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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JANET HUDSON, on behalf of herself and all other similarly situated,

Plaintiffs,

v.

CITIBANK (SOUTH DAKOTA), N.A., ALASKA LAW OFFICES, INC. and CLAYTON WALKER,

Defendants.

Case No 3AN-11-09196-CI

SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND TO STAY ACTION

Pursuant to this Court's Order dated March 1, 2012 (the "Order"),[1] defendant Citibank, N.A. ("Citibank") submits this Supplemental Reply Brief responding to Plaintiff's Response to the Order.[2]

[1] Capitalized terms are used herein as defined in the Motion and Citibank's Supplemental Brief.
[2] This Court's March 1 Order required Supplemental Briefs to be filed within 15 days of the date of the Order (and Reply Briefs to be filed 5 days thereafter), i.e., March 16. Nonetheless, Plaintiff did not file her Brief until March 19, 2012, and Citibank did not receive Plaintiff's Brief until March 20, 2012. Citibank is filing this Supplemental Reply Brief in accordance with the 5-day deadline set in the Court's Order and Civil Rule 6. *See* Ak. R. Civ. P. 6(a) (time periods less than 7 days are calculated based on court days).

I. RESPONSE TO PLAINTIFF'S "UNDISPUTED FACTS."

Although this Court directed that the parties' discuss four specific issues, Plaintiff elected to include an additional section entitled "Undisputed Facts." Citibank responds to Plaintiff's contentions as follows:

It is correct that Citibank mailed to Plaintiff, along with her October 2001 billing statement, a change in terms notice advising Plaintiff that Citibank was adding the Arbitration Agreement to the terms and conditions governing Plaintiff's Account. The following notice was included in the billing statement:

> PLEASE SEE THE ENCLOSED CHANGE IN TERMS NOTICE FOR IMPORTANT INFORMATION ABOUT THE BINDING ARBITRATION PROVISION WE ARE ADDING TO YOUR CITIBANK CARD AGREEMENT.

It is also undisputed that Plaintiff ***had a meaningful choice to reject*** the Arbitration Agreement, ***but did not do so***. Plaintiff could have elected to reject the Arbitration Agreement and continue using her Account for the later of the current membership year or the expiration date on the credit card, and then could have paid off the balance of her Account under the existing terms of the Account. (*See* Walters Affidavit, ¶¶ 9-11, Ex. 2 (non-acceptance instructions in the arbitration change-in-terms notice).) Plaintiff ***chose*** not to do so, but elected to continue using the Account pursuant to the new terms and conditions (including the Arbitration Agreement).

Plaintiff also had the opportunity to reject the changes made to the Arbitration Agreement in February 2005. Once again, Plaintiff ***chose*** not to do so, but elected to

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continue using the Account pursuant to the new terms and conditions in the Arbitration Agreement.

When Plaintiff defaulted under the terms of the Account, Citibank did sue Plaintiff in a completely separate lawsuit to recover the balance owed in Alaska state court. Plaintiff had the opportunity to elect arbitration of the claims asserted in that separate lawsuit, but did not do so. Rather, she chose not to respond, and Citibank obtained a default judgment.

Plaintiff, through her current counsel, then decided to sue Citibank in a separate lawsuit claiming that Citibank's attorney assessed excessive attorneys' fees. Plaintiff has filed her separate lawsuit as a putative class action. Citibank has properly moved to compel arbitration of Plaintiff's claims in this separate lawsuit.

II. RESPONSE TO PLAINTIFF'S ARGUEMENT AND AUTHORITIES.

A. Plaintiff's Discussion Regarding FAA Preemption Is Wholly Incorrect And Inaccurate.

1. Plaintiff's FAA Preemption Standard Is Incorrect.

Although *Concepcion* does describe ***two situations*** under which state laws are preempted by the FAA,[3] *Concepcion* does not mandate any "two-part test." Indeed, the words "two-part test" are not even contained in the opinion. The Court instructed as follows:

> When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The

[3] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (Apr. 27, 2011).

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> conflicting rule is displaced by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), for example, we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist "'at law or in equity for the revocation of any contract.'" *Id.*, at 492, n. 9, 107 S.Ct. 2520 (emphasis deleted). We said that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot." *Id.*, at 493, n. 9, 107 S.Ct. 2520.

Concepcion, 131 S. Ct. at 1747. This is not a "two-part test," but rather a description of the two situations under which state laws can be preempted under the FAA.

This is exactly how the Ninth Circuit recently interpreted *Concepcion* in *Kilgore v. KeyBank, Nat. Ass'n*, --- F.3d ---, 2012 WL 718344 (9th Cir. Mar. 7, 2012), a decision that Plaintiff conveniently ignores. In *Kilgore*, the Ninth Circuit, relying on *Concepcion*, described the applicable preemption standard as follows:

> The Court identified ***the two situations in which a state law rule will be preempted by the FAA.*** First, "[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." *Concepcion*, 131 S.Ct. at 1747. A second, and more complex, situation occurs "when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." *Id.* In that case, a court must determine whether the state law rule "stand[s] as an obstacle to the accomplishment of the FAA's

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> objectives," which are principally to "ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1748. If the state law rule is such an obstacle, it is preempted.

2012 WL 718344, at *6 (emphasis added). Furthermore, a second Ninth Circuit decision issued on March 16, 2012, *Coneff v. AT&T Corp.*, 2012 WL 887598 (9th Cir. Mar. 16, 2012), confirms the same standard: "*Concepcion* is broadly written. ... By requiring arbitration to maintain procedures fundamentally at odds with its very nature, a state court impermissibly relies on 'the uniqueness of an agreement to arbitrate' to achieve a result that the state legislature cannot." *Coneff*, 2012 WL 887589, at *2.

Accordingly, Plaintiff's contentions regarding FAA preemption, including that this Court must first determine whether the state law at issue "applies only to arbitration," are just flat wrong. The standard set forth by Citibank in its Supplemental Brief (and also applied by the Ninth Circuit) is the correct standard.

2. Plaintiff's FAA Preemption Analysis Is Inaccurate.

Plaintiff's preemption analysis wholly misstates her own position as well as Citibank's position. For example, Plaintiff maintains that she "does *not* claim that Citi's arbitration agreement is unfair or for some reason unenforceable under some categorical anti-arbitration rule." (Plaintiff's Supp. Brief at 5.) Yet, Plaintiff has repeatedly argued that the UTPA's purported guarantee of the right to litigate prohibits her claims from being arbitrated, including as a supposed "private attorney general." If the UTPA

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prohibits arbitration of claims brought pursuant to its provisions, then it is a "conflicting rule" that "is displaced by the FAA." *See Concepcion*, 131 S. Ct. at 1747.

Furthermore, contrary to Plaintiff's contention, Citibank has not argued that Plaintiff's waiver argument is defeated by FAA preemption. Rather, Citibank has properly argued that the issue of waiver is a question of federal law under the FAA and that Plaintiff has failed to establish grounds for waiver under federal law, particularly given that the alleged waiver occurred in a completely separate lawsuit. Nor has Citibank argued that the question of whether Plaintiff agreed to the Arbitration Agreement raises a question of FAA preemption. Rather, Citibank maintains that Plaintiff agreed to the Arbitration Agreement by choosing not to opt out of the Agreement and by choosing to continue to use her Account, an argument that is supported by the great weight of authority presented in the briefs.

Finally, with respect to Plaintiff's argument regarding unconscionability, to the extent Alaska state law is even relevant to this issue (and Citibank maintains it is not), Plaintiff's argument fails on three grounds. First, if Plaintiff is arguing that it was unconscionable under Alaska law for Citibank to add the Arbitration Agreement to the parties' contract, such an argument fails based on federal preemption as stated in *Concepcion*. *See Concepcion*, 131 S. Ct at 1747 ("a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that

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enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot."" (citing *Perry*, 482 U.S. at 493, n.9 (1987))).

Second, if Plaintiff is arguing (as she seems to be doing in her prior Consolidated Reply Brief)[4] that the ***entire*** Card Agreement is unconscionable and unenforceable under Alaska law because it contains a provision that authorizes Citibank to unilaterally change the terms of the Agreement (which Citibank denies), such an argument ***must*** be referred to the arbitrator (and should not be decided by this Court) because it is argument directed to the entire agreement and not solely the Arbitration Agreement. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) ("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 Marketing Group, Inc. v. Goldbelt Eagle, LLC*, 157 P.3d 470, 475 (Alaska 2007) ("The *Buckeye* decision makes it clear that courts may consider challenges of illegality to arbitration agreements but not to the underlying contracts").

Third, the record evidence before this Court clearly establishes that Citibank did not unilaterally add the Arbitration Agreement to the Card Agreement; rather, as previously discussed in Citibank's briefs, Plaintiff had a meaningful choice to reject the Arbitration Agreement, but did not do so. Thus, the Arbitration Agreement is not

[4] *See* Plaintiff's Consolidated Reply at 7. Citibank was not previously provided any opportunity to respond to Plaintiff's Consolidated Reply Brief, including with respect to Plaintiff's arguments regarding unconscionability.

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unconscionable in that regard. In summary, because Plaintiff states an incorrect standard for FAA preemption, and then offers an analysis that is belied by the law and the evidence presented, Plaintiff's positions should be rejected, and the Motion granted.

B. In This Case, Any Purported Right To Litigate In The UTPA Is Preempted By The FAA.

Plaintiff's arguments regarding the UTPA's purported right to litigate (as well as to act as a "private attorney general") are unavailing based on *Concepcion* and its progeny, including the recent U.S. Supreme Court's recent *per curiam* decision in *Marmet*,[5] and the Ninth Circuit's recent decisions in *Kilgore* and *Coneff*.

For example, in *Marmet*, the U.S. Supreme Court found that "[t]he West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court. ... West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." 132 S. Ct. at 1203-04. Similarly, any prohibition by Alaska law against arbitration of claims brought under the UTPA, whether on an individual, class or "private attorney general" basis, is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is preempted as being contrary to the terms and coverage of the FAA.

[5] *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (Feb. 21, 2012).

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In *Kilgore*, the Ninth Circuit held that, pursuant to *Concepcion*, the FAA preempted California law holding that state law claims for public injunctive relief are ***not*** subject to arbitration. As summarized by the Ninth Circuit:

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

Kilgore, 2012 WL 718344, at *13; *see also Coneff*, 2012 WL 887589, at *2-4 (holding that *Concepcion* preempted Washington unconscionability law to the extent it is based on an argument that arbitration would preclude plaintiff from vindicating her rights under state law).

Based on the foregoing authority, Plaintiff's reliance on the UTPA's legislative history is unavailing. Moreover, Plaintiff's argument that the public of the State of Alaska is not a party to Arbitration Agreement also carries no weight. The public of the

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State of Alaska is neither a party to this case, nor a party to the Arbitration Agreement. The issue presented is whether the claims of the one and only Plaintiff in this action are subject to arbitration on an individual basis. Pursuant to *Concepcion* and the FAA, the answer is clearly "yes."

C. The Supreme Court Has Already Answered The Question Of Whether *Concepcion* Applies In State Court.

As set forth in Citibank's Supplemental Brief, the United States Supreme Court's recent *per curiam* decision in *Marmet Health Care Center*, 132 S. Ct. 1201, answers in the affirmative whether *Concepcion* applies in state court. Plaintiff's rehashing of her previous arguments does not change the answer.

In addition, as previously argued in Citibank's Supplemental Brief, if the United States Supreme Court were to adjudicate the issue presented in this case, it is highly probable that Justice Thomas would reject Plaintiff's arguments in this case. This is particularly true given that the Plaintiff in this case is relying significantly on Alaska public policy and the purported intent of the Alaska Legislature. As Justice Thomas has expressly opined, "Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause." *Concepcion*, 131 S. Ct. at 1755 (Thomas, J, concurring and *joining* in the majority). Unlike Plaintiff, Citibank maintains that it would be improper for this Court to adjudicate the instant Motion based on a "hypothetical"; rather, the Motion should be decided on the facts and the law as it actually exists, all of which plainly confirm that the Motion should

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be granted and this action stayed pending arbitration of Plaintiff's claims on an individual basis.

D. Plaintiff's Choice Of Law Analysis Is Fundamentally Flawed.

Contrary to the appropriate choice of law analysis, which is set forth in Citibank's initial Reply Brief and its Supplemental Brief, Plaintiff's choice of law analysis picks and chooses from relevant facts in determining whether Alaska, Missouri, or South Dakota law should apply here in the absence of a choice of law provision. Giving *zero* weight to the parties' place of contracting and negotiation (which would be Missouri and South Dakota, but not Alaska), Plaintiff focuses solely on the "place of performance," which Plaintiff (incorrectly) asserts is Alaska. Plaintiff claims that Alaska is the "place of performance" because the "at-issue performance took place via defendant's unlawful debt collection activities in or before the Kenai District Court." (Plaintiff's Supp. Brief at 15.) This analysis, however, is completely deficient.

The "place of performance" is the locale where the contract at issue—the Card Agreement—is to be performed. That is, the locale of where Plaintiff initially was lent money by Citibank—South Dakota—or alternatively, where Plaintiff was to pay back Citibank for the money lent—Missouri or South Dakota. The "performance" cited by Plaintiff has nothing to do with either Citibank's or Plaintiff's "performance" under the Card Agreement. Instead, it is based solely on the consequences of Plaintiff's default on the Card Agreement.

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Plaintiff is mixing proverbial apples and oranges, improperly relying on the nature of her substantive claims to try and analyze what law should apply to the parties' arbitration agreement under which the parties agreed to arbitrate any disputes over ten years ago. *See AT&T Tech., Inc. v. Comm. Workers of Am.*, 475 U.S. 643, 649-50 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. . ."). The pertinent facts here relate to the time period when the parties first entered into the Agreement, or at most, when Citibank added the Arbitration Agreement and Plaintiff elected not to opt out of such Agreement over a decade ago. Simply put, Alaska law did not come into play here until Plaintiff defaulted under the terms of the Card Agreement, which was long after she was sent the Arbitration change in terms notice, chose not to reject such notice, and elected to continue using the Account subject to the new terms. Alaska law is, therefore, not relevant to the enforceability of the Arbitration Agreement.

III. CONCLUSION

For all of the foregoing reasons, and the reasons in the Citibank's prior briefs, Citibank respectfully requests that the Court grant the Motion and compel arbitration of Plaintiff's claims on an individual basis in accordance with the express terms of the valid and enforceable Arbitration Agreement governing Plaintiff's Account. In addition, this action should be stayed pending completion of arbitration proceedings.

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Dated: March 27, 2012

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

Certificate of Service

On the 27th day of March, 2012, a true and correct copy of the foregoing document was sent by U.S. Mail, postage paid, to the following parties:

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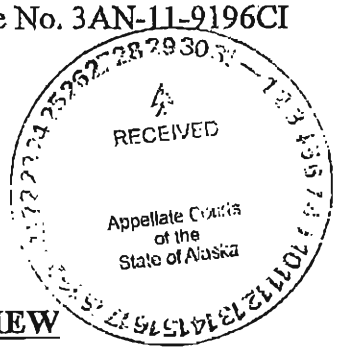
IN THE SUPREME COURT FOR THE STATE OF ALASKA

JANET HUDSON, on behalf of herself And all others similarly situated, Petitioner, v. CITIBANK (SOUTH DAKOTA), N.A., ALASKA LAW OFFICES, INC. and CLAYTON WALKER, Respondents.	Supreme Court Case No. S-14740 Superior Court Case No. 3AN-11-9196CI



RESPONSE TO PETITION FOR REVIEW

Instead of simply arbitrating her claims on an individual basis, and then appealing any confirmed arbitration award as a matter of right, Petitioner/Plaintiff Janet Hudson ("Plaintiff" or "Hudson") seeks to further disregard the parties' written agreement to arbitrate (the "Arbitration Agreement") by filing the instant Petition for Review (the "Petition"). The Petition for Review should not be granted because Plaintiff does not, and cannot, demonstrate sufficient grounds for an immediate appeal under Rule 402(b). Indeed, while Plaintiff devotes most of her Petition to the "merits" of her anticipated appeal, she only devotes two cursory paragraphs explaining why this case should be given the special treatment of an immediate appeal. She fails in this regard.

Furthermore, Plaintiff's arguments as to why the Trial Court's Order is erroneous are simply wrong. Tellingly, Plaintiff does not include in her "issues presented" the fundamental question at the heart of the Trial Court's Order – whether the Trial Court properly granted Citibank's Motion to Compel Arbitration. The reason for this is clear – Plaintiff cannot reasonably challenge the recent rulings by the United States Supreme

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Court in *AT&T Mobility LLC v. Concepcion*,[1] and its progeny, all of which are dispositive of the Motion to Compel Arbitration. Instead, Plaintiff attempts to focus on other issues, none of which have merit.

For example, Plaintiff's incorrect interpretation and application of this Court's decision in *Gibson v. Nye Frontier Ford, Inc.*,[2] does not support a reversal of the Order. Through a premature appeal, Plaintiff would have this Court exponentially expand a few statements *Gibson* into a per se rule that all "adhesion" contracts that include a provision allowing for one party to make changes to the contract are unconscionable and unenforceable. No such statement is made in *Gibson*, which is a case that actually ***enforced*** the arbitration agreement at issue. Citibank maintains that Plaintiff's proposed judicial legislation clearly is not supported by the decision in *Gibson*, and not supported by the facts in this case. Indeed, Plaintiff simply ignores the undisputed fact that she had the right to reject the Arbitration Agreement, but chose not to do so. Plaintiff's other grounds for appeal are similarly defective.

"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). Plaintiff's Petition fails in this regard. Accordingly, the Petition should be denied.

I. Factual Background

A. The Arbitration Agreement.

Plaintiff's "Statement of Facts" either misstates or omits several important facts.

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[1] 131 S. Ct. 1740, 179 L. Ed. 2d 742 (Apr. 27, 2011)
[2] 205 P.3d 1091 (Alaska 2009).

In or about April 1999, Plaintiff was issued a Citibank credit card account (the "Account"); the original written terms and conditions governing the Account (the "Card Agreement") did not contain an arbitration agreement. The Card Agreement did include a provision authorizing Citibank to change the terms of the Agreement (subject to notice to cardholders), and also states that South Dakota law governs disputes that arise thereunder.

In October 2001, Citibank mailed to Plaintiff (who at that time lived in Missouri) a "Notice of Change in Terms Regarding Binding Arbitration to Your Citibank Card Agreement" (the "Notice") with Plaintiff's Account statement. The Notice added the Arbitration Agreement to the Card Agreement. Citibank included messages on Plaintiff's October and November Account statements alerting Plaintiff as to the Notice and the Arbitration Agreement.

Contrary to Plaintiff's story, Citibank did not "unilaterally" add the Arbitration Agreement to the Card Agreement. Plaintiff had the opportunity to reject the Arbitration Agreement, but did not do so. Indeed, as explicitly recognized by the Trial Court, the Notice "gave [Plaintiff] the option to opt out of the arbitration agreement. If Hudson opted out, she could have used her card until the later of the end of the membership year or the card expiration date."[3] After that, the Account would be closed and Hudson would have been able to pay off any remaining balance under the then-existing terms (i.e., with no arbitration).[4] Under the Arbitration Agreement, Hudson remained free to

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[3] Order, p. 5.

[4] Citibank also amended the Arbitration Agreement in 2005, once again sending her a notice to her Missouri address. Hudson, however, "continued to use the card throughout this time and did not opt out." Order, p. 5. In fact, Citibank mailed Plaintiff another

pursue any and all claims against Citibank, but (upon election of either party) would have to do so on an individual basis in arbitration. That is, she cannot seek class relief in arbitration pursuant to the express terms of the Agreement.

B. The Instant Action And The Motion To Compel Arbitration

In July, 2011, Hudson filed this putative class action lawsuit, claiming that, in a prior collection lawsuit filed over a year earlier (Feb. 2010), Citibank's collection attorneys supposedly obtained an excessive attorneys' fees award. Plaintiff alleges that the conduct of the collection attorneys violates Alaska's Unfair Trade Practices and Consumer Protection Act ("UTPA").[5] In the prior collection lawsuit, Citibank obtained a default judgment against the Plaintiff based on her failure to pay the Account. Plaintiff did not challenge the attorneys' fee order in the prior collection lawsuit. In response to Hudson's new claims, Citibank filed the Motion to Compel Arbitration, which was granted by the Trial Court.

II. Law and Argument

A. The Trial Court Properly Enforced The Parties' Arbitration Agreement Pursuant To The Federal Arbitration Act By Requiring Plaintiff To Arbitrate Her Claims On An Individual Basis.

Plaintiff's brief conveniently ignores the fact that the Arbitration Agreement is governed by the FAA, which (like Alaska law) "evinces a strong policy in favor of the arbitration of disputes."[6] As noted by the U.S. Supreme Court in *Concepcion*, the FAA

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complete copy of the Card Agreement in June 2005, which included the Arbitration Agreement, but Plaintiff continued to use the Account.

[5] AS 45.50.471, *et seq.*

[6] *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)).

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."[7] 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."[8] *Concepcion* undoubtedly applies here – as the Arbitration Agreement specifically is governed by the FAA, which Plaintiff does *not* dispute – and is dispositive.[9] *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 law specifically targeting arbitration.[10] Thus, because the "FAA requires courts to honor parties' expectations," plaintiffs were required to arbitrate their claims on an individual (non-class, non-representative) basis, as required by the parties' contract. Similarly, here, the FAA and *Concepcion* require that Plaintiff arbitrate her claims on an individual basis pursuant to the express terms of the Arbitration Agreement.[11]

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[7] 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.* at 1747 (italics added).

[8] *Concepcion*, 131 S.Ct. at 1748; *see also id.* at 1746 (construing Section 2 to "permit[] agreements to arbitrate to be invalidated by generally applicable contract defenses . . . but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.").

[9] Order, pp. 34-38.

[10] *See* 131 S. Ct. at 1746-48. 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. *Id.* at 1753.

[11] *See also Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (Feb. 21, 2012) (holding that, pursuant to *Concepcion*, the FAA preempted West Virginia law that attempted to preclude certain types of state law claims from arbitration); *Kilgore v.*

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. As noted above, Plaintiff fails to make any real showing under these factors, choosing instead to focus almost entirely on the merits (or lack thereof) of her attempted appeal. Plaintiff needs to arbitrate her individual claim, and then appeal following the end of arbitration proceedings. A close review of the factors reveals that interlocutory review is inappropriate and unnecessary in this case, particularly when proceeding with the usual appellate process is so simple and straightforward.

First, Plaintiff cannot demonstrate 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. Indeed, given that an individual arbitration proceeding can be completed in 60-90 days,[12] Plaintiff cannot possibly justify proceeding with an interlocutory appeal as opposed to following the usual appellate process (i.e., appealing as a matter of right after confirmation of an arbitration award). Plaintiff argues, in wholly conclusory fashion, that "full relief" to the supposed class (which has not been certified) "will be delayed for years." This argument is unsupported by any facts, and also assumes that the arbitration agreement would be found unenforceable by this Court – which was certainly not the case in *Gibson* (discussed below) and would also conflict with

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KeyBank, Nat. Ass'n, 673 F.3d 947 (9th Cir. Mar. 7, 2012) (holding that, pursuant to *Concepcion,* the FAA preempted California's rule excluding claims for public injunctive relief from arbitration).

[12] 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.

Concepcion. It is Plaintiff who unnecessarily seeks to delay these proceedings by prematurely appealing the Order, thus defeating the very purpose of arbitration.[13]

Second, Plaintiff 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."[14] This Court also has properly followed the rulings of the Supreme Court with respect to arbitration agreements governed by the FAA.[15] Contrary to Plaintiff's arguments (which simply ignore *Concepcion*), there is no valid basis upon which Plaintiff can challenge the parties' Arbitration Agreement.[16] Accordingly, the second factor in Rule 402(b) does not support an immediate appeal.

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[13] *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.").

[14] *Gibson*, 205 P.3d at 1096, n. 13, 14.

[15] *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)..

[16] Moreover, Plaintiff'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 an individual arbitration, and then addressing Plaintiff's arguments following issuance of an arbitration award, advances the ultimate termination of the litigation just as much as, if not more than, Plaintiff's proposal.

Third, Plaintiff does not challenge the Trial Court's Order as being so improper that it requires appellate intervention. Nor can she. In enforcing the Arbitration Agreement and requiring Plaintiff 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, Plaintiff does not, and cannot, contend that the ultimate issue presented (whether the Arbitration Agreement is enforceable) is an issue that will otherwise evade review, or is needed for the guidance of lower courts. Plaintiff will no doubt appeal the Trial Court's Order following entry of a final judgment, and there are no facts presented to establish urgency for an immediate appellate decision now. Furthermore, Plaintiff does not (and cannot) point to any conflicting rulings by other Alaska courts. Indeed, as noted above and further discussed below, this Court in *Gibson* actually enforced the Arbitration Agreement at issue. Plaintiff's attempt to skew the *Gibson* decision in its favor should not support a finding that an immediate appeal is necessary.

Because none of the factors under Rule 402(b) support the grant of review, Plaintiff's Petition should be denied, and Plaintiff allowed to proceed per the usual appellate procedure (appeal after final judgment is entered following confirmation of an arbitration award).

C. Order Compelling Arbitration.

1. Plaintiff's Proffered Application Of *Gibson* Is Wrong.

Plaintiff 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."[17] ***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.[18] 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 interpretation that permits arbitration is to be preferred over one that would frustrate arbitration."[19]

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).[20] Accordingly, the fundamental premise underlying Plaintiff's position – that *Gibson* stands for a certain proposition that is a fundamental public policy of Alaska – is completely wrong.

Moreover, regardless of Plaintiff's incorrect assessment of *Gibson*, the fact remains that Citibank did ***not*** unilaterally add the Arbitration Agreement to the Card Agreement. Rather, as discussed above, Plaintiff had a meaningful choice to reject the Arbitration Agreement, but did not do so. She continued to use the Account having had

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[17] Petition, p. 1.
[18] 205 P.3d at 1096-97.
[19] *Id.* at 1097.
[20] *Id.* at 1097-1101.

the opportunity to reject the Arbitration Agreement. The Arbitration Agreement is not unconscionable in that regard.

And finally, if Plaintiff is arguing that the ***entire*** Card Agreement is unconscionable and unenforceable under Alaska law because it contains a provision that authorizes 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. 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. Plaintiff's Choice-Of-Law Analysis Is Incorrect.

Plaintiff's choice-of-law analysis is based on the determination that, because the entire Card Agreement and the Arbitration Agreement are unenforceable under *Gibson*, then the South Dakota choice-of-law provision in the Card Agreement is invalid because it supposedly violates a fundamental public policy of Alaska. The problem with Plaintiff's argument is that it puts the proverbial cart before the horse. Determining what law applies does not begin and end with a determination of forum state's laws, but rather, must be completely assessed under proper Restatement § 187(2) test.[21] Critically, the

[21] *See Peterson v. Ek*, 93 P.3d 458, 465 n.11 (Alaska 2004); *Long v. Holland America Line Westours, Inc.*, 26 P.3d 430, 432 (Alaska 2001). A choice of law clause "will generally be given effect unless (1) the chosen state [e.g., South Dakota] has no substantial relationship with the transaction . . . or (2) the application of the law of the

"issue" here is the formation of the Arbitration Agreement -- not the determination of Plaintiff's claims on the merits (which would be subject to a separate choice-of-law analysis to be determined by an arbitrator).

Under the correct choice-of-law test, there is no dispute that South Dakota has a substantial relationship to the parties' agreement because Citibank is, and has been, a national bank located in South Dakota.[22] Furthermore, Alaska law would not apply here because Alaska law would not otherwise apply under Restatement § 188 in the absence of an effective choice of law.[23] Considering the relevant factors[24] compared with South Dakota, Missouri (where Plaintiff lived when the Arbitration Agreement was added to the Card Agreement), and Alaska, Alaska has minimal, if any, relationship to the parties' contractual relationship. With respect to the place of contracting and negotiation, only Missouri and South Dakota would have any interest. With respect to the issue of place of performance, the place of performance at the time of the formation of the Agreement was South Dakota because Citibank agreed to lend funds to Plaintiff (the performance) based on Plaintiff's acceptance of the terms of the Account, including the Arbitration Agreement. Finally, looking at the domicil, residence, nationality, place of incorporation and place of business of the parties, only Missouri and South Dakota had any relevance

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chosen state [e.g., South Dakota] 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 [e.g., South Dakota, Missouri, or Alaska]." *Peterson*, 93 P. 3d at 465 n.11.

[22] Order, p. 15.

[23] *See Long*, 26 P.3d at 430, 432 (Alaska 2001).

[24] These factors include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, [and] (e) the domicil, residence, nationality, place of incorporation and place of business of the parties. *Id.*

as of the time of the Agreement's formation.[25] Accordingly, because Alaska is not the law that would apply in the absence of a choice-of-law provision, the South Dakota law would apply in evaluating the formation of the Arbitration Agreement.[26]

3. Whether An Arbitrator Can Properly Issue A Statewide Injunction Can Be Evaluated Following Issuance Of The Arbitration Award.

Although Citibank disputes the portion of the Trial Court's Order authorizing an arbitrator to issue an arbitration award for public injunctive relief, that dispute does not warrant the necessity of an immediate appeal. Plaintiff clearly can proceed with her individual claim in arbitration. As a part of that claim, Plaintiff requests injunctive relief. Citibank maintains that, pursuant to the terms of the parties' Agreement (and in accord with *Concepcion* and the FAA), that any such request must be limited to Plaintiff.[27] While the Trial Court concluded that the arbitrator can issue injunctive relief beyond Plaintiff'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. It should be noted, however, that Plaintiff's

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[25] Where the issue is a contract formation (such as the arbitration agreement here), the Restatement factors should be considered as of the time of contracting – not a decade later as Plaintiff proposes. *See McKinney v. National Dairy Council*, 491 F. Supp. 1108, 1113-14 (D.C. Mass. 1980); *Boston Law Book Co. v. Hathorn*, 119 Vt. 416, 423, 127 A.2d 120, 125 (1956).

[26] Order, p. 15-20. Furthermore, even if Alaska did apply in the absence of a choice-of-law provision, Citibank's Arbitration Agreement is not contrary to a fundamental public policy of Alaska, nor does Alaska have a greater interest in the law governing the formation of the parties' Agreement. *Id.*

[27] *See Kilgore v. KeyBank, Nat. Ass'n*, 673 F.3d 947 (9th Cir. Mar. 7, 2012) (holding that California's rule precluding claims for public injunctive relief from arbitration was preempted by the FAA pursuant to *Concepcion*).

contention -- that arbitrators are somehow not suited to issue injunctions – is ***exactly*** the type of propaganda that resulted in passage of the FAA.[28] Accordingly, although the Trial Court did err in authorizing the arbitrator to adjudicate Plaintiff's claim for public injunctive relief, it did so based on the express terms of the parties' Arbitration Agreement, not as a result of Alaska public policy.

4. The Trial Court's Ruling On Waiver Was Not Clearly Erroneous.

Because the question of waiver is a question of fact, "[a] trial court's finding of waiver will therefore be set aside on review only if it is clearly erroneous."[29] Here, the Trial Court's ruling on the waiver issue was not clearly erroneous because Plaintiff's lawsuit is a separate and distinct lawsuit brought ***after*** Citibank sued Plaintiff in a prior lawsuit to recover the balance owed on the Account.

As previously instructed by this Court, "[t]he law favors arbitration" and "waiver is not to be lightly inferred ...."[30] Indeed, "courts should resolve doubts concerning whether there has been a waiver in favor of arbitration."[31] 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

---

[28] *See Concepcion*, 131 S. Ct. at 1745, 1747.

[29] *Blood v. Kenneth Murray Ins., Inc.*, 68 P.3d 1251, 1254 (Alaska 2003) (citing *Miscovich v. Tryck*, 875 P.2d 1293, 1302 (Alaska 1994)).

[30] *Blood*, 68 P.3d at 1254 (citations omitted). Under the FAA, arbitration waivers "are not favored." *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986).

[31] *Id.*; *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.").

party opposing arbitration resulting from such inconsistent acts."[32]

Here, the facts do not establish grounds for waiver,[33] and the Trial Court's determination in that regard was not clearly erroneous. Plaintiff does not establish any grounds for prejudice here. Nor can she establish that Citibank had any notice of the claims that Plaintiff intended on bringing later on. Absent such notice, Citibank's conduct of suing to collect on the debt cannot be deemed inconsistent with an intent to arbitrate Plaintiff's later-filed claim. Moreover, if, as Plaintiff contends, her claim is merely an extension of Citibank's debt collection lawsuit, then Plaintiff's claim plainly would be barred by res judicata because Plaintiff failed to raise the claim in the prior lawsuit. Plaintiff also cannot reasonably argue that the prior Collection Lawsuit was not completed prior to the filing of this lawsuit; collection efforts on a final judgment in a prior action does not mean that the Collection Lawsuit is continuing. Once again, the concept of res judicata precludes any such argument. The various cases cited by Plaintiff are inapposite and easily distinguishable because they pertain to situations either where parties seek arbitration of claims in pending actions (not a separate action, as here) initiated by the party seeking arbitration, or where parties seek to arbitrate the same claims in subsequent actions that the party seeking arbitration has already litigated. The cases do not apply here. Accordingly, because the Trial Court's decision was not clearly erroneous, the Order should stand with respect to any supposed waiver of arbitration.

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[32] *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);
[33] Order, pp. 58-60.

III. CONCLUSION

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

DATED this 29th day of May, 2012.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Respondent Citibank (South Dakota) NA

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

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the typestyle and font used in the foregoing Response to Petition for Review is Times New Roman 13, proportionally spaced.

_____
Jon S. Dawson

CERTIFICATE OF SERVICE

I, Karina Chambers, hereby certify that on May 29, 2012, I caused the foregoing Response to Petition for Review to be served by U.S. Mail, postage paid to the following:

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

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

Karina Chambers
Karina Chambers

Jon S. Dawson
David M. Hymas
DAVIS WRIGHT TREMAINE LLP
701 West 8th Avenue, Suite 800
Anchorage, AK 99501
(907) 257-5300

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.	COPY Original Received FEB 14 2012 Clerk of the Trial Courts Case No. 3AN-11-12054 Civil

APPLICATION FOR COMMISSION TO TAKE OUT OF STATE DEPOSITION AND FOR ISSUANCE OF SUBPOENA DUCES TECUM

Defendant Midland Funding, LLC applies to this Court for a commission to take the deposition in the State of South Dakota of the witness listed below, who is located in South Dakota. The deposition will be taken pursuant to the notice attached to the Affidavit of Jon S. Dawson, and a subpoena to be issued by the appropriate South Dakota

Davis Wright Tremaine LLP
LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

court, the place of residence of the witness. Arrangements for this deposition will be made with a duly authorized court reporter presiding over the deposition, to be conducted on the date and time listed below.

Further application is made for a commission to authorize the appropriate South Dakota court to issue a subpoena to the deponent compelling his/her attendance at the deposition. It is requested that the South Dakota court be authorized to issue the subpoena consistent with the Notice of Deposition. Because this deposition is related to obtaining records demonstrating that this matter is subject to binding arbitration between the parties, the undersigned respectfully urges that the Commission be issued forthwith.

This application is needed because Plaintiff's complaint accuses Midland of violating Alaska's Unfair Trade Practices Act when Midland obtained a default judgment against Plaintiff for an unpaid credit card debt. (Dawson Aff. at ¶ 2.) Midland's defenses include the fact that Plaintiff's credit card agreement includes an arbitration provision. (*Id.*) Midland therefore intends to bring a motion to compel arbitration. (*Id.*)

In preparation to bring its motion to compel arbitration, Midland is now seeking Plaintiff's account records held by Citibank. (*Id.* at ¶ 3.) The commission sought is necessary to allow the foreign court to issue the appropriate subpoena.

Deponent: Citibank, Records Custodian, 701 E. 60th St. North, Sioux Falls, South Dakota 57117-6034

Davis Wright Tremaine LLP
LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

Documents to Bring: Deponent is requested to bring the following records: For the period January 2008 to the present,

(1) All account notes for the Account (defined below);

(2) All credit card 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, "Account" means Account No. **** **** **** 3235, and "Cardholder" means Cynthia Stewart.

Date and time: Telephonic on March 14, 2012 at 10:00 A.M. at the offices of Moore, Rasmussen, Kading & Kunstle, LLP, 2415 West 57th Street, Sioux Falls, South Dakota 57108.

DATED this 14th day of February, 2012.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Defendant Midland Funding, LLC

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

Davis Wright Tremaine LLP
LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

Certificate of Service

On the 14th day of February, 2012, a true and correct copy of the foregoing document was sent by U.S. Mail, postage paid, to the following party:

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

Marc Wilhelm
Richmond & Quinn
360 K Street, Suite 200
Anchorage, AK 99501

By: Karina Chambers
Karina Chambers

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Jon S. Dawson
David M. Hymas
DAVIS WRIGHT TREMAINE LLP
701 West 8th Avenue, Suite 800
Anchorage, AK 99501
(907) 257-5300

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.	COPY Original Received FEB 14 2012 Clerk of the Trial Courts Case No. 3AN-11-12054 Civil

AFFIDAVIT OF JON S. DAWSON IN SUPPORT OF APPLICATION FOR COMMISSION TO TAKE OUT-OF-STATE DEPOSITION AND FOR ISSUANCE OF SUBPOENA DUCES TECUM

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Davis Wright Tremaine LLP
LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

JON S. DAWSON, being first duly sworn, deposes and says:

1. I am a lawyer with Davis Wright Tremaine, counsel for Defendant Midland Funding, LLC in this action. This affidavit is made in support of Defendant's Application For Commission To Take Out-of-State Deposition And For Issuance Of A Subpoena Duces Tecum.

2. Plaintiff's complaint accuses Midland of violating Alaska's Unfair Trade Practices Act when Midland obtained a default judgment against Plaintiff for an unpaid credit card debt. Midland's defenses include the fact that Plaintiff's credit card agreement includes an arbitration provision. Midland therefore intends to bring a motion to compel arbitration.

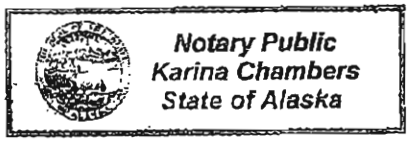
3. In preparation to bring its motion to compel arbitration, Midland seeks Plaintiff's account records held by Citibank. The commission sought is necessary to allow the foreign court to issue the appropriate subpoena. The Notice of Records Deposition to be served on Citibank is attached to this Affidavit as Exhibit A.

DATED this 14th day of February, 2012, at Anchorage, Alaska.

Jon S. Dawson

Davis Wright Tremaine LLP
LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

SUBSCRIBED AND SWORN TO before me this 14th day of February, 2012.



Karina Chambers
Notary Public in and for Alaska
My Commission Expires: 1/31/2013

Certificate of Service

On the 14th day of February, 2012, a true and correct copy of the foregoing document was sent by U.S. Mail, postage paid, to the following party:

James J. Davis, Jr.	Marc Wilhelm
Northern Justice Project	Richmond & Quinn
310 K Street, Suite 200	360 K Street, Suite 200
Anchorage, AK 99501	Anchorage, AK 99501

By: Karina Chambers
Karina Chambers

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Jon S. Dawson
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DAVIS WRIGHT TREMAINE LLP
701 West 8th Avenue, Suite 800
Anchorage, AK 99501
(907) 257-5300

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 Civil

NOTICE OF RECORDS DEPOSITION

To: Citibank
Records Custodian
Attn: Legal Dept./Subpoenas
701 E. 60th St. North
Sioux Falls, South Dakota 57117-6034

EXHIBIT A
Page 1 of 4

Davis Wright Tremaine LLP
LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

PLEASE TAKE NOTICE that Midland Funding, LLC shall take the deposition of the Records Custodian for Citibank on March 14, 2012, at 10:00 a.m., at the offices of Moore, Rasmussen, Kading & Kunstle, LLP, 2415 West 57th Street, Sioux Falls, South Dakota 57108, upon oral examination before a notary public, or before some other officer authorized by law to administer oaths. The examination will continue from day to day until completed. You are invited to attend and cross-examine. 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.

DATED this 14th day of February, 2012.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Defendant Midland Funding, LLC

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

Certificate of Service

On the 14th day of February, 2012, a true and correct copy of the foregoing document was sent by U.S. Mail, postage paid, to the following party:

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

Marc Wilhelm
Richmond & Quinn
360 K Street, Suite 200
Anchorage, AK 99501

By:_____
Karina Chambers

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Anchorage, Alaska 99501
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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 card 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, "Account" means Account No. **** **** **** 3235, and "Cardholder" means Cynthia Stewart.

DECLARATION FOR RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY

Re: Notice of Records Depositions, and Subpoena for Taking Deposition and Exh. A thereto, in *Stewart v. Midland Funding LLC, et al.*, Case No. 3AN-11-12054 Civil (Alaska Superior Ct.)
Account Holder: Cynthia Stewart Account Number: **** **** **** 3235

I, _____, declare that I am employed by _____ (the "Bank") in the _____ Department and am the Bank's designated duly authorized Custodian of Records for documents and/or information produced under the above referenced legal order. The Bank reserves its right to designate another Custodian as it deems appropriate in the event an actual appearance is required concerning the records produced herein.

The records produced herewith are true and correct copies of all of the Bank's documents that are responsive to the above-referenced Notice of Records Deposition and Subpoena served pursuant to the above referenced case. I certify the authenticity of the records and that they were:

A. Made at or near the time of the occurrence, condition, or event of the matters set forth by, or from information transmitted by, a person with knowledge of these matters.

B. Kept in the course of regularly conducted activity.

C. Made by the regularly conducted activity as a regular practice, by the personnel of the business.

I declare under penalty of perjury under the law(s) of the State of South Dakota that the foregoing is true and correct.

Executed on this ____ day of _____, 2012.

_____

Custodian of Records

EXHIBIT A
Page 4 of 4

Jon S. Dawson
David M. Hymas
DAVIS WRIGHT TREMAINE LLP
701 West 8th Avenue, Suite 800
Anchorage, AK 99501
(907) 257-5300

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

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND STAY ACTION

Table of Contents

Defendant Midland Funding, LLC ("Midland") submits this Memorandum in support of its Motion to Compel Arbitration and Stay Action.

I. INTRODUCTION

Plaintiff Cynthia Stewart's Citibank credit card account is subject to a binding arbitration agreement contained in her credit card agreement. The Arbitration Agreement is a valid and enforceable agreement to arbitrate under both the Federal Arbitration Act, 9 U.S.C. §§1, *et seq*. and South Dakota law, which is applicable pursuant to the choice-of-law provision in the Card Agreement. Plaintiff's claims and legal theories are clearly within the Arbitration Agreement's broad scope, and the Arbitration Agreement expressly requires that Plaintiff's claims be arbitrated on an individual basis. Midland has notified Plaintiff of its election to arbitrate her claims. For the following reasons, Midland's motion should be granted, Plaintiff should be compelled to arbitration on an individual, non-class basis, and this action should be stayed pending the outcome of arbitration.

II. FACTS

A. Plaintiff's Account, The Operative Card Agreement, And The Binding Arbitration Agreement.

Plaintiff is a resident of Anchorage, Alaska. (First Amended Class Action Complaint ("Complaint" or "Compl.") ¶ 4.). She 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 South Dakota. (*See* Decl. for Records of Regularly Conducted Business Activity by Mariya Kharlamova ("Kharlamova Decl.")

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(Account Holder: Cynthia Stewart); *see also* MID0007 (Citibank's internal records noting that "Date Open 03-02").) The last four digits of Plaintiff's account number were XXXX-XXXX-XXXX-3235. (*See* Kharlamova Decl.)

Over the years that Plaintiff held her credit card, her credit card account was governed by a succession of card agreements. When Citibank mailed Plaintiff her January 2009 account statement, Citibank included a "Notice of Change in Terms, Right to Opt Out and Information Update" and the then-current form of Card Agreement. (*See* MID0093-95 (Plaintiff's January 2009 Account Statement); *see also* MID0051-68 (Change in Terms and Card Agreement.); *see also* MID0047 (Citibank's internal records noting that "JAN 2009 CIT [Change-in-terms]–SEGA027-SM3C0109-P+19.99-STMT INSERT" was sent to Plaintiff).)

Citibank included the following special message (in all capital letters) in Plaintiff's January 2009 account statement: "PLEASE SEE THE ENCLOSED NOTICE OF CHANGE IN TERMS FOR IMPORTANT INFORMATION." (MID0093-95.) The Change in Terms in turn informed Plaintiff that the Card Agreement replaced her prior agreement and would become effective on or after February 3, 2009. (Card Agreement at 1-2.) However, Plaintiff was given the express opportunity to opt out of the Card Agreement:

> **Right to Opt Out.** To opt out of these changes, you must call or write us by March 31, 2009. When you do, you must tell us that you are opting out. Call us at the toll-free number shown on your account statement or on the back of your card. (Please have your account number available.) Write us at PO BOX 6280, Sioux Falls, SD 57117-6280.

Wright Tremaine LLP
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> (Include your name, address, and account number on your letter.) If you opt out of these changes, we will close your account, unless it is already closed. You must then repay the balance under the current terms.

(*Id.* at p. 2 (emphasis in original).)

Plaintiff did not opt out of the Card Agreement, and Plaintiff's account was therefore allowed to remain open. The Card Agreement became effective on February 3, 2009, (*id.* at 1), and Plaintiff continued making regular payments on her account for some months thereafter. (*See, e.g.,* MID0096-107 (Plaintiff's Account Statements from February-May 2009).)

The Card Agreement included an arbitration provision (the "Arbitration Agreement"). (*See id.* at 13-15.)[1] The Arbitration Agreement provides that either party can elect mandatory binding arbitration as follows:

[1] Although the Change in Terms identified the Arbitration Agreement as being a new term, Sears' card agreements have in fact contained arbitration agreements since at least 1999. *See, e.g., Daugherty v. Experian Info. Solutions, Inc.*, Case No. C 11-01285 SBA, slip. op. at 2 (N.D. Cal. March 8, 2012) (noting that Sears changed the terms of their agreements to include arbitration provisions beginning in 1999); *see also* Decl. of Adam R. Pogwist In Support Of Motion To Compel Arbitration, Case No. C 11-01285 SBA, ¶¶ 6-7 & Exs. 1-5 (N.D. Cal. filed Dec. 2, 2011) (attaching Sears 1998-2003 card agreements on which the *Daugherty* district court relied on in granting Citibank's motion to compel arbitration). *Accordingly, the card agreement that was replaced by the operative Card Agreement—and every other card agreement that governed Plaintiff's account over the life of that account—contained an arbitration agreement.* (Midland has attached courtesy copies of the *Daugherty* order and the Pogwist Declaration to this Memorandum as Exs. 1 & 2.).

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ARBITRATION

PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. **IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.**

Agreement to Arbitrate: Either you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called "Claims").

Claims Covered

What Claims are subject to arbitration? All Claims relating to your account, a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise; and Claims made independently or with other claims. A party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party. Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis.

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

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> **What time frame applies to Claims subject to arbitration?** Claims arising in the past, present, or future, including Claims arising before the opening of your account, are subject to arbitration.
>
> **Broadest Interpretation.** Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").
>
> * * *
>
> **Who can be a party?** Claims must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party. If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claim in arbitration as a class action, private attorney general action or other representative action, nor may such Claim be pursued on your or our behalf in any litigation in any court. . . .

(*Id.* at 13-15 (bolding and italics in original, underlining added).)

The Arbitration Agreement includes specific language (underlined above) that requires that any arbitration may resolve only individual claims. The Arbitration Agreement also includes terms: (i) excluding small claims court actions; (ii) allowing for the parties to choose between nationally recognized arbitration firms, including the American Arbitration Association; and (iii) allowing for the reimbursement and/or advancement of arbitration fees. (*Id.* at 13-16.)

B. Citibank Assigns Plaintiff's Account To Midland.

The Card Agreement provides that Citibank "may assign any or all of our rights and obligations under the Agreement to a third party." (*Id.* at 16.) The Arbitration Agreement in the Card Agreement specifically states that it "shall survive . . . any

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transfer, sale or assignment of your account, or any amounts owed on your account, to any other person or entity." (*Id.*)

On or around January 22, 2010, Citibank sold a number of credit card accounts to Midland, a Delaware corporation with a principal office in San Diego, California. (Aff. of Kyle Hannan ¶¶ 2-3; *see also* Ex. A thereto.) In the Bill of Sale and Assignment ("Bill of Sale") related to that sale Citibank assigned Midland "all of [Citibank's] right, title and interest in and to the Accounts described in Exhibit 1 and the Final Data File delivered on or about January 20, 2010." (*Id.* ¶ 4 & Ex. A.)[2]

The Final Data File contains the individual customer data for the Asset Schedule of accounts Citibank sold Midland. (*Id.* ¶ 7.) Midland extracted Plaintiff's Sears Gold MasterCard account data from the Final Data file and confirmed that her account is one of the Sears MasterCard accounts that Citibank sold to Midland. (*Id.* ¶ 8; Ex. C.) Thus, Citibank assigned to Midland all of Citibank's rights under Plaintiff's account and the Card Agreement, including its right to compel arbitration under the Arbitration Agreement.

C. Plaintiff's Complaint Alleges Claims Covered By The Arbitration Agreement.

Plaintiff ultimately failed to pay amounts owing on her credit card, and Midland obtained a default judgment against her in Anchorage District Court for $3,655.37.

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[2] Exhibit 1 to the Bill of Sale is the Asset Schedule of accounts Citibank sold to Midland. (*Id.* ¶ 5; *see also* Ex. B.) The Asset Schedule lists the accounts sold to Midland and includes various Sears MasterCard accounts. (*Id.* ¶ 6; Ex. B.)

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(Compl. ¶¶ 8-9.) Included in the judgment were attorney fees awarded by the court in the amount of $371.04. (*Id.* ¶¶ 9-11.) Plaintiff contends in this action that "defendants" allegedly violated Alaska law by seeking that amount. (*Id.* ¶¶ 12-16; 21-25.) Thus, Plaintiff's claims in this action relate to her account and to Midland's enforcement of its rights under the Card Agreement—matters that are expressly covered by the Arbitration Agreement. (Card Agreement at 13 (MID0063).) Plaintiff brings her claim on her own behalf and purportedly on behalf of a putative class of similarly situated persons. (Compl. ¶¶ 17-20.) However, the Arbitration Agreement provides that *claims sought as part of a class action must be arbitrated on an individual, non-class basis, and the arbitrator may award relief only on an individual, non-class basis.* (Card Agreement at 13 (MID0063).)

By letter dated January 30, 2012, Midland demanded arbitration pursuant Plaintiff's Arbitration Agreement. (Aff. of Jon S. Dawson ¶ 2, and Ex. A thereto.) Plaintiff has not complied with Midland's demand. (Dawson Aff. ¶ 3.)

III. ARGUMENT

A. Under The FAA, This Court Should Compel Arbitration Pursuant To The Express Terms Of The Arbitration Agreement.

1. General Principles Of Applying the FAA.

Section 2 of the FAA mandates that binding arbitration agreements in contracts "evidencing a transaction involving [interstate] commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA applies to all transactions directly or indirectly

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affecting interstate commerce. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967). The Act "embodies the national policy favoring arbitration[,] and places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Section 2 of the FAA reflects the principle that "arbitration is a matter of contract" and promotes a "liberal federal policy favoring arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (Apr. 27, 2011); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (stating that arbitration agreements falling within the scope of the FAA "must be 'rigorously enforce[d]'" (citations omitted)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25; *see also Perry*, 482 U.S. at 490.

In *AT&T Mobility*, the United States Supreme Court confirmed that the "overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." 131 S. Ct. at 1748; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (Apr. 27, 2010); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). And by consenting to bilateral arbitration, the "parties forgo the procedural rigor and appellate review of the courts in

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order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen*, 130 S. Ct. at 1775 (citations omitted).

"Underscoring the consensual nature of private dispute resolution . . . parties are 'generally free to structure their arbitration agreements as they see fit.'" *Id.* at 1774 (citations omitted). Parties may, therefore, "agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes." *AT&T Mobility*, 131 S. Ct. at 1748-49 (emphasis added) (citations omitted). 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." *Id.* at 1749. Thus, "[i]t falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Stolt-Nielsen*, 130 S. Ct. at 1774-75; *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Finally, it is well-settled that the party resisting arbitration bears the burden of showing that the arbitration agreement is invalid or does not encompass the claims at issue. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

2. The FAA Applies In This State Court Action.

Last month, in a per curiam decision, the United States Supreme Court confirmed that Section 2 of the FAA applies in state courts. *See, e.g., Marmet Health Care Ctr.,*

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