No. S224086

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SHARON MCGILL, an individual,
Plaintiff and Respondent,

v.

CITIBANK, N.A.,
Defendant and Appellant.

AFTER DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION THREE
CASE G049838

FROM THE SUPERIOR COURT,
COUNTY OF RIVERSIDE,
CASE NO. RIC1109398, ASSIGNED FOR ALL PURPOSES
TO JUDGE PRO TEM JOHN W. VINEYARD,
DEPARTMENT 12

RESPONDENT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Citibank's Answer Brief is an exercise in misdirection. Sidestepping Sharon McGill's primary arguments, Citibank falls back on broad assertions that the Federal Arbitration Act ("FAA") clears everything in its path. According to Citibank, a contractual term banning its customer-signatories from pursuing all non-individual claims and remedies, simply because it is contained within an arbitration agreement, must categorically be enforced by courts. But the FAA requires courts to place arbitration agreements on "an equal footing" with other agreements. It does not render arbitration agreements *more enforceable* than other agreements, as Citibank contends. This term, which would be clearly illegal and unenforceable under California law if contained in an ordinary contract, cannot be made legal merely by inclusion in an arbitration clause. The FAA's savings clause, which incorporates generally applicable state law defenses to contract enforcement, would forbid it.

Citibank also fails to contend with the precedents of this Court or key decisions of the United States Supreme Court. Taken together, these controlling decisions stand for the proposition that state law rules that invalidate prospective waivers of statutory rights are not pre-empted by the FAA, unless such a state law rule would interfere with "fundamental attributes of arbitration," such as by requiring complex procedures. Citibank fails to address this point, instead broadly asserting that the non-waiver (or "effective vindication") principle applies only to federal statutory rights. This facile response ignores both this Court's numerous precedents that have

incorporated the non-waiver principle into the FAA's savings clause, explaining that arbitration law's legitimacy derives from conferring minimum protections to parties when claims are transferred to the arbitral forum, and the U.S. Supreme Court's decisions that have applied the non-waiver principle to state law ensure fairness.

Indeed, Citibank only superficially deals with this Court's very recent FAA decisions, discussed extensively by McGill. In *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348, the Court held that a waiver of the right to pursue representative actions under the Labor Code Private Attorneys General Act ("PAGA") is unenforceable and that such a rule is not preempted by the FAA. Critical to *Iskanian*'s holding are the findings that the right to bring a PAGA action is an unwaivable statutory right pursued for the public's benefit and that the FAA does not necessarily extend to public rights. Citibank ignores these aspects of *Iskanian*.

Furthermore, Citibank's discussion of *AT&T Mobility v. Concepcion* (2011) 363 U.S. 333 ignores this Court's thorough consideration of that decision in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 ("*Sonic II*"). *Sonic II* explained that, under *Concepcion*, rules that interfere with the "fundamental attributes" of arbitration of streamlined resolution, like requiring class procedures in arbitration, are preempted. Conversely, state rules that neither interfere with arbitration's fundamental attributes nor facially discriminate against arbitration are *not* preempted.

Under this Court's precedents, generally applicable state law rules forbidding prospective waiver of unwaivable statutory rights will not be preempted so long as that rule does not interfere with the fundamental attributes of arbitration. By evading this key holding, Citibank fails to confront a threshold question: how would preservation of a right to pursue public injunctive relief interfere with arbitration's fundamental attributes? In fact, it would not so interfere, and therefore a rule preserving the right to pursue public injunctive relief is not preempted. Once the offending term is severed, the most logical next step is to remand the matter to the trial court for further determination as to where McGill's public injunction claim should be resolved.

If the Court takes that route, it need not reach a decision regarding the vitality of *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066 and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303. However, even if considered, the Court should find that the "*Broughton-Cruz* rule" survives. As applied here, the *Broughton-Cruz* rule does no more than preserve the right of parties to pursue the statutory remedy of public injunctive relief in some forum.

Citibank claims that this Court's decisions in *Broughton* and *Cruz* were abrogated by *Concepcion*'s statement that the FAA pre-empts state rules "prohibiting outright the arbitration of a particular type of claim." The fatal flaw in this argument—a point never addressed by Citibank—is that this aspect of *Concepcion* did not break any new ground and relied on decisions

that predated *Broughton* and *Cruz* and had carefully been considered and distinguished by this Court. Because there has been no change in law, *Broughton* and *Cruz* have not been abrogated.

However, the Court need not reach that issue. This Court should strike Citibank's contractual ban on non-individual claims and relief under this Court's precedents and return the matter for further consideration as to where McGill's public injunction claim should be resolved.

ARGUMENT

I. CITIBANK'S CONTRACTUAL BAN ON THE RIGHT TO PURSUE PUBLIC INJUNCTIVE RELIEF CANNOT BE ENFORCED

A. McGill's Argument That Citibank's Prospective Waiver of Statutory Remedies Is Unenforceable Was Properly Presented Below, And In Any Event Should Be Decided Here

Citibank first argues that McGill "never properly preserved" the argument that Citibank's express contractual ban on consumers' right to pursue non-individual claims and relief, including her right to pursue public injunctive relief, is unenforceable. (Answer Brief on the Merits ["Ans. Brf."], at pp. 23-24.) Not so.

On June 5, 2014, the Court of Appeal vacated the oral argument date and requested an optional letter brief on the impact of the then-newly issued *Iskanian* decision. In response, McGill devoted three full pages of her letter brief dated July 23, 2014 to the argument that her right to pursue public injunctive relief is a substantive statutory right that cannot be prospectively waived by Citibank's arbitration agreement. This argument was also prominently featured in McGill's Petition for Review, at pp. 24-27. It is simply not true that McGill failed to present this argument.

More broadly, this appeal centered on the scope of FAA preemption from the outset. In her Respondent's Brief filed on December 6, 2012, McGill elucidated the FAA's non-waiver principle, arguing that cases like *Mitsubishi Motors v. Soler Chyrsler-Plymouth* (1985) 473 U.S. 614 (*"Mitsubishi"*), *Gilmer v.*

Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, and *EEOC v. Waffle House* (2002) 534 U.S. 279, among others, stand for the proposition that courts cannot enforce agreements that force employees or consumers prospectively to waive statutory rights and remedies. (See Resp.'s Brief on 13-15.) This principle lies at the very core of McGill's contention that the FAA does not compel Citibank customers to forfeit statutory remedies. Thus, this is not like the inapposite cases cited by Citibank, where courts have declined to consider entirely distinct issues that had never been raised by any party (or that involved disputed factual issues).[1] (Ans. Brf. at p. 24 & fn.5.)

Furthermore, even if McGill were presenting a "new theory," it pertains only to a question of law on undisputed facts and therefore may be considered. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [new theories of law on undisputed facts may be presented on appeal because there is no unfairness to opposing parties].) The at-issue arbitration agreement is in the record (1

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[1] (See *Flannery v. Prentice* (2001) 26 Cal.4th 572, 591 [disallowing a party's newly raised argument that "collateral proceedings" for attorneys' fees should not be permitted in a case deciding whether the plaintiff or her attorneys "own" the attorneys' fees award in a Fair Employment and Housing Act ("FEHA") action]; *Acquire II, Ltd. v. Colton Real Estate Grp.* (2013) 213 Cal.App.4th 959, 977, fn.12 [rejecting a party's attempt to introduce factual examples of defendant's mismanagement of funds at oral argument in an appeal regarding arbitration, where the newly-raised examples had no bearing on public policy]; *Gentis v. Safeguard Bus. Sys.*, Inc. (1998) 60 Cal.App.4th 1294, 1308 [commenting that the defendants could have sought an opinion letter from the attorney general to support their claims but failed to do so; moreover, did not actually reject any newly-raised issue by any party].)

CT 109-10), and no party disputes its contents or the facts surrounding its formation.

This Court also retains jurisdiction to consider "important questions of public policy" that were not raised below. (See, e.g., *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, fn.3 [ruling on the "validity of municipal rent controls under antitrust law [because it] raises extremely significant issues of public policy and public interest" even though the appellant did not raise the issue below].) As set forth in the Opening Brief on the Merits ("Opng. Brf."), the public injunction remedy provided by California's consumer protection statutes is a critical component of California's consumer protection regime. (Opng. Brf. at pp. 15-17.) Recently, this Court has acknowledged that the policies at issue here are important, declaring that "the public has a strong interest in ensuring that fraudulent business practices are enjoined." (*Sanchez v. Valencia Holding Co.* (2015) 61 Cal.4th 899, 917.) If Citibank's position in this case prevails, insertion of arbitration clauses eliminating the right to pursue public injunction relief will become the norm. Therefore, even if McGill had not properly raised the issue below, on public policy grounds this Court should consider whether Citibank's contractual ban on a consumer's right to pursue any non-individual claims and/or remedies in any forum is made enforceable solely by virtue of being contained within an arbitration agreement.

B. The FAA Does Not Mandate Enforcement Of A Contractual Term That Causes A Party To Forfeit Statutory Remedies

1. The Non-Waiver Principle Precludes Enforcement Of Citibank's Contractual Ban Of Non-Individual Claims And Remedies

At the outset, Citibank contends the FAA requires courts to "enforce arbitration agreements as written." (Ans. Brf. at p. 24.) According to Citibank, the FAA does not protect parties from forfeiting statutory rights—or, at most, only protects federal statutory rights from waiver. Neither is true.

First, Citibank never engages with the key aspect of FAA jurisprudence, that, when an arbitration clause operates "as a prospective waiver of a party's right to pursue statutory remedies..., [the Court] would have little hesitation in condemning the agreement as against public policy." (*Mitsubishi Motors*, 473 U.S. at p. 637 fn.19.) One of the issues in *Mitsubishi* was whether the Clayton Act's treble damages provision, which "play[s] an important role in penalizing wrongdoers and deterring wrongdoing," is available in an arbitration of antitrust claims. (*Id.* at p. 636.) Acknowledging that those remedies are both critical to antitrust enforcement and fully available in arbitration, the *Mitsubishi* Court declared that "[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." (*Id.* at p. 628.) In other words, under *Mitsubishi*, the legitimacy of arbitration depends upon the preservation of the parties' substantive

statutory rights when their claims are transferred to the arbitral forum.

This fundamental principle of the FAA has been reaffirmed by the Court numerous times. (See Opng. Brf. at pp. 32-35 [citing cases].) However, without directly responding to McGill's arguments, Citibank simply contends that *American Express Co. v. Italian Colors Rest.* (2013) 570 U.S. ___, 133 S.Ct. 2304, 2310 ("*Italian Colors*"), by rejecting an "effective vindication" defense to the enforcement of a class waiver in that case, forecloses McGill's argument. (Ans. Brf. at p. 29.) This is incorrect. In *Italian Colors*, the plaintiffs argued against enforcement of a class action waiver that would, as a practical matter, end their case because it would make proof of liability prohibitively expensive for individual plaintiffs. (*Italian Colors*, 133 S.Ct. at p. 2308.) The *Italian Colors* plaintiffs showed that necessary expert witness analysis would have cost several hundred thousand dollars while the maximum individual recovery for individual plaintiffs would have been $12,850, or $38,549 when trebled. (*Ibid.*) Thus, absent the class action device, no rational plaintiff would pursue these claims.

Rejecting the plaintiff's argument, the *Italian Colors* Court drew a distinction between a contractual term that, if enforced, creates practical barriers to proving liability on a party's statutory claims and one that literally cuts off the right to pursue those claims in any forum. In *Italian Colors*, the plaintiff merely showed that "it is not worth the expense involved in providing a statutory remedy [which] does not constitute the elimination of

the *right to pursue* that remedy." (*Italian Colors*, 133 S.Ct. at p. 2310 [emphasis in original].) According to *Italian Colors*, practical impediments to plaintiffs' pursuit of claims do not "eliminate[] those parties' right to pursue their statutory remedy." (*Ibid.*) Importantly, however, the Court emphasized that the non-waiver (i.e., "effective vindication") principle would "certainly cover a provision in an arbitration agreement **forbidding the assertion of certain statutory rights.**" (*Ibid.* [emphasis added].)

In other words, the at-issue agreement in *Italian Colors* was enforceable because it did not actually forbid the plaintiffs' ability to pursue their statutory remedies. It follows that an agreement that *does* categorically forbid the pursuit of certain statutory remedies would be unenforceable. That is precisely the situation presented here: McGill, after all, does not argue that Citibank's agreement prohibits her from banding together with other consumers to share costs in proving the merits of her claims, the effect of which *indirectly* would render her unable to vindicate her statutory rights, as did the plaintiffs in *Italian Colors*. Rather, Citibank's agreement, as written, would directly and ***expressly eliminate*** McGill's right to pursue any non-individual claims or remedies in any forum, including private attorney general actions or public injunctive relief. Notably, Citibank does not dispute that its agreement, if enforced literally, would do just that. This is precisely the type of agreement that *Italian Colors* strongly suggested would not be enforceable.

Moreover, members of this Court recently relied on *Italian*

Colors in recognizing that the FAA does not mandate enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights." (*Iskanian*, 59 Cal.4th 348, 395 (conc. opn. of Chin, J.) [citing *Italian Colors*, 133 S.Ct. at p. 2310].) In his concurring opinion in *Iskanian*, Justice Chin concluded that because the defendant's mandatory arbitration agreement barred its employees from seeking PAGA penalties in any forum, it fell within the exception stated in *Italian Colors*. (*Ibid.*)

Citibank does not dispute the existence of the non-waiver principle. Rather, Citibank contends that the non-waiver (or "effective vindication") principle does not extend to state statutory rights. (Ans. Brf. at pp. 29-31.) This position is contradicted by numerous majority opinions of this Court. (See, e.g., *Armendariz v. Found. Health Psychcare Svcs., Inc.* (2000) 24 Cal.4th 83, 98-103 [analyzing *Mitsubishi* and its progeny and finding that "an arbitration agreement cannot be made to serve as a vehicle for the waiver of [unwaivable] statutory rights"].)

This Court in *Armendariz* held that, in enforcing arbitration agreement, courts must adopt minimum standards to prevent statutory claims that are unwaivable in court from being waived simply because the parties have agreed to arbitrate the claims. (*Ibid.*) In *Armendariz*, the unwaivable statutory rights at issue are those conferred by FEHA, a California statute. (*Id.* at p. 101 ["[I]t is evident that an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA."].) A term in the at-issue arbitration

agreement in that case restricted the plaintiff's right to statutory attorneys' fees, punitive damages, and injunctive relief, all of which are available to a party pursuing claims under FEHA. Striking that provision, *Armendariz* stated that "the principle that an arbitration agreement may not limit statutorily imposed remedies... appears to be undisputed." (*Id.* at p. 103.)

Subsequently, in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1096 (also ignored by Citibank), this Court expressly disapproved of a lower court's finding that the non-waiver principle applies only to federal statutory rights, finding that the "long-standing ground for refusing to enforce a contractual term is that it would force a party to forgo unwaivable public rights" is incorporated into the savings clause of Section 2 of the FAA as a generally applicable state contract defense. (*Id.* at p. 1079 [emphasis added].) Thus, while "a party compelled to arbitrate such rights does not waive them, but merely 'submits to their resolution in the arbitral, rather than judicial forum,' arbitration cannot be misused to accomplish a de facto waiver of these rights." (*Ibid.* [quoting *Gilmer*, 500 U.S. at p. 26].) *Little* illustrates the non-waiver principle as applied to state-conferred rights. At issue in *Little* is the right to be protected from termination for reasons that violate public policy pursuant to *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178 ("*Tameny*") is unwaivable almost "by definition." (*Id.* at p. 902.) Because this right under state law was subject to *Armendariz*'s protections against statutory forfeiture, the *Little* Court held that the employee cannot be forced to share the prohibitive costs of

arbitration, if that operates as a de facto waiver of his *Tameny* claims. (*Id.* at pp. 908-909.) Importantly, the Court did not hold that the *Tameny* claims cannot be arbitrated; rather the Court simply instructed the lower court to hold proceedings consistent with its holding (i.e., the plaintiff may arbitrate the *Tameny* claims if the defendant bears the arbitral costs) to ensure that the plaintiff does not forfeit those rights if the claims are arbitrated. (*Ibid.*)

There is no daylight between this Court's reasoning in *Armendariz* and *Little* and that of the United States Supreme Court in *Italian Colors* when it comes to agreements that categorically ban the pursuit of a statutory remedy: such agreements are not enforceable. This is because the non-waiver principle is a fundamental limiting principle built into the FAA essential to arbitration's legitimacy and the prevention of illegal contracts. The non-waiver principle simply "sets a standard by which arbitration agreements and practices are to be measured, and disallows forms of arbitration that in fact compel claimants to forfeit certain substantive statutory rights." (*Armendariz*, 24 Cal.4th at pp. 99-100.) *Little* further explains that "*Armendariz*'s requirements are... applications of **general state law contract principles** regarding the unwaivability of public rights to the unique context of arbitration, and accordingly are not preempted by the FAA." (*Little*, 29 Cal.4th at p. 1079 [emphasis added].)

In short, under *Little* and *Armendariz*, generally applicable California law principle invalidating contracts that prospectively waive unwaivable statutory rights also apply to arbitration

agreements, since the savings clause of the FAA makes such generally applicable state law defenses applicable to agreements govern by the FAA.

Furthermore, in its most recent decision on the FAA, *DIRECTV, Inc. v. Imburgia* (Dec. 14, 2015, No. 14-462) ___ U.S. __, [2015 WL 8546242] ("*Imburgia*"), the United States Supreme Court stated that courts applying state law must place "arbitration contracts 'on an equal footing with all other contracts.'" (*Id.* at p. *6 [quoting *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443].)[2] *Imburgia* emphasized that the "equal footing" principle relied on by the Court is "well within the confines of (and goes no further than) present well-established law on the FAA." (*Id.* at p. *8.) Because the non-waiver principle embodied in *Little* and *Armendariz* simply places arbitration agreements on an equal footing with other

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[2] Notably, the actual *Imburgia* decision bears little resemblance to the sweeping decision anticipated by Citibank after reading some tea leaves. (Ans. Brf. at 25 [arguing that *Imburgia*'s oral argument transcript demonstrated that "[A] majority of the Supreme Court[] would reject any state-law rule of contract interpretation that is applied to undermine the federal policy to enforce arbitration agreements as written."].) Nowhere in *Imburgia* does the Court endorse the notion that a contract must, without exception, be "enforced as written" as long as it contains an arbitration clause. Indeed, *Imburgia*'s instruction to courts to place arbitration agreements on "an equal footing" with other contracts is at odds with Citibank's apparent position that arbitration agreements are more enforceable than other agreements. (Ans. Brf. at pp. 24-26.) After all, a non-arbitration agreement that prospectively waives statutory claims and relief—including public injunctions—would be held unenforceable as illegal and contrary to public policy. (See Civ. Code § 1668 [exculpatory contracts are illegal and unenforceable].)

contracts, it does not run afoul of the FAA. (See, e.g., *Armendariz*, 24 Cal. 4th at p. 127 [finding that, under its holding, "arbitration agreements are neither favored nor disfavored, but simply placed on an equal footing with other contracts."].)

The above also refutes Citibank's reliance on *Ferguson v. Corinthian Colleges* (9th Cir. 2013) 733 F.3d 928, 936, which found that the non-waiver principle is aimed purely at reconciling conflicting federal statutes. Notably, *Ferguson* also failed to consider that there is already a longstanding, separate doctrine that guides courts on how to do just that. (*United States v. Fausto* (1988) 484 U.S. 439, 453 [discussing implied repeal of conflicting law].) And when two federal statutes actually collide, the court must perform a conflict analysis much like the one performed by this Court in its recent discussion of the National Labor Relation Act's interaction with the FAA. (*Iskanian*, 59 Cal.4th at pp. 367-374.) It makes little sense for the United States Supreme Court to invoke a separate FAA-based principle (i.e., the non-waiver principle) when these doctrines (such as implied repeal) were already in place to guide courts. It is no surprise therefore that the U.S. Supreme Court itself invoked the non-waiver principle in a case involving California state law to ensure that its decision did not violate the FAA's threshold protections.[3] (*Preston v. Ferrer* (2009) 552 U.S. 46, 359 [stating

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[3] Citibank brushes aside *Preston* by observing that the Court did not actually apply the non-waiver or effective vindication principle to deny arbitration. (Ans. Brf. at p. 30, fn.7.) But this sidesteps the question McGill posed as to why the *Preston* Court, on an issue of state law, would perform the non-

the FAA cannot compel a party to relinquish any substantive right.... [state] law may afford him."].)

Citibank simply has no answer to McGill's central point that, as a matter of generally applicable contract law, an agreement cannot prospectively force the forfeiture of unwaivable statutory rights. (See Opng. Brf. at pp. 35-36, 38-39.)

Applied here, the non-waiver principle invalidates the broad, prospective waiver of statutory rights contained in Citibank's arbitration agreement. The scope of Citibank's contractual ban is breathtaking, covering "private attorney general actions," "other representative actions," and other claims "be[ing] pursued on your or our behalf in any litigation in any court." (1 CT 110.) This means that not only can McGill not pursue injunctive relief for anyone else in court *or* in arbitration, she is banned even from being a *beneficiary* of any representative action. McGill would be unable to benefit from any of the protections provided by a public injunction, or participate as a class member in a class action settlement. Such a provision carves out a gaping void in California's consumer protection regime, essentially precluding signatories from any protection afforded by a court order. It cannot be enforced.

2. Citibank's View of FAA Preemption Is At Odds With This Court's Precedents

The flipside to Citibank's disavowal of the non-waiver principle is its insistence that the FAA mandates that its

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waiver analysis in the first place if that analysis is limited to federal statutes. As to this critical inquiry, Citibank has no answer.

arbitration agreement, including its blanket ban on non-individual statutory claims and remedies, must be literally enforced without exception or limitation. (Ans. Brf. at pp. 24-26.)

Citibank's hyper-expansive view of FAA preemption is at odds with the recent decisions of this Court. There is no mystery as to this Court's view of *Concepcion*. In a thorough, carefully-reasoned opinion, this Court explained that "what's new" in *Concepcion* is the proposition that states may not "impos[e] procedural requirements that 'interfere[] with fundamental attributes of arbitration,' especially its 'lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.'" (*Sonic II*, 57 Cal.4th at p. 1143 [quoting *Concepcion*, 563 U.S. at pp. 344-345, 348].) *Sonic II* goes on to explain that state law rules that "do not interfere with the fundamental attributes of arbitration"—such as a hypothetical law requiring defendant to pay a penalty plus attorneys' fees if a plaintiff with a small-value claim obtains an award through court or arbitration—would not be preempted by the FAA. (*Id.* at pp. 1150 & 1151 ["Although *Concepcion* says state law cannot require a procedure that undermines fundamental attributes of arbitration 'even if it is desirable for unrelated reasons' (*Concepcion*, at p. 352), this does not mean that the FAA preempts generally applicable state laws that do *not* undermine fundamental attributes of arbitration." (emphasis in original)].)

Citibank fails to grapple with this Court's construction of FAA preemption, post-*Concepcion*.[4] This omission is fatal to

[4] McGill discussed *Sonic II* extensively in her Opening

Citibank's position, which fails to demonstrate how allowing public injunctive relief to proceed (potentially in arbitration, if the ban on non-individual remedies is stricken) would interfere with the fundamental attributes of arbitration. As explained below, because McGill's public injunctive claim here would not entail complex procedures, incompatible with the streamlined rules of arbitration (see *infra*, Section I.B.3), a decision that strikes a categorical ban on such relief would not be preempted by the FAA.

Citibank primarily relies on the sweeping view that the FAA "mandates" enforcement of arbitration agreements according to their terms, failing to recognize that this Court has already considered, and comprehensively rejected, this obtuse reading of *Concepcion*.

In *Sonic II*, the majority opinion first observed that while a state unconscionability rule "results in a refusal to enforce arbitration agreements 'according to their terms' [citation]... [b]ut that is true of any generally applicable principle of unconscionability as applied to an adhesive arbitration agreement." (57 Cal.4th at pp. 1151-52.) Clearly, then, the FAA does not preempt all rules that refuse to enforce agreements according to its terms. (*Id.* at pp. 1152.) Further, "[t]he directive to enforce arbitration 'in accordance with the terms of the agreement,' which appears in section 4 of the FAA (9 U.S.C. § 4), logically applies after a court has determined that there is an 'enforceable agreement' under section 2 of the FAA (9 U.S.C. §

Brief, at pp. 40-42.

2)." (*Ibid.*) Given both saving clause's importance as well as the location of the FAA's savings clause within the statute itself, *Sonic II* concluded that this directive to "enforce agreements according to their terms" cannot provide guidance in distinguishing a state rule that is preempted from one that is not. (*Ibid.*)

Sonic II later turned to the dissent's "assign[ing] decisive weight" to this principle that agreements must be enforced according to their terms. (57 Cal.4th at p. 1167.) The majority in *Sonic II* held that this principle cannot overwhelm all other values since "no statute... pursues its 'broad purpose' at all costs." (*Id.* [citing Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) p. 21].) The existence of the savings clause, the *Sonic II* majority explained, highlights the FAA's "other values at play" apart from enforcement of arbitration terms. Indeed, if "enforcement of arbitration agreements according to their terms" were the paramount principle, the *Sonic II* majority reasoned, then the FAA would "authorize even blatant forms of unconscionability, such as an adhesive agreement that gives the drafting party sole power to choose the arbitrator [citation], or imposes a one-sided provision for appealing an arbitral award [citation]." (*Ibid.*) As this example underscores, that clearly cannot be the case.

Citibank also seeks to limit *Iskanian* to the unique attributes of a PAGA action, in which the state is the real party in interest.[5] According to Citibank, since McGill does not

[5] On December 14, 2015, the United States Supreme Court,

"represent" the state in advancing her public injunction claim, *Iskanian* is irrelevant. (Ans. Brf. at pp. 27-28.) This argument fails for several reasons.

First, while it is true that *Iskanian* carefully couched its holding to avoid a proliferation of PAGA-like statutes providing for "victim-specific relief" promulgated by state legislatures seeking to "circumvent the FAA" (*Iskanian*, 59 Cal.4th at pp. 387-88), no such fears exist in this case. Public injunctive relief under the UCL and CLRA is a type of private attorney general action that *predates* PAGA. (See Opng. Brf. at pp. 12-14.) Thus, applying *Iskanian*'s reasoning in this context would not open the door to new exemptions, but simply would reinforce existing law.

Second, central to *Iskanian* is the finding that the right to pursue representative PAGA claims is unwaivable. (See Opng. Brf., at pp. 47-48 [discussing *Iskanian*, 59 Cal.4th at pp. 382-384.) Only after establishing that the right to pursue PAGA claims is unwaivable and for the public benefit did the Court move on to the preemption analysis.

Citibank ignores this reasoning altogether. If *Iskanian* turned solely on PAGA being primarily a state action brought by a proxy, then why would the Court have devoted significant

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for ***the third time***, denied a petition for writ of certiorari from a petitioner seeking to overturn *Iskanian*. (See *CarMax Auto Superstores California, LLC v. Areso* (Dec. 14, 2015, No. 15-236) 2015 WL 5005244; see also *Bridgestone Retail Operations, LLC v. Brown* (2015) 135 S.Ct. 2377 [denying writ of certiorari on case seeking reversal of the "*Iskanian* rule"]; *CLS Transp. Los Angeles, LLC v. Iskanian* (2015) 135 S.Ct. 1155 [denying petition for writ of certiorari].)

portions of its opinion to explaining why PAGA actions, because they are brought to benefit the public, are unwaivable? Indeed, Citibank does not refute the strong echoes between *Iskanian*'s emphasis on the PAGA claim being an unwaivable statutory right for the public benefit and *Broughton*'s nearly identical descriptions of the nature of public injunctive relief. (*Broughton*, 21 Cal.4th at p.1080, fn.5 [defining public injunctions as where "the public is generally benefitted directly... and the plaintiff benefitted, if at all, only by virtue of being a member of the public."].) Again, public injunctive relief is not intended to provide "victim-specific relief," which would be expressly beyond the scope of *Iskanian*. Rather, as with PAGA, the statutes providing for public injunction relief have a "public statutory purpose that transcends private interests." (*Id.* at p. 1083.) If *Iskanian*'s discussion of unwaivable rights for public benefit were not significant, it would not have its own section (Section V.B.). (Cf. *Sonic II*, 57 Cal.4th at p. 1166 [inquiring "why would the high court [in *Concepcion*] have bothered to spill so much ink explaining... the 'fundamental attributes of arbitration'" if that discussion were not important to its decision, as the dissent asserts].)

Third, *Iskanian* also observed that the FAA was enacted to resolve private disputes, and that no U.S. Supreme Court case has held that public rights can be forfeited by a private agreement.[6] (*Iskanian*, 59 Cal.4th at pp. 385-386.) *Iskanian*'s

[6] Citibank tries to distinguish *Waffle House* on the same ground as *Iskanian*—that a governmental agency acting as an

preemption analysis begins from that premise, as McGill discussed (see Opng. Brf. at pp. 44-46), which Citibank entirely ignored).

Fourth, in *Sakkab v. Luxottica Retail N.A., Inc.* (9th Cir. 2015) 803 F.3d 425, issued several months *before* Citibank submitted its Answer Brief, the Ninth Circuit followed *Iskanian*'s holding and further expanded on its reasoning. As in *Iskanian*, *Sakkab* held that the FAA does not mandate enforcement of a representative action waiver that operates to eliminate the representative component of PAGA.[7] In so holding, *Sakkab* first found that state rules that interfere with the fundamental attributes of arbitration, such as procedural simplicity and speed, are what the FAA preempts—rejecting the notion that the FAA operates to make enforceable all terms in an arbitration agreement (which would nullify the savings clause if taken at face value). (*Id.* at pp. 434-35.)

Sakkab then explained that representative actions under PAGA, even if arbitrated, would not result in the type of procedural complexity that would interfere with the fundamental attributes of arbitration since the PAGA action does not join

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law enforcer cannot be compelled to arbitrate—but it does not address McGill's point that *Cruz* construed *Waffle House* more broadly to mean that the FAA does not cover claims strictly for the public benefit (i.e., non-victim-specific relief). (See Opng. Brf. at pp. 49-50.)

[7] As in *Iskanian*, the at-issue waiver in *Sakkab*, if strictly enforced, would extinguish any right to a PAGA action since a PAGA action by definition is a "representative action" in that the plaintiff represents the state as a proxy. (See *Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 986.)

other employees as parties or "vindicate absent employees' claims," but rather is an action brought by an employee-plaintiff to recover penalties "arising out of violations against other employees" on behalf of the state. (*Sakkab*, 803 F.3d at pp. 435-36.) PAGA has no notice requirements, opt-outs, adequacy standards, or other Rule 23(a) requirements. (*Ibid.*) *Sakkab* thus ventures beyond *Iskanian* to observe that, aside from PAGA being a state action, it also differs from class actions in that the PAGA action is *bilateral.* Other employees participate in a PAGA suit primarily as a measure of damages. (*Id.* at p. 438 ["The amount of penalties an employee may recover is measured by the number of violations an employer has committed, and the violations may involve multiple employees."].)

Moreover, just because representative PAGA claims frequently involve greater stakes than an individual action does not mean a rule preserving such claims runs afoul of the FAA, so long as it does not generate the kind of "procedural morass" that would prevent parties from choosing streamlined procedures in arbitration. (*Id.* at pp. 438-439.) *Sakkab* concludes that "[b]ecause representative PAGA claims do not require any special procedures, prohibiting waiver of such claims does not diminish parties' freedom to select arbitration procedures that best suits their needs." (*Id.* at p. 436.)

Citibank does not suggest that arbitration involving public injunction claims would require complex procedures interfering with the fundamental attributes of arbitration. Indeed, it is easy to imagine a simple process by which the claims here would be

resolved in arbitration. To prevail on her injunctive relief claim, McGill would have to show that Citibank's business practices are such that "members of the public are likely to be deceived." (*Bank of the West v. Super. Ct.* (1992) 2 Cal.4th 1254, 1266-67.) But McGill would not need to prove "via extrinsic evidence" (such as survey evidence) that any consumers were actually misled. (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 99.) Rather, "the primary evidence in a false advertising case is the advertising itself." (*Id.* at p. 100.)

McGill's pursuit of a public injunction claim will not require additional, more complex procedures. At most, arbitration of McGill's public injunction claim may result in greater complexity than non-individual claims only when it comes to ***proof***. Here, McGill may, through extrinsic evidence or by Citibank's own admissions, demonstrate that a reasonable person would be deceived by Citibank's marketing of the Credit Protector program. Moreover, to the extent that McGill's claims involve Citibank's implementation of its Credit Protector Program, such as systematically denying benefits without cause or delaying payment to beneficiaries, McGill may be able to marshal evidence from Citibank's document production, deposition testimony, or through anecdotal evidence. No special procedures are needed, and McGill cannot be denied her right to pursue her statutory claims for the public's benefit even if it would be challenging to prevail on those claims. The FAA does not preempt a rule that preserves a statutory claim when it may require greater complexity to prove that particular claim than

other types of claims. (*Sakkab*, 803 F.3d at pp. 436-38 [finding that the potentially greater complexities of proving PAGA and antitrust claims do not result in their interfering with the fundamental attributes of arbitration].)

Finally, another recent decision from this Court, *Sanchez*, 61 Cal.4th 899, provides further support to McGill's position. Citibank cites *Sanchez* as having confirmed that the CLRA's class action waiver does not survive *Concepcion* (Ans. Brf. at p. 18, fn. 3), but it ignores all other aspects of *Sanchez*'s decision. In *Sanchez*, the Court examined an arbitration agreement that contained, among other provisions, a clause that authorized a new arbitration by a three-arbitrator panel if the "arbitrator's award for a party is $0, or against a party is in excess of $100,000 or includes an award of injunctive relief against a party." (*Sanchez*, 61 Cal.4th at p. 908.) This provision was among those that the intermediate court found to be substantively unconscionable, primarily because the more powerful drafting party is more likely to have an injunction issued against it. This Court reversed the lower court's decision, including its finding that the extra arbitration protection is substantively unconscionable. (*Id.* at pp. 916-917.)

In so holding, the Court found it "significant Valencia's concern that the scope of an injunction can extend well beyond the transaction at issue and can compel a car seller to change its business practices." (*Sanchez*, 61 Cal.4th at p. 917.) By finding that such a term is enforceable, the Court implicitly acknowledges that injunctive relief—even if it "extends beyond

the transaction" to compel a business to change its practices (i.e., a public injunction)—is arbitrable, and would not interfere with the fundamental attributes of arbitration. The Court also acknowledges that, given the broad scope of the public injunctive relief that an arbitrator may award, the affected party may be allowed to furnish itself with "a margin of safety"—that is, by adding a layer of procedural protection. (*Id.*) This finding underscores that the drafting party, such as Citibank here, could have crafted procedures to protect itself in a way that is consistent with both the fundamental attributes of arbitration and state unconscionability law. What cannot be countenanced, however, is a rule permitting businesses like Citibank to extinguish the right of McGill and other California consumers to seek public injunctive relief via a contractual ban. (See *Sakkab*, 803 F.3d at p. 437 [finding that the FAA would not "require courts to enforce a provision limiting a party's liability in [a high stakes action] even if that provision appeared in an arbitration agreement."].)

In short, these decisions hold that the FAA would not preempt a state rule invalidating prospective waivers of a statutory right, so long as that rule does not interfere with the fundamental attributes of arbitration. A decision to invalidate the at-issue contractual ban here, which operates to foreclose McGill from pursuing her public injunctive claim, is fully consistent with the above decisions by preserving her right to pursue an unwaivable statutory claim for the public benefit in any forum—a claim which would not require any greater

procedural complexity if pursued in arbitration.

C. The Court Should Sever Citibank's Contractual Ban On Non-Individual Remedies

Based on the foregoing, the Court should sever Citibank's unlawful contractual ban on all non-individual claims, relief, and benefits. However, severance of the offending term would leave open the question of whether the parties intended to arbitrate the public injunction claims. In both *Iskanian* and *Sakkab*, the reviewing court returned the matter to the trial (or district) court and the parties to decide in the first instance where the representative PAGA claims should be resolved. (*Iskanian*, 59 Cal.4th at p. 391; *Sakkab*, 803 F.3d at p. 440.) This Court should order likewise for McGill's public injunction claims, and remand the matter to the trial court for further proceedings.

II. THE *BROUGHTON-CRUZ* RULE HAS NOT BEEN PREEMPTED

Because the Court should sever the at-issue ban, with instructions for further proceedings, the fate of the *Broughton-Cruz* rule need not be reached. And to the limited extent that the *Broughton-Cruz* rule applies in this case to preserve McGill's right to pursue public injunctive relief in any forum, it is not preempted for reasons stated above. However, even if the Court does consider the vitality of the *Broughton-Cruz* rule standing on its own, it is still not preempted by the FAA.

A. The *Broughton-Cruz* Rule Does Not Stand As An Obstacle to The Objectives of the FAA

It comes as little surprise that Citibank failed to address McGill's discussion regarding FAA preemption on the state's police powers. (See Opng. Brf. at pp. 50-54.) The FAA, in

Citibank's view, appears to be untethered to broader preemption principles—operating as a kind of super-law. But there is no basis to support Citibank's approach. Like any other case involving preemption, the Court must apply well-settled preemption principles. This holds no less true for cases involving the FAA. (*Iskanian*, 59 Cal.4th at p. 388; *Broughton*, 21 Cal.4th at pp. 1083-84.)

The FAA preempts laws that "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Concepcion*, 563 U.S. at p. 352 [citation omitted].) A recent decision of this Court examined the principles of obstacle preemption in great depth:

> [Obstacle preemption] requires proof Congress had particular purposes and objectives in mind, a demonstration that leaving state law in place would compromise those objectives, and reason to discount the possibility the Congress that enacted the legislation was aware of the background tapestry of state law and content to let that law remain as it was.

(*Quesada v. Herb Thyme Farms* (Dec. 3, 2015, No. S216305) 2015 WL 7770635, at p. *8.) And for a proponent of obstacle preemption to succeed, he or she must overcome the "presumption that displacement of state regulation in areas of traditional state concern was not intended absent clear and manifest evidence of a contrary congressional intent." (*Id.* at p. *10.)

While the FAA displaces state-laws that facially discriminate against arbitration or interfere with the

fundamental attributes of arbitration, the *Broughton-Cruz* rule does neither. (See Section II.B.1-2.) And, as *Broughton* articulated, there is no indication that Congress, when it enacted the FAA in 1925, sought to strip citizens of their protections under state consumer laws, or that statutory claims for the public's benefit can extinguished by a waiver contained in an arbitration agreement. (Opng. Brf. at pp. 53-54; *Broughton*, 21 Cal.4th at pp. 1083-84.) There is certainly no "clear and manifest" congressional purpose to achieve such outcomes though the enactment of the FAA.

A straightforward application of obstacle preemption analysis confirms the *Broughton*-Cruz rule's continuing vitality. Conversely, Citibank fails make even a threshold showing that the *Broughton-Cruz* rule—which, as applied in this instance, simply preserves the right for consumers to pursue public injunctions in *some forum*—overcomes the presumption against preemption. Citibank's position must be rejected.

B. No Subsequent Case Law Operates To Abrogate The *Broughton-Cruz* Rule

No decision from the U.S. Supreme Court has directly abrogated *Broughton* and *Cruz*. This is made clear by Citibank's failure to contend with McGill's discussion of two separate lines of Supreme Court case law supporting the continuing vitality of that pair of decisions. In her Opening Brief and above, McGill traces the *Broughton-Cruz* rule to the non-waiver principle, and demonstrates that the principle retains vitality and that it is not limited to federal statutory claims. (Opng. Brf. at pp. 31-39; *supra* at I.B.1.)

As for the proposition that the FAA preempts state rules "prohibiting outright the arbitration of a particular type of claim" McGill traces that the lineage of that law to a long line of cases, dating back to *Southland Corp. v. Keating* (1984) 465 U.S. 1—cases that were considered and distinguished by *Broughton* and *Cruz*. (Opng. Brf. at pp. 41-44; *Broughton*, 21 Cal.4th at pp. 1074-75; *Cruz*, 30 Cal.4th at pp. 311-13.) Citibank fails to show how the same legal proposition previously distinguished by *Broughton* and *Cruz* can now abrogate those cases.

The only new case Citibank cited is *Marmet Health Care Center v. Brown* (2012) 132 S.Ct. 1201. (Ans. Brf. at pp. 18-19.) But that short, per curiam opinion only confirms the origins of this proposition, relying on the same cases McGill cites:

> 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. See *ibid.* See also, *e.g., Preston v. Ferrer,* 552 U.S. 346, 356, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (FAA pre-empts state law granting state commissioner exclusive jurisdiction to decide issue the parties agreed to arbitrate); *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 56, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (FAA pre-empts state law requiring judicial resolution of claims involving punitive damages); *Perry v. Thomas,* 482 U.S. 483, 491, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) (FAA pre-empts state-law

> requirement that litigants be provided a judicial forum for wage disputes); *Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (FAA pre-empts state financial investment statute's prohibition of arbitration of claims brought under that statute).

(*Marmet,* 132 S. Ct. at pp. 1203-04.)

This long line of cases did not represent new law. *Marmet,* relying on these cases, cannot be read to have abrogated *Broughton* and *Cruz.* Citibank's reliance on *Ferguson* and *Nelsen v. Legacy Partners Res. Inc.* (2012) 207 Cal.App.4th 1115, 1135-36 is similarly misplaced (Ans. Brf. at pp. 19-21), as both also failed to consider that neither *Concepcion* and *Marmet* broke any new ground.

Citibank also recites the holdings of *Sonic II* and *Iskanian* cursorily, without exploring how the *Broughton-Cruz* rule is akin to the rule requiring a Berman hearing or class procedures under *Gentry v. Super. Ct.* (2007) 42 Cal.4th 443 that this Court found to have interfered with the fundamental attributes of arbitration. But a Berman hearing, as *Sonic II* held, is a pre-litigation impediment to the speedy resolution of a claim that the parties bargained for in arbitration, not a statutory right for the public's benefit. And in *Iskanian,* this Court held both that the FAA: (1) preempts a rule requiring class procedures since it is incompatible with the fundamental attributes of arbitration (*Iskanian,* 59 Cal.4th at p. 365); (2) does not preempt a term eliminating a right to pursue a statutory right for the public benefit. (*Id.* at pp. 386-387.) Citibank glosses over these

important distinctions.

Citibank also fails to engage with many of the other difficult issues presented by McGill. For instance, Citibank does not address the problem of arbitration's institutional shortcomings in implementing broad-based public injunctive relief. That both the FAA[8] and the CAA[9] authorize courts to issue interim injunctive relief due to the inherent limits of the arbitrator's powers underscores that the *Broughton-Cruz* rule—which also leaves public injunctive to the court for that limited purpose—falls within the permissible bounds of the FAA.

Finally, as the Ninth Circuit aptly observed, "by their very nature, some types of claims are better suited to arbitration than others [Citations.] But the FAA would not preempt a state statutory cause of action that imposed substantial liability merely because the action's high stakes would arguably make it poorly suited to arbitration." (*Sakkab*, 803 F.3d at p. 437.) This proposition, stated in the context of the PAGA action, applies with equal force to this case. Although certain kinds of public injunctive claim or relief may be poorly suited to arbitration as *Broughton* and *Cruz* found, it does not follow that rules preserving their availability are preempted. So long as such a rule does not interfere with the fundamental attributes of arbitration—by requiring layers of procedural complexity to

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[8] (*Toyo Tire Holdings v. Continental Tire North. Amer.* (9th Cir. 2010) 609 F.3d 975, 981 [authorizing courts to issue interim injunctive relief in furtherance of arbitration].)

[9] (Cal. Civ. Proc. Code § 1281.8(a) & (b) [authorizing courts to issue provisional remedies to preserve the effectiveness of an eventual arbitral award].)

facilitate the action—it is not preempted. As applied in this case, *Broughton-Cruz* rule merely protects California consumers' right to pursue public injunctive relief in *some forum*, and does not require additional procedural complexity. Such a rule is not preempted.

III. CITIBANK'S ARGUMENT AGAINST FURTHER PROCEEDINGS TO DETERMINE UNCONSCIONABILITY IS CONTRARY TO EQUITY AND THIS COURT'S *SONIC II* DECISION

Citibank also argues that it is inappropriate for the Court to remand the matter for further consideration in light of Sonic II in the alternative. Citibank's stated reasons are utterly baseless.

First, Citibank argues that McGill "did not preserve her argument about somehow being barred from receiving benefits as a non-party." (Ans. Brf. at p. 33.) But McGill actually contends that the broad contractual ban on her participation in private attorney general actions as well as any non-individual actions and relief is unconscionable under the new formulation of unconscionability set forth in *Sonic II*. (Opng. Brf. at p. 55.) *Sonic II*, of course, was issued in October 17, 2013, approximately two years after the trial court rendered the at-issue order. Citibank's preposterous attack on McGill as having failed to "preserve" an argument that was not available to her at the time of briefing and hearing should be disregarded.

Second, Citibank further argues that its bar on statutory claims relates to "the arbitration process" itself and therefore cannot be unconscionable. But Citibank readily acknowledges in its primary argument that the contractual ban is intended to foreclose McGill from asserting her statutory right to pursue

public injunctive relief. This has nothing to do with procedures governing the arbitration.

Third, Citibank observes that McGill had already argued that the agreement was unconscionable at the trial court. But in those proceedings, McGill did not have the benefit of *Sonic II* and *Sanchez*—new and significant statements on unconscionability—and she also primarily rested on controlling law, the *Broughton-Cruz* rule. If this Court finds that the *Broughton-Cruz* rule no longer controls (which it should not), then, in combination with other changes in law, counsel for remand.

IV. CITIBANK'S REJECTION OF MCGILL'S ALTERNATIVE PROPOSAL TO HAVE THE ARBITRATOR DECIDE THE SCOPE OF INJUNCTIVE RELIEF IS UNPERSUASIVE

Assuming this Court holds a contractual ban on the right to pursue injunctive relief for public benefit is unenforceable, the Court should at a minimum hold California consumers must be allowed to pursue public injunctive relief *in some forum.*

The best approach is to remand the matter for further proceedings. However, Citibank also makes no persuasive case why an arbitrator cannot decide the scope of his own powers—leaving the final implementation and enforcement of injunctive relief to the court upon confirmation. Citibank asserts without serious examination of McGill's proposals or authorities, that the arbitrator is limited to deciding McGill's individual relief. Citibank fails to persuasively challenge this alternative method of disposition.

CONCLUSION

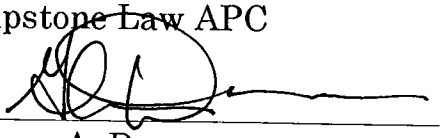
McGill respectfully requests that this Court reverse the

Court of Appeal's decision and invalidate Citibank's Agreement and order further proceedings consistent with that ruling.

Dated: December 21, 2015

Respectfully submitted,

Capstone Law APC

By: 

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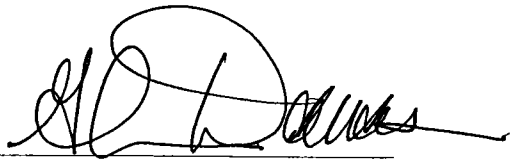
CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.504(d)(1) and 8.490, the enclosed Reply Brief on the Merits was produced using 13-point Century Schoolbook type style and contains 8,399 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: December 21, 2015

Respectfully submitted,

Capstone Law APC

By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1840 Century Park East, Suite 450, Los Angeles, California 90067.

On **December 21, 2015**, I served the document described as: **RESPONDENT'S REPLY BRIEF ON THE MERITS** on the interested parties in this action by sending on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof to interested parties as follows [or] as stated on the attached service list:

See attached service list.

[☒] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

[☐] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

[☐] **BY FAX:** I hereby certify that this document was served from Los Angeles, California, by facsimile delivery on the parties listed herein at their most recent fax number of record in this action.

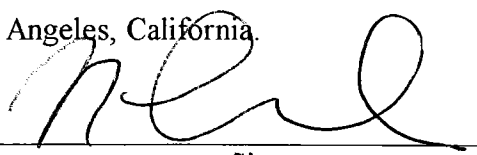
[☐] **BY PERSONAL SERVICE:** I personally delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

[☒] **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **December 21, 2015**, at Los Angeles, California.

Natalie Torbati
Type or Print Name



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