emphasis in original). Because the UTPA's statutory guarantee of non-party injunctive relief cannot be effectively vindicated, the parties' arbitration agreements cannot be enforced.

This result is consistent with the FAA. The Respondents argued and the Superior Court held that permitting the parties to litigate their UTPA claims would be preempted after the U.S. Supreme Court's decision in *Concepcion*, 131 S. Ct. 1740, but that reasoning is flawed. [Exc. 124-25, 247, 397-401] Nothing in *Concepcion* overrules or purports to overrule the longstanding rule that arbitration agreements are enforceable only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors*, 473 U.S. at 637. *Concepcion* itself, which enforced a waiver of class action rights in an arbitration agreement, rested on the premise that the plaintiffs *could* effectively vindicate their statutory claims in individual arbitration. 131 S. Ct. at 1753. As such, the U.S. Supreme Court's decision did not reach cases like these, where statutory rights cannot be effectively vindicated in arbitration. And, even *after Concepcion*, the U.S. Supreme Court has emphasized that agreements to arbitrate statutory claims are valid only if they preserve the statute's "*guarantee of the legal power to impose liability*." *CompuCredit Corp.*, 132 S. Ct. at 671 (emphasis in original).

Other courts' decisions have confirmed that declining to enforce arbitration agreements that prevent a party from effectively vindicating her statutory rights is not preempted. The Ninth Circuit has applied the California *Broughton*/*Cruz* rule that public injunctions cannot be effectively vindicated in arbitration and declined to enforce an arbitration agreement that purported to interfere with a party's right to seek such an injunction in court. *Davis*, 485 F.3d at 1082. Since *Concepcion*, even in the context of class action waivers, courts have refused to enforce agreements to arbitrate when they prevent a party from effectively vindicating her statutory right. *See, e.g.*, *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528, 538 (S.D.N.Y. 2012); *Torrence v. Nationwide Budget Fin.*, No. 05-CVS-0447, 2012 WL 335947, at ¶ 75 (N.C. Super. Ct. 2012).[8]

* * *

In sum, Ms. Hudson and Ms. Stewart cannot effectively vindicate their claims in arbitration because the arbitration agreements prohibit an arbitrator from awarding statewide injunctive relief and because limitations inherent in the arbitral forum make such relief incompatible with arbitration. The Superior Court erred in holding that Ms. Hudson and Ms. Stewart could effectively vindicate their UTPA claims in arbitration and should have instead held the parties' arbitration agreements unenforceable and permitted Ms. Hudson and Ms. Stewart to pursue their UTPA claims in court.

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[8] In holding that any right to litigate a UTPA claim in court would be preempted by the FAA, the Superior Court relied on the Ninth Circuit's panel decision in *Kilgore v. Keybank, Nat'l Ass'n*, 673 F.3d 947 (9th Cir. 2012), which held that the *Broughton*/*Cruz* rule was preempted and purported to overrule *Davis* on that point. [Exc. 242-47] However, the Ninth Circuit has since granted rehearing en banc in *Kilgore*, and it is currently pending. *Kilgore v. Keybank, Nat'l Ass'n*, 697 F.3d 1191 (9th Cir. 2012).

CONCLUSION

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

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IN THE SUPREME COURT OF THE STATE OF ALASKA

Janet Hudson, on behalf of herself and all others, *Petitioners*, v. Citibank (South Dakota) NA, Alaska Law Offices, Inc. and Clayton Walker, *Respondents*.	)	Supreme Court No. S-14740 Trial Court Case No. 3AN-11-09196CI
		Consolidated with
Cynthia Stewart, on behalf of herself and all others who are similarly situated, *Petitioners*, v. Midland Funding LLC, Alaska Law Offices, Inc. and Clayton Walker, *Respondents*.	)	Supreme Court No. S-14826 Trial Court Case No. 3AN-11-12054CI

CERTIFICATE OF SERVICE AND OF TYPEFACE AND POINT SIZE

I, James J. Davis, Jr., of Northern Justice Project, LLC, hereby certify that:

1. A 13-point serifed Times New Roman typeface was used in preparing the foregoing Petitioners' Opening Brief.

2. Copies of the foregoing brief and Petitioners' Excerpt of Record were mailed, via the United States Postal Service, first class mail, postage prepaid, in a sealed envelope, on the 11th day of February, to the offices of:

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