NO. 09-16703

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW C. KILGORE and WILLIAM BRUCE FULLER

Plaintiffs-Appellees

v.

KEYBANK, NATIONAL ASSOCIATION and
GREAT LAKES EDUCATIONAL LOAN SERVICES, INC.

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 3:08-CV-02958-TEH

PETITION FOR REHEARING AND REHEARING *EN BANC*

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INTRODUCTION

This petition for rehearing and rehearing *en banc* should be granted because the panel decision both conflicts with U.S. Supreme Court precedents – *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), as well as several other U.S. Supreme Court cases applying its principles, as set forth below – and to ensure uniformity of decision on this Court, as the panel reversed this Court's earlier decision in *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007).

Plaintiffs Matthew Kilgore and William Fuller are seeking public injunctive relief against Defendants Key Bank and Great Lakes Educational Loan Services, Inc. under California's Unfair Competition Law ("UCL"). Plaintiffs allege that they have been victimized by a sham for-profit trade school, which did not provide them with the degree and credentials they had been promised. Plaintiffs asserted state law claims against the bank in the Third Amended Complaint. They alleged that the bank aided and abetted the vocational school's fraudulent course of conduct in failing to include the Federal Trade Commission's "Holder Rule," 16 C.F.R. § 433.2, which requires money loan agreements arranged by sellers to contain a notice to all loan holders that preserves the borrower's ability to raise claims and defenses against the lender arising from the seller's misconduct in its school contracts with them and other students. Federal law requires that national

banks not engage in conduct which violates the Holder Rule. 12 C.F.R. § 7.4008(c). The lender Defendants have continued to pursue Plaintiffs and other defrauded students for debts not owed, and have reported false information about the students to credit reporting agencies. Under the UCL, plaintiffs have a substantive statutory right to a *public* injunction prohibiting this unlawful conduct. Only that public injunction will serve the UCL's historic remedial and deterrent function to restrain ongoing unlawful conduct.

In two landmark cases, the California Supreme Court held that arbitration clauses cannot be used to gut the availability of public injunctive relief under the State's consumer protection statutes: *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 78 (Cal. 1999); and *Cruz v. PacifiCare Health Sys.*, 66 P.3d 1157, 1164-65 (Cal. 2003). The logic driving these cases, which together is known as the "*Broughton/Cruz* doctrine," is that arbitrators would not have the ability to issue and enforce public injunctions, and thus compelling parties to arbitration in cases where public injunctive relief is sought would be tantamount to prohibiting those parties' substantive statutory rights to such relief.

This Court embraced the *Broughton*/*Cruz* doctrine in *Davis*, 485 F.3d 1066, relying upon a line of cases from the U.S. Supreme Court that originated with *Mitsubishi Motors*, 473 U.S. 614, 628, 637. Those cases hold that arbitration clauses are enforceable only where they permit parties to effectively vindicate their

substantive statutory rights and remedies in the arbitral forum. In *Davis*, this Court, like many others, including the U.S. Supreme Court itself on at least six occasions, accepted the *Mitsubishi Motors* rule as creating a limited exception to the rule of enforceability of arbitration clauses where plaintiffs cannot effectively vindicate their substantive statutory rights in arbitration. The U.S. Supreme Court recently held that, in general, arbitration clauses that bar classwide relief are enforceable. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748, 1753 (2011). However, *Concepcion* did not overrule the *Mitsubishi Motors* line of cases holding that arbitration clauses may *not* be enforced where they would prevent parties from effectively vindicating their substantive statutory rights. The *Mitsubishi Motors* rule therefore remains a crucial exception to *Concepcion*'s general rule of enforceability, and the task for this Court is to harmonize the two doctrines.

As this Petition, will establish below, the Supreme Court has provided guidance as to how this can be accomplished. *Mitsubishi Motors* remains a limitation on *Concepcion*'s general holding that arbitration clauses that bar class relief are enforceable, but only when plaintiffs must offer proof sufficient to establish that they would be unable to vindicate their own substantive statutory

rights in arbitration for a court to refuse to enforce the clause.[1] The effective vindication of rights doctrine is intended to enable individuals to secure both the "remedial and deterrent function" of the statute's promise. *Mitsubishi Motors*, 437 U.S. at 637.

In this case, however, the Panel found a different way to harmonize *Concepcion* and the *Mitsubishi Motors* doctrine by holding that the *Mitsubishi Motors* doctrine "applies only to *federal* statutory claims," not cases involving state statutory claims like those at issue here. (Panel Op. at 2651.) Under this approach, arbitration clauses may not be used to vitiate claims raised under federal statues, but corporations *may* use arbitration clauses to exempt themselves from state consumer protection, civil rights, and similar remedial statutes. As this Petition will establish, the Panel's distinction between federal and state statutes as a way to harmonize *Concepcion* with the *Mitsubishi Motors* doctrine is erroneous and should be reversed for three reasons: (a) the Panel's approach conflicts with substantial authority; (b) the logic and rationale of the *Mitsubishi Motors* doctrine applies with equal force to state statutes; and (c) this distinction leads to harmful and anomalous policy results.

[1] The plaintiffs have also challenged Key Bank's arbitration clause as being unconscionable. The panel rejected that challenge as well. While plaintiffs disagree with this holding, in the interest of narrowing the issues and in view of the tight page limits applicable here, this Petition only addresses the panel's decision on the *Broughton*/*Cruz* issue.

I. THE PANEL'S APPROACH CONFLICTS WITH ANOTHER DECISION OF THIS COURT

The Panel majority acknowledged that its decision conflicts with this Court's earlier decision in *Davis*, 485 F.3d at 1082, and overruled it. (Panel Op. at 2646.) The Panel concluded that *Davis* had been abrogated, however, by *Concepcion*, 131 S. Ct. 1740. As set forth below, the correct view is that *Concepcion* does not abrogate the portion of this Court's decision in *Davis* that applied and followed the *Broughton*/*Cruz* doctrine. Accordingly, this Court should hold that *Davis* remains good law, and reverse the panel decision here to the extent it conflicts with *Davis*.

II. THE PANEL'S APPROACH CONFLICTS WITH DECISIONS OF THE U.S. SUPREME COURT

A. In A Long Series of Decisions, the U.S. Supreme Court Has Held That Arbitration Clauses Are Only Enforceable Where They Permit Parties to Effectively Vindicate Their Rights.

The Supreme Court has consistently held that statutory claims are arbitrable "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"—and 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." *Mitsubishi Motors*, 473 U.S. at 628, 637; *see Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) ("[C]laims arising under a statute designed to further important

social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum'") (citation omitted); *Vimar Seguros y Reaseguros SA v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (Kennedy, J.) (holding that, if an arbitration provision were to operate "as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors*); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009) (holding open the possibility that an arbitration agreement could be invalidated if it "prevent[s] respondents from 'effectively vindicating' their 'statutory rights in the arbitral forum,'" but explaining that, because the issue had not been raised below, the Court would not "invalidate arbitration agreements on the basis of speculation");[2] *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) (statutory claims may be arbitrated as long as a party can vindicate her substantive rights) (citation omitted); *Shearson/American Exp. Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987) (citing *Mitsubishi Motors* that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive

[2] The *Pyett* opinion references that the statutory rights at issue were federal, but the logic that arbitration is not to be a means of stripping substantive rights is more broadly applicable.

rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum").

In the Supreme Court's most recent decision concerning arbitration, *Compucredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), the Court again stressed that while parties may waive procedural rights in arbitration agreements, they do not waive substantive rights. As the Court explained, "contractually required arbitration of claims *satisfies* the statutory prescription of civil liability," *id.* at 671 (emphasis added), and is permissible as long as "*the guarantee of the legal power to impose liability* … is preserved." *Id.* (emphasis in original).

It is true that each of these seven cases involved federal statutory claims. As set forth in Part II-C below, however, this fact does not limit the rationale of the *Mitsubishi Motors* doctrine. The core purpose of this doctrine—to ensure that arbitration is a forum in which parties can effectively vindicate their statutory rights, as opposed to a device where stronger parties can insulate themselves from any repercussions from illegal conduct—applies with equal force to state statutes.

B. *Concepcion* Did Not Abrogate the *Mitsubishi Motors* "Effective Vindication of Rights" Doctrine.

Concepcion did not overrule the *Mitsubishi Motors* line of cases. *Mitsubishi Motors* and *Gilmer* remain good law after *Concepcion*, as Justice Scalia cites both cases (albeit for different reasons) with authority in *Concepcion*. *Concepcion*, 131 S. Ct. at 1748 (citing *Mitsubishi Motors*); *id.* at 1749 n.5 (citing *Gilmer*). In the

absence of a clear statement to the contrary by the Supreme Court, this Court may not hold that this line of U.S. Supreme Court cases has been overturned. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (lower courts may not "conclude our more recent cases have, by implication, overruled an earlier precedent" and must "leav[e] to this Court the prerogative of overruling its own decisions").

Accordingly, the question for this Court is how to harmonize *Concepcion*'s rule of enforceability with the *Mitsubishi Motors* exception. The answer lies in whether the party claiming that enforcement of the arbitration clause would bar the vindication of substantive statutory rights is able to prove that fact. In *Randolph*, the Supreme Court declined to rule on the claim that the existence of large arbitration costs precluded the plaintiff from effectively vindicating her rights because the record included no evidence beyond the actual arbitration agreement itself. *See* 531 U.S. at 91-92. As the Court explained, the record did not contain any particularized evidence to afford a sufficient basis to determine the actual costs associated with the arbitration of the plaintiff's claims. *Id.* at 91 n.6. Thus, the Court enforced the clause, concluding that "we lack information about how claimants fare under Green Tree's arbitration clause." *Id.* at 91. *See also Pyett*, 556 U.S. at 273 (declining to rule on claim that arbitration agreement precluded the effective vindication of statutory rights because the question "require[d] resolution of contested factual allegations," which were not resolved by any lower court).

Concepcion based its decision on a key factual premise that is not present in this case: that the Concepcions *could* effectively vindicate their substantive statutory claims if the arbitration clause was enforced. *Concepcion*, 131 S. Ct. at 1753 (finding that "the claim here was most *unlikely* to go unresolved" because, *inter alia*, AT&T's arbitration agreement contained sufficient incentives "for the individual prosecution of meritorious claims that are not immediately settled") (emphasis added). Because *Concepcion* is based on the premise that the plaintiffs there *could* vindicate their rights, its holding does not authoritatively resolve the core issue in *this* case, because here, as the Panel recognized and as this Court previously recognized in *Davis*, Plaintiffs will be unable to pursue their statutory right to public injunctive relief to deter ongoing prohibited conduct if this arbitration clause is enforced.

The *Concepcion* Court's conclusion that the class action ban there was not exculpatory was understandable, given that there was no factual record to the contrary. In the absence of such evidence, the Court accepted AT&T's argument that its arbitration clause had beneficial features that made it possible for consumers to vindicate rights. *Concepcion*, 131 S. Ct at 1753. Indeed, the district court there had opined that the incentives for individual arbitration in AT&T's clause would leave the Concepcions "better off . . . than they would have been as

participants in a class action," and this Court "admitted that aggrieved customers who filed claims would be 'essentially guaranteed' to be made whole." *Id.*

In this case, by contrast, there is no doubt that enforcing Defendants' arbitration clause will deny Plaintiffs' their substantive statutory right under the UCL to a public injunction. Under *Mitsubishi Motors* and its progeny, arbitration clauses that deny plaintiffs the ability to pursue their substantive rights are unenforceable, and nothing in *Concepcion* changed this long-standing principle.

C. Notwithstanding the Panel's Decision, the *Mitsubishi Motors* Doctrine Applies to State Statutes.

There is no serious question that the *Mitsubishi Motors* effective vindication doctrine applies to claims brought under federal statutes. *Concepcion* did not overturn this doctrine. Moreover, the Panel itself acknowledged that *Mitsubishi Motors* remains vibrant with respect to federal statutory claims. (Panel Op. at 2651.) The only question is whether the *Mitsubishi Motors* doctrine applies to state statutory claims. The Panel held that it does not. Plaintiffs respectfully submit that the Panel's decision on this point was in error.

First, the logic and rationale of the *Mitsubishi Motors* line of cases applies with full force to state statutory law claims at issue here. In *Mitsubishi Motors*, the Court made clear that determining whether a plaintiff *effectively* may vindicate his statutory cause of action in arbitration turns not on whether a specific right can be categorized as either "substantive" or "procedural," but rather whether, by forcing

the plaintiff into arbitration, the statute "will continue to serve both its remedial and deterrent function." 473 U.S. at 637; *see also Randolph*, 531 U.S. at 90 (explaining that the imposition of fees could, if prohibitive, preclude a litigant from effectively vindicating her statutory rights). Thus, an arbitration provision that, if enforced, would frustrate or eliminate a core statutory objective and would not allow a plaintiff to effectively vindicate his statutory rights, would therefore be unenforceable, irrespective of what type of right it attempts to curtail.

In *Mitsubishi Motors*, the question presented to the Court was whether a plaintiff's antitrust claims could be resolved in international arbitration. *Mitsubishi Motors*, 473 U.S. at 616. The chief argument raised against allowing arbitrators to resolve antitrust claims was that it would undermine one of the core objectives of the antitrust laws—deterrence—by eliminating the right of plaintiffs to seek treble-damages. *See id.* at 634-35 (explaining that the treble-damages provision "wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators"). If this right to treble-damages was unavailable in the arbitral forum, the plaintiff argued, forcing plaintiffs to pursue antitrust claims in arbitration would gut the antitrust enforcement scheme and allow companies to violate the law with impunity. *Id.* at 634-36.

The Court, however, rejected this argument, holding that American antitrust claims could be arbitrated. *Id.* at 636-38. Although it agreed with the "importance

of the private damages remedy" as a deterrent tool, it held that there was no evidence to "compel the conclusion that it may not be sought outside of an American court." *Id.* at 635. The Court therefore concluded that there was "no reason *to assume at the outset* . . . that international arbitration will not provide an adequate mechanism [for resolving the dispute]." *Id.* at 636 (emphasis added).

Key to the Court's conclusion, however, was its belief that arbitration would provide an adequate mechanism *because* it would ensure that the statute's objectives would be preserved. Thus, the Court explained that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, *the statute will continue to serve both its remedial and deterrent function*." *Id.* at 637 (emphasis added). In other words, the Court concluded that, because the right to treble-damages would likely be available to a private litigant forced to arbitrate his Sherman Act claims, the core objectives of the American antitrust laws—including deterrence—would be protected. *See id.* at 634-36. If, on the other hand, the plaintiff could demonstrate that, in fact, the right to treble damages would be unavailable in international arbitration, the Court held that a court could refuse to require the parties to arbitrate their dispute. *See id.* at 637 n.19 (if clauses in a contract operated "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy").

These cases "demonstrate that … claims arising under a statute designed to further important social policies may be arbitrated because so long as a prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, *the statute serves its functions*," *Randolph*, 531 U.S. at 90 (emphasis added), but where the arbitration clause *precludes* the litigant from effectively vindicating his rights and thereby undermines the statute's functions, it will not be enforced. By urging a rule that would read this core principle out of the FAA jurisprudence for state statutory claims, the Panel reads *Concepcion* as turning the central promise of the FAA—that arbitration become a credible and legitimate alternative dispute resolution mechanism—on its head.

Second, the Panel's decision conflicts with a wealth of precedent applying the principles embodied in the *Mitsubishi Motors* line of cases to cases involving state statutory rights. In *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005), for example, then-Judge Roberts, in a case involving state law, struck down a provision in an arbitration clause that stripped a party of state statutory rights. The opinion cited *Randolph* and held that a party may "resist[] arbitration on the ground that the terms of any arbitration agreement interfere with the effective vindication of statutory rights." *Id.* at 81. *See also, Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (explaining that a class action ban would be unenforceable where it would "prevent the vindication of statutory rights under

state and federal law"); *Alexander v. Anthony Int'l, L.P.*, 341 F.2d 256 (3rd Cir. 2003) (employee had a right to prove her claim under *Randolph*, that resort to arbitration would deny her a forum to vindicate her *state* statutory rights); *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 624 (3d Cir. 2009) (in case raising claims under state usury statute, term in arbitration clause requiring parties to bear their own attorneys' fees is stricken and severed, citing to *Randolph*'s holding that "prohibitively expensive arbitration may render a clause unenforceable").

For all of these reasons, this Court should hold that the *Mitsubishi Motors* doctrine applies with equal force regardless of whether the substantive rights and remedies at issue originate from federal or state law.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT WILL IMPACT A LARGE NUMBER OF CONSUMERS AND EMPLOYEES.

Finally, review *en banc* is warranted because this case presents an important question of federal law – does the FAA preempt state law that would protect a wide variety of state consumer protection and civil rights laws from standard form contracts that would gut those laws? The answer will affect a large number of cases and individuals. The Panel itself forthrightly acknowledged the concern that its decision would have substantial policy implications:

> We are not blind to the concerns engendered by our holding today. It may be that enforcing arbitration agreements even when the plaintiff is requesting public injunctive relief will reduce the effectiveness of state

> laws like the UCL. It may be that FAA preemption in this case will run contrary to a state's decision that arbitration is not conducive to broad injunctive relief claims as the judicial forum. And it may be that state legislatures will find their purposes frustrated.

(Panel Op. at 2649.)

In this case and others the Panel's decision will result in an exculpatory rule insulating the defendant bank from a federal regulation prohibiting the conduct that gave rise to this vocational school fraud lawsuit and insulating the bank from the deterrent force of a public injunction. The Panel's decision to draw an arbitrary distinction between state law and federal law is particularly troublesome in light of the rule that, "[b]ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area." *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011) (citation omitted). The Panel's sharp distinction between federal statutes (which may not be gutted by arbitration clauses) and state statutes (which may), will lead to anomalous results for many consumers.[3]

CONCLUSION

For the forgoing reasons, the petition for rehearing or rehearing *en banc* should be granted.

[3] The panel's decision may also impact other cases before this Court, such as *Cardenas v. Americredit Financial Services, Inc.*, No. 10-17292.

Respectfully submitted,

Dated: March 21, 2012

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Attorneys for Plaintiffs and Petitioners Matthew C. Kilgore and William Bruce Fuller

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiffs/Appellees hereby state that they are no appeals involving the same appellants as this case, and that they are aware of two cases previously heard in this Court involving the same or closely related issues or the same transaction or event: *Cardenas v. Americredit Financial Services, Inc.*, No. 10-17292, and *Coneff v. AT&T Corp.*, No. 09-35563 (panel opinion issued on March 16, 2012).

March 21, 2012

THE STURDEVANT LAW FIRM

/s/ James C. Sturdevant
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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Circuit Rule 35-4 or 40-1, the attached petition for petition for rehearing *en banc* is proportionally spaced, has a typeface of 14 points or more and contains 3,559 words. In preparing this certificate, the undersigned relied on the word count feature of Microsoft Word.

March 21, 2012

THE STURDEVANT LAW FIRM

/s/ James C. Sturdevant
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW C. KILGORE, individually and on behalf of all others similarly situated; WILLIAM BRUCE FULLER, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

KEYBANK, NATIONAL ASSOCIATION, successor in interest to KeyBank USA, N.A.; KEY EDUCATION RESOURCES, a division of KeyBank National Association; GREAT LAKES EDUCATION LOAN SERVICES, INC., a Wisconsin corporation,
Defendants-Appellants,

No. 09-16703

D.C. No.
3:08-cv-02958-THE

MATTHEW C. KILGORE, individually and on behalf of all others similarly situated; WILLIAM BRUCE FULLER, individually and on behalf of all others similarly situated,
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Defendants-Appellees.

No. 10-15934
D.C. No. 3:08-cv-02958-THE
OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, Senior District Judge, Presiding

Argued and Submitted
December 5, 2011—San Francisco, California

Filed March 7, 2012

Before: Stephen S. Trott and Carlos T. Bea, Circuit Judges, and Rebecca R. Pallmeyer, District Judge.*

Opinion by Judge Trott

*The Honorable Rebecca R. Pallmeyer, District Judge for the U.S. District Court for Northern Illinois, sitting by designation.

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OPINION

TROTT, Circuit Judge:

These consolidated appeals involve the sometimes delicate and precarious dance between state law and federal law. Matthew Kilgore and William Fuller ("Plaintiffs") brought this putative class action against KeyBank, N.A., Key Education Resources, and loan servicer Great Lakes Education Loan Services, Inc. (collectively, "KeyBank"), alleging violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, in connection with private student loans that KeyBank extended to Plaintiffs. Each of Plaintiffs' loan contracts contained an arbitration clause, which the district court declined to enforce. In Interlocutory Appeal No. 09-17603, we consider whether, in light of the Supreme Court's recent decision in *AT&T Mobility, Inc. v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740 (2011), the Federal Arbitration Act ("FAA" or "Act") preempts California's state law rule prohibiting the arbitration of claims for broad, public injunctive relief — a rule established in *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (Cal. 1999), and *Cruz v. Pacificare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003). We consider also whether the arbitration clause is unconscionable. We have jurisdiction pursuant to 9 U.S.C. § 16(a)(1)(C).

We conclude that (1) the FAA preempts the *Broughton-Cruz* rule and (2) the arbitration clause in the parties' contracts must be enforced because it is not unconscionable. Therefore, we do not reach the question, presented in Appeal No. 10-15934, whether the National Bank Act ("NBA") and the regulations of the Office of the Comptroller of the Currency ("OCC") preempt Plaintiff's UCL claims. Accordingly, in Interlocutory Appeal No. 09-16703, we reverse the district court's denial of KeyBank's motion to compel arbitration, vacate the judgment, and remand to the district court with instructions to enter an order staying the case and compelling

arbitration. Because the disposition of that appeal renders the district court's subsequent dismissal order a nullity, we dismiss Appeal No. 10-15934 as moot.

I

BACKGROUND

Plaintiffs are former students of a private helicopter vocational school located in Oakland, California, and operated by Silver State Helicopters, LLC ("SSH"). According to Plaintiffs, SSH engaged in an elaborate, aggressive, and misleading marketing effort to attract students. Plaintiffs claim SSH was a "sham aviation school" that targeted limited-income individuals who could not afford to pay for their pilot training without taking out student loans. SSH's "preferred lender" was KeyBank, and SSH gave prospective students loan application forms and other information about borrowing tuition money from KeyBank.

To fund their helicopter training, Plaintiffs and each member of the putative class borrowed between $50,000 and $60,000 from KeyBank. Each Plaintiff signed a promissory note ("Note"), promising to repay KeyBank for the student loan. The transaction was structured so that KeyBank disbursed the entire loan proceeds to SSH before the student completed his training.

Each Note contained an arbitration clause, included in a separate section entitled "**ARBITRATION**." The arbitration clause informed Plaintiffs that they could opt out of the clause and that if they did not, Plaintiffs would be giving up their rights (1) to litigate any claim in court and (2) to proceed with any claim on a class basis:

> **IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR I WILL HAVE THE RIGHT**

> ***TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL*** **ON THAT CLAIM . . . . FURTHER, I WILL NOT HAVE THE RIGHT TO PARTICIPATE *AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS* . . . . I UNDERSTAND THAT OTHER RIGHTS THAT I WOULD HAVE IF I WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION. THE FEES CHARGED BY THE ARBITRATION ADMINISTRATOR MAY BE GREATER THAN THE FEES CHARGED BY A COURT.**
>
> *There shall be no authority for any Claims to be arbitrated on a class action basis*. Furthermore, an arbitration can only decide your or my Claim(s) and may not consolidate or join the claims of other persons that may have similar claims.

(boldface in original) (additional emphasis added). The arbitration clause included an opt-out provision: "**This Arbitration Provision will apply to my Note . . . unless I *notify you in writing* that I reject the Arbitration Provisions *within 60 days* of signing my Note.**" (emphasis added) (boldface in original).

In addition, each Note included a choice of law clause:

> **THE PROVISIONS OF THIS NOTE WILL BE GOVERNED BY FEDERAL LAWS AND THE LAWS OF THE STATE OF OHIO, WITHOUT REGARD TO CONFLICT OF LAW RULES.**

The Note also contained a forum-selection clause designating, as the appropriate forum for the resolution of all disputes arising from the Notes, the county in which KeyBank has its principal place of business: Cuyahoga County, Ohio. KeyBank,

however, does not argue on appeal that the forum-selection clause should have been enforced.

Plaintiffs signed the Notes immediately below several conspicuous statements contained in a box set off from the rest of the document. One of these statements provided,

> **I UNDERSTAND THAT THE MASTER STUDENT LOAN PROMISSORY NOTE GOVERNING MY LOAN CONTAINS AN ARBITRATION PROVISION UNDER WHICH CERTAIN DISPUTES (AS DESCRIBED IN THE ARBITRATION PROVISION) BETWEEN ME AND YOU AND/OR CERTAIN OTHER PARTIES WILL BE RESOLVED BY BINDING ARBITRATION, IF ELECTED BY ME OR YOU OR CERTAIN OTHER PARTIES. IF A DISPUTE IS ARBITRATED, THE PARTIES *WILL NOT HAVE THE OPPORTUNITY TO HAVE A JUDGE OR JURY RESOLVE IT AND OTHER RIGHTS MAY BE SUBSTANTIALLY LIMITED.***

(boldface in original) (additional emphasis added). Another statement was a warning: "**CAUTION: IT IS IMPORTANT THAT I THOROUGHLY READ THE CONTRACT BEFORE I SIGN IT."** A third statement in the box was a promise by the student: "**I WILL NOT SIGN THIS AGREEMENT/NOTE BEFORE I READ IT (EVEN IF OTHERWISE ADVISED)**."

Each Plaintiff also signed a Service Contract Agreement with SSH. In this Agreement, SSH described its vocational training services as including 175 flight hours, unlimited access to a flight simulator, ground school classes, and individual instruction "as needed." Included in the cost of training were textbooks, supplies, and other required materials. Plaintiffs claim that although the Agreement required all training

to be completed within 18 months, SSH's lack of resources made it impossible to finish within that time.

SSH executives allegedly misappropriated the student loan funds it received from KeyBank "for their own personal benefit" and "knew [SSH] did not have and never would have sufficient equipment, trainers or maintenance personnel to meet its obligations under the Service Contract Agreements" within the required time period. Although Plaintiffs Kilgore and Fuller logged 185.8 and 310 hours of flight training respectively — more than the promised 175 hours — they did not complete all requirements for graduation before SSH closed its doors and filed for bankruptcy in February of 2008. They therefore did not receive a diploma, certificate or other accreditation for their training.

According to Plaintiffs, KeyBank had knowledge that "the private student loan industry — and particularly aviation schools — was a slowly unfolding disaster," yet continued to loan tuition money to students and disburse the loan proceeds to SSH. This knowledge was allegedly based on KeyBank's previous dealings with similar schools. In Plaintiffs' words, "KeyBank single-handedly fueled the meteoric rise of SSH which subsequent lenders gleefully continued."

Unable to take action against SSH because of the automatic stay, 11 U.S.C. § 362, Plaintiffs turned their focus to KeyBank.

II

DISTRICT COURT PROCEEDINGS

On June 17, 2008, Plaintiffs filed suit against KeyBank in California state court.[1] After Plaintiffs filed their Second

[1]The suit initially included a third plaintiff, Kevin Wilhelmy, and two additional defendants, Student Loan Xpress and American Education Services. Wilhelmy was not listed as a plaintiff in the Third Amended Complaint, and Plaintiffs voluntarily dismissed the two additional defendants.

Amended Complaint, KeyBank removed the case to the U.S. District Court for the Northern District of California under 28 U.S.C. §§ 1441, 1446, and 1453. Plaintiffs asserted claims of unfair competition under California's UCL, which prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Although Plaintiffs' Second Amended Complaint also included claims of aiding and abetting fraud and claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, these claims were omitted from Plaintiffs' Third Amended Complaint — the last complaint filed in this case.

Plaintiffs did not seek damages. Rather, they requested an order enjoining KeyBank from (1) "reporting to any credit agency any default by Plaintiffs or the Class under the Notes," (2) "enforcing the Notes against Plaintiffs and the Class or taking any action in furtherance of enforcement efforts," and (3) "engaging in false and deceptive acts and practices" with respect to consumer credit contracts involving purchase money loans. Plaintiffs sought to prohibit KeyBank from collecting *any* amount of the debt, even though Plaintiffs had received at least some benefit from the loan in the helicopter pilot training they received before SSH shut down.

KeyBank moved to compel arbitration. The district court, Judge Thelton E. Henderson, denied the motion.[2] The initial question the district court had to consider was whether California or Ohio law applied to determine the enforceability of the arbitration clause. Plaintiffs argued that the parties' choice of Ohio law should not control. The district court agreed, holding that Ohio law was "contrary to a fundamental policy of California" and that California had a "materially greater

[2]At the time of the district court's decision on the motion to compel arbitration, the operative complaint was the Second Amended Complaint. Later, when the court dismissed Plaintiffs' case, the operative complaint was the Third Amended Complaint. Any differences between the two complaints are not material to our resolution of this appeal.

interest" than Ohio in the resolution of the dispute. *See Hoffman v. Citibank (S.D.), N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008) (per curiam). This fundamental policy was California's rule prohibiting the arbitration of claims for public injunctive relief, notwithstanding the parties' agreement to arbitrate.[3] *See Cruz*, 66 P.3d at 1164-65. In contrast to California, Ohio law appeared to allow arbitration of such claims. *Hawkins v. O'Brien*, No. 22490, 2009 WL 50616, at *6 (Ohio Ct. App. Jan. 9, 2009). With these considerations in mind, the court declined to apply the parties' choice of Ohio law.

Judge Henderson next considered whether, under California law and the FAA, Plaintiffs could maintain their lawsuit or whether they were bound to arbitrate as required in the Notes. Judge Henderson held that *Broughton* and *Cruz* prohibited the arbitration of Plaintiffs' injunctive relief claims and that therefore, the arbitration clause was unenforceable. Judge Henderson denied the motion to compel arbitration in July of 2009, nearly two years before the Supreme Court issued the *Concepcion* decision and thus did not have the benefit of that opinion.

Pursuant to 9 U.S.C. § 16(a)(1)(C), KeyBank appealed the district court's denial of its motion to compel arbitration. While that interlocutory appeal was pending, KeyBank moved to dismiss the Third Amended Complaint. The district court granted the motion and entered judgment, from which Plaintiffs appeal.

[3]Presumably because the district court was considering Plaintiffs' Second Amended Complaint, which requested only private injunctive relief, the district court extended the *Broughton-Cruz* rule to *all* claims for injunctive relief, not merely those for public injunctive relief. Given the Third Amended Complaint's later request for a broad public injunction, we do not address whether such an extension was warranted.

III

STANDARD OF REVIEW

We review de novo the district court's decision to deny KeyBank's motion to compel arbitration. *Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1152 (9th Cir. 2004). Plaintiffs, as the parties challenging the enforceability of the arbitration clause, "bear[ ] the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

IV

DISCUSSION

KeyBank asks us to find error in the district court's refusal to enforce the Note's choice of Ohio law and its application of California law, but we need not address this issue. We assume, without deciding, that California law governs Plaintiffs' claims, because even under California law, the arbitration agreement must be enforced.

A

The Federal Arbitration Act

[1] The FAA provides for the enforcement of private agreements to arbitrate disputes. It also includes a savings clause that allows such agreements to be invalidated only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Unless the savings clause applies, arbitration agreements are "valid, irrevocable, and enforceable." *Id.* The United States Supreme Court has repeatedly explained that the FAA was intended to reverse the long history of judicial refusal to enforce arbitration agreements. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55 (1995); *Volt Info. Sci., Inc. v. Bd. of Trs.*,

489 U.S. 468, 474 (1989). As the Court stated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985), "the Act was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law."

Causes of action premised on statutory rights are subject to contractual arbitration agreements just as are claims under the common law. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 725 (9th Cir. 2007) (citing *Mitsubishi Motors Corp.*, 473 U.S. at 627). Congress may, of course, determine that certain claims should not be subject to arbitration and can pass federal legislation that removes such claims from the reach of the FAA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). But "[a]lthough all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party [opposing arbitration] should be held to it unless *Congress itself has evinced an intention to preclude a waiver of judicial remedies* for the statutory rights at issue.' " *Id.* (emphasis added) (second alteration in original) (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628). Such congressional intent can be found from the text of the statute or from "an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

[2] The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). The federal case must be stayed while the parties proceed to arbitration. 9 U.S.C. § 3. "The court's role under the Act is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. If the response is affirmative on both counts, then the Act requires the court to enforce

the arbitration agreement in accordance with its terms." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (internal citation omitted). Because the parties here agree that the particular claims at issue fall within the scope of the arbitration clause, we must decide only whether the agreement to arbitrate is valid.

[3] The FAA preserves generally-applicable contract defenses and thus allows for invalidation of arbitration agreements in limited circumstances — that is, if the clause would be unenforceable "upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). However, any other state law rule that purports to invalidate arbitration agreements is preempted because the Act "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). In short, a state statute or judicial rule that applies only to arbitration agreements, and not to contracts generally, is preempted by the FAA:

> A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner *different from that in which it otherwise construes nonarbitration agreements* under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable . . . .

Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (emphasis added). The federal government's authority to preempt state laws invalidating arbitration agreements derives from the Supremacy Clause of the Constitution. U.S. Const. art. VI ("This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.").

B

The *Concepcion* Decision

It is against this backdrop that we must read the savings clause found in § 2 of the FAA. Although that section "explicitly retains an external body of law governing revocation (such grounds 'as exist at law or in equity')," *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, ___, 129 S. Ct. 1896, 1902 (2009) (quoting 9 U.S.C. § 2), it also "ensures that [the parties'] agreement will be enforced according to its terms *even if a rule of state law would otherwise exclude such claims from arbitration*," *Mastrobuono*, 514 U.S. at 58 (emphasis added). This inherent tension between the two clauses of § 2 has caused many courts to struggle to define the precise scope of the savings clause.

The Supreme Court recently clarified that scope in *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740 (2011). *Concepcion* reemphasized that the "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' 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." *Id.* at 1746 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

The plaintiffs in *Concepcion* were telephone service customers to whom AT&T had promised free phones. Although AT&T did not charge its customers for the actual phones, it did charge sales tax based on the retail value of the phones. *Id.* at 1744. When the customers filed suit in federal court, AT&T moved to compel arbitration pursuant to the arbitration agreement in the customers' service contracts. The arbitration clause required all customers to arbitrate disputes in an "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *Id.*

The district court concluded in *Concepcion* that the arbitration clause was unconscionable, relying on the California Supreme Court's opinion in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). The *Discover Bank* rule prohibited as unconscionable the enforcement of class action waivers in arbitration agreements,

> when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.

Id. at 1110. On appeal, we affirmed the district court's application of the *Discover Bank* rule to find the arbitration clause unenforceable. We held that the *Discover Bank* rule was not preempted by the FAA because it was "simply a refinement of the unconscionability analysis applicable to contracts generally in California," rather than a rule that applied only to arbitration agreements. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009) (internal quotation marks omitted), *rev'd sub nom.*, *Concepcion*, 131 S. Ct. 1740.

[4] The Supreme Court disagreed. 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 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.

The Court held that the *Discover Bank* rule — prohibiting class action waivers in arbitration agreements — was just such a rule because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. Just as the FAA guarantees that contracting parties "may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate," *id.* at 1748-49 (internal citations omitted), so too does it allow them to agree to limit *in what capacity* they arbitrate, *id.* at 1750-51. In so holding, the Court rejected the plaintiffs' argument that the savings clause applied to the *Discover Bank* rule because of the rule's "origins in California's unconscionability doctrine and California's policy against exculpation." *Id.* at 1746. Neither was the Court persuaded by the dissent's policy argument that requiring the availability of class proceedings allows for vindication of small-dollar claims that otherwise might not be prosecuted, concluding that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753. Even though California might have had a legitimate basis for its public policy against class action waivers, that policy could not save the *Discover Bank* rule from FAA preemption.

C

California's *Broughton-Cruz* Rule

As the Supreme Court did with the Discover Bank rule in *Concepcion*, we examine the state law rule at issue here to determine whether it is preempted by the FAA. In *Broughton*, the California Supreme Court considered whether plaintiffs asserting claims under that state's Consumers Legal Remedies Act ("CLRA") could be compelled to arbitrate those claims.

Plaintiffs requested remedies including an order enjoining the defendant from engaging in deceptive advertising. *Broughton*, 988 P.2d at 71. The court concluded that an agreement to arbitrate could not be enforced in a case where the plaintiff is "functioning as a private attorney general, enjoining future deceptive practices on behalf of the general public." *Id.* at 76. This decision was based on the court's determination that the California legislature "did not intend this type of injunctive relief to be arbitrated." *Id.*

According to the California Supreme Court, "the evident institutional shortcomings of private arbitration in the field of such public injunctions" would be unacceptable in a case where there was more "at stake" than a "private dispute by parties who voluntarily embarked on arbitration aware of the trade-offs to be made." *Id.* at 77. The court noted that enforcement of an arbitrator's injunction would require a new arbitration proceeding, but that a court retains jurisdiction and could more easily handle the "considerable complexity" involved in supervising injunctions. *Id.* Further, judges "are accountable to the public in ways arbitrators are not." *Id.* The court thus found that the judicial forum "has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators." *Id.* at 78.

The *Broughton* court held also that prohibiting the arbitration of CLRA claims for injunctive relief did not contravene the FAA: "although the [U.S. Supreme Court] has stated generally that the capacity to withdraw statutory rights from the scope of arbitration agreements is the prerogative solely of Congress, not state courts or legislatures, it has never directly decided whether a [state] legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests." *Id.* (internal citation omitted).

In *Cruz*, the California Supreme Court extended the *Broughton* rule to claims for public injunctive relief under the UCL. 66 P.3d at 1159. The court found that "the request for injunctive relief is clearly for the benefit of health care consumers and the general public by seeking to enjoin PacifiCare's alleged deceptive advertising practices." *Id.* at 1164. Because public injunctive relief claims under the UCL are "designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff," the court held that such claims could not be subject to arbitration, notwithstanding the parties' agreement to the contrary. *Id.* at 1165.

We have previously agreed with the California Supreme Court that the *Broughton-Cruz* rule prohibits arbitration for claims for public injunctive relief. *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1082 (9th Cir. 2007) ("California law provides that certain 'public injunctions' are incompatible with arbitration . . . . Actions seeking such injunctions cannot be subject to arbitration even under a valid arbitration clause."). We must, however, reexamine whether *Davis* remains good law after *Concepcion*. *United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005) (a prior panel decision is binding unless "intervening Supreme Court or en banc authority" compels a contrary conclusion).

D

Concepcion's Effect on the *Broughton-Cruz* Rule

We now turn to whether California's rule against arbitration of public injunctive claims is preempted by federal law. The district courts in California have been working diligently to discern precisely whether the *Broughton-Cruz* rule has survived *Concepcion*. They have come to different conclusions.

Shortly after *Concepcion* was decided, Judge Alsup of the Northern District of California determined that the California state law rule against arbitration of public injunctive relief

claims did not survive the Supreme Court's decision and was preempted by the FAA. *Arellano v. T-Mobile USA, Inc.*, No. 3:10-cv-05663-WHA, Dkt. 82, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011). The district court noted the Supreme Court's decades-old statement that " 'Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.' " *Id.* at *1 (quoting *Southland Corp.*, 465 U.S. at 16). *Arrellano* concluded that because "California's preclusion of public injunctive relief claims from arbitration . . . 'prohibits outright the arbitration of a particular type of claim,' " the rule is preempted by the FAA. *Id.* at *1-2 (quoting *Concepcion*, 131 S. Ct. at 1747). Judge Alsup acknowledged the policy argument that enforcement of an arbitration clause in a public injunctive relief case "would preclude an individual from ever bringing these types of claims by foisting prohibitive costs on the individual plaintiff," but determined that, "[p]erhaps regrettably, this argument was rejected by *Concepcion*." *Id.* at *2.

Other cases from the Northern District have similarly held that *Concepcion* compels the conclusion that the FAA preempts the *Broughton-Cruz* rule. Judge Whyte agreed with *Arellano*'s reliance on *Concepcion*'s "particular type of claim" analysis and concluded that "*Concepcion* would seem to preempt California's arbitration exemption for claims requesting public injunctive relief." *In re Apple and AT&T iPad Unlimited Data Plan Litig.*, No. 5:10-cv-02553-RMW, Dkt. 107, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011).

After *Concepcion*, Judge Henderson — the district judge in this case — also interpreted that case as foreclosing the application of the *Broughton-Cruz* rule. *Nelson v. AT&T Mobility LLC*, No. 3:10-cv-04802-THE, Dkt. 30, 2011 WL 3651153, at *2 (N.D. Cal. Aug. 18, 2011). Describing the rule against arbitration of public injunctive relief claims as a "blanket ban[ ]" of arbitration under state law, Judge Henderson held that *Concepcion* compels preemption of that rule, notwith-

standing "public policy arguments thought to be persuasive in California." *Id.* (internal quotation marks omitted).

Other district courts have disagreed and determined that the *Broughton-Cruz* rule is still viable after *Concepcion*. Judge Guilford of the Central District stated that "[t]he holdings of *Cruz* and *Broughton* are not inconsistent with *Concepcion*, and they protect important public rights and remedies." *In re DirecTV Early Cancellation Fee Marketing and Sales Practices Litig.*, ___ F. Supp. 2d ___, No. 8:09-ml-02093-AG-AN, Dkt. 255, 2011 WL 4090774, at *10 (C.D. Cal. Sept. 6, 2011) (*In re DirecTV Litigation*). He reasoned that the public injunction rule was not an "outright" prohibition of arbitration of a particular type of claim because it did not prohibit arbitration of all injunctive relief claims, but only those "brought on behalf of the general public." *Id.* The court, relying on *Broughton*'s claimed institutional advantages of the judicial over the arbitral forum, found "compelling reasons why arbitration is not the proper forum for vindicating a broad public right." *Id.* (citing *Broughton*, 988 P.2d at 77-78)

Judge Carter of the Central District recently considered *Concepcion* and the *Broughton-Cruz* rule in a case with allegations quite similar to those before us, albeit against the school, not the lender. *Ferguson v. Corinthian Colleges*, ___ F. Supp. 2d ___, No. 08:11-cv-00127-DOC-AJW, Dkt. 56, 2011 WL 4852339 (C.D. Cal. Oct. 6, 2011). There, a former student of one of the defendant colleges alleged that the school induced students to enroll by making them "believ[e] they are receiving a quality education at an affordable price, when, in fact, they pay some of the highest tuition rates in the country, incur crippling student loans, and graduate with a degree that never qualifies nor prepares them for any job placement other than low-wage, low-skill employment." *Id.* at *1. The student claimed, *inter alia*, that these actions violated the UCL.

Ferguson held that "the California Legislature's decision to allow citizens to bring injunctive relief claims . . . *on behalf*

of the public" was not preempted by the FAA. *Id.* at *7. The court noted that "[n]otwithstanding *Concepcion*'s mandate that state law cannot prohibit arbitration of certain types of claims, the Supreme Court previously acknowledged that 'not . . . all controversies implicating statutory rights are suitable for arbitration.' " *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 627) (omission in original). The court agreed with the principle announced in *Broughton* that a state legislature *can* enact laws the purposes of which are incompatible with the enforcement of an arbitration agreement. Claims under such laws avoid FAA preemption, Judge Carter reasoned, as long as "the primary purpose of an injunctive relief action under the [statute] is to protect the public." *Id.* at *9. Judge Carter held that "[b]ecause Plaintiffs' injunctive relief claims seek to enforce a public right, there is an inherent conflict with sending these claims to an arbitrator." *Id.*

[5] We hold that the *Broughton-Cruz* rule does not survive *Concepcion* because the rule "prohibits outright the arbitration of a particular type of claim" — claims for broad public injunctive relief. *Concepcion*, 131 S. Ct. at 1747. Therefore, our statement in *Davis* — that *Broughton* and *Cruz* prohibit the arbitration of public injunctive relief claims in California — is no longer good law. *See* 485 F.3d at 1082.

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

The difficulty with the preemption analysis urged by Plaintiffs and applied in *Ferguson* and *In re DirecTV Litigation* is

twofold. First, it improperly gives weight to state public policy rationales to contravene the parties' choice to arbitrate. *Concepcion* rejected this proposition, holding that state law "cannot require a procedure that is inconsistent with the FAA, *even if it is desirable for unrelated reasons*." 131 S. Ct. at 1753 (emphasis added); *see also id.* at 1753 (Thomas, J., concurring) ("If § 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration."). Although Plaintiffs are correct that "*Concepcion* did not address the question of arbitrability of a public injunction remedy," the policy arguments justifying the *Broughton-Cruz* rule, however worthy they may be, can no longer invalidate an otherwise enforceable arbitration agreement.

Indeed, the Supreme Court recently relied on *Concepcion* to reaffirm the FAA's preemption of state public policy justifications. *In Marmet Health Care Center, Inc. v. Brown*, Nos. 11-391 and 11-394, 565 U.S. ___ (Feb. 21, 2012) (per curiam), the Court held that under the FAA, an arbitration agreement between a nursing home and a patient's family member was enforceable in a suit against the nursing home for personal injury or wrongful death — despite the West Virginia Supreme Court of Appeals' conclusion that arbitration of such claims was against that state's public policy. Slip Op. at 3-4. Because the public policy of West Virginia prohibited " 'outright the arbitration of a particular type of claim" — personal injury and wrongful death claims — that policy was "displaced by the FAA.' " *Id.* at 3 (quoting *Concepcion*, 131 S. Ct. at 1747).

The second problem with Plaintiffs' argument is that it mistakenly regards the motivation of state legislators as relevant to determining whether federal law preempts their legislation. "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum* for the resolution of claims which the contracting parties agreed to resolve by arbi-

tration." *Southland Corp.*, 465 U.S. at 10 (emphasis added). In *Southland Corp.*, the Court identified "only two limitations" on the FAA's enforcement provision: arbitration provisions (1) "must be a part of a written maritime contract or a contract 'evidencing a transaction involving commerce' " and (2) can be invalidated under the savings clause. *Id.* at 10-11 (quoting 9 U.S.C. § 2). No other "additional limitations under State law" can render arbitration clauses unenforceable. *Id.* at 11.

The *Ferguson* court was correct that there is a third exception to the FAA's applicability, but it applies only to *federal* statutory claims. In *Mitsubishi Motors Corp.*, the Court approved a two-step inquiry in determining whether a statutory claim was subject to arbitration. This approach "first determin[es] whether the parties' agreement to arbitrate reached the statutory issues, and then . . . consider[s] whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." 473 U.S. at 628. But such external constraints may be found only in other federal statutes, not in state law or policy. *See id.* ("We must assume that if *Congress* intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.") (emphasis added).

Broughton, upon which *Ferguson* and *In re DirecTV Litigation* relied, found an inherent conflict between arbitration and public injunctive relief claims under California law. 988 P.2d at 78-79. The *Broughton* court then explained why its rule prohibiting the arbitration of claims for public injunctive relief was consistent with the FAA: "Although both California and federal law recognize the important policy of enforcing arbitration agreements, it would be perverse to extend the policy so far as to preclude states from passing legislation the purposes of which make it incompatible with arbitration." *Id.* at 79.

But the very nature of federal preemption *requires* that state law bend to conflicting federal law — no matter the purpose of the state law. It is not possible for a state legislature to avoid preemption simply because it intends to do so. The analysis of whether a particular statute precludes waiver of the right to a judicial forum — and thus whether that statutory claim falls outside the FAA's reach — applies only to *federal*, not state, statutes. On the several occasions that the Supreme Court has considered whether a statutory claim was unsuitable for arbitration, the claim at issue was a federal one. *See Gilmer*, 500 U.S. at 35 (Age Discrimination in Employment Act); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479-484 (1989) (Securities Act of 1933, overruling *Wilko v. Swan*, 346 U.S. 427 (1953)); *McMahon*, 482 U.S. at 238, 242 (Securities Exchange Act of 1934 and RICO); *Mitsubishi Motors Corp.*, 473 U.S. at 629 (Sherman Act). Although some members of the Court have expressed a desire to interpret § 2 as allowing states to preclude arbitration on public policy grounds, that view has not carried the day. *See Perry*, 482 U.S. at 495 (O'Connor, J., dissenting) ("[T]here can be little doubt that the California Legislature intended to preclude waiver of a judicial forum . . . . California's policy choice to preclude waivers of a judicial forum for wage claims is entitled to respect."); *Southland*, 465 U.S. at 21 (Stevens, J., concurring in part and dissenting in part) ("We should not refuse to exercise independent judgment concerning the conditions under which an arbitration agreement, generally enforceable under the Act, can be held invalid as contrary to public policy simply because the source of the substantive law to which the arbitration agreement attaches is a State rather than the Federal Government.").

We read the Supreme Court's decisions on FAA preemption to mean that, other than the savings clause, the only way a particular statutory claim can be held inarbitrable is if *Congress* intended to keep that *federal* claim out of arbitration proceedings:

> That is not to say that all controversies implicating statutory rights are suitable for arbitration. There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the *congressional* policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the *congressional* intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

Mitsubishi Motors Corp., 473 U.S. at 627 (emphasis added). *See also Dean Witter Reynolds, Inc.*, 470 U.S. at 221 ("The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, . . . at least absent a countervailing policy manifested in *another federal statute*.") (emphasis added).

[6] 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.

E

Unconscionability

The district court, having determined that Plaintiffs' claims were not arbitrable under *Broughton* and *Cruz*, did not decide whether the Note's arbitration clause is unconscionable. Given our conclusion that the *Broughton-Cruz* rule is no longer viable post-*Concepcion*, we accept the parties' invitation to consider this issue.

[7] *Concepcion* did not overthrow the common law contract defense of unconscionability whenever an arbitration clause is involved. Rather, the Court reaffirmed that the savings clause preserves generally applicable contract defenses such as unconscionability, so long as those doctrines are not "applied in a fashion that disfavors arbitration." *Concepcion*, 131 S. Ct. at 1747.

Unconscionability under California law "has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (internal quotation marks omitted). Courts use a "sliding scale" in analyzing these two elements: "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.* No matter how heavily one side of the scale tips, however, *both* procedural and substantive unconscionability are required for a court to hold an arbitration agreement unenforceable. *Id.*

[8] In *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199-1200 (9th Cir. 2002), we applied California law and

determined that an arbitration agreement was not procedurally unconscionable, in large part because it contained an opt-out provision allowing the plaintiff to reject the arbitration program within 30 days of signing the contract. The provision constituted a "meaningful" opportunity to opt out, notwithstanding the plaintiff's arguments that "he did not have the degree of sophistication necessary to recognize the meaning of the opt-out provision or to know how to avoid it." *Id.* at 1200. We invoked "the general rule . . . that 'one who signs a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument.' " *Id.* (quoting *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1175, 1185 (Cal. 1976). We further held that 30 days was an "ample opportunity to investigate any provisions [the plaintiff] did not understand before deciding whether to opt out of [the] arbitration program." *Id.*

[9] Here, the arbitration clause in the Note, like that at issue in *Circuit City*, withstands scrutiny. The arbitration agreement is not buried within the document; it is conspicuous and appears in its own section of the Note. The Note contains more than one statement setting forth in plain language the rights that Plaintiffs would waive if they did not opt-out of the arbitration clause: the right to litigate in court, the right to a jury trial, and the right to proceed on a class basis. The arbitration clause even points out that the costs of arbitration could be higher than those of a trial.

Plaintiffs attempt to dismiss these obvious statements by asserting that KeyBank never communicated the existence of the clause to them other than in the Note; further, all of the face-to-face interaction the students had regarding the Note was with SSH, not with KeyBank. Plaintiffs claim also that they had "no guidance on what to do in the event" they had any questions about the Note and that it is therefore "[n]ot surprising[ ] [that] not a single SSH borrower exercised his/her opt-out right."

We do not see how these allegations are relevant given the clarity of the contract that Plaintiffs signed. The Note states that the opt-out notice must be in writing and that telephone calls do not suffice. It lists precisely what information must be included in the notice and the address to which the notice must be sent. Far from accepting Plaintiffs' suggestion at oral argument that these requirements were intolerably onerous, we view them as clear, easy-to-follow instructions as to how Plaintiffs could have opted out of the arbitration agreement had they chosen to do so. To the extent Plaintiffs claim that they were so "intoxicated by helicopters" that they never saw the arbitration clause, we refer them to the end of the Note. Immediately above each Plaintiff's signature line is a warning that the student should read the contract carefully before signing, as well as a promise from the student that he would do so "even if otherwise advised."

[10] The arbitration agreement was not forced upon the Plaintiffs leaving them with no meaningful choice. We will not relieve Plaintiffs of their contractual obligation to arbitrate by manufacturing unconscionability where there is none. Because we hold that the arbitration clause in the parties' contract is not procedurally unconscionable, we need not address whether the terms of that clause are substantively unconscionable. It is enough that when faced with a 60-day opt-out provision and a conspicuous and comprehensive explanation of the arbitration agreement, Plaintiffs did not reject that agreement.

F

KeyBank's Motion to Dismiss

At oral argument, both counsel urged us to reach the issues raised in Appeal No. 10-15934 even if we were to conclude that the case must proceed to arbitration. It would be inappropriate for us to do so. Because the motion to compel arbitration should have been granted, the subsequent judgment in

favor of KeyBank is a nullity. For this reason, and given our decision to vacate the judgment, Appeal No. 10-15934 is moot. We express no opinion on the central issue in that appeal — whether Plaintiffs' UCL claims would be pre-empted by the NBA or the OCC regulations.

V

CONCLUSION

[11] The FAA preempts California's *Broughton-Cruz* rule that claims for public injunctive relief cannot be arbitrated. Plaintiffs must be held to their decision to sign the Note — and accept at least a portion of the benefit of their contract with KeyBank — without opting out of the arbitration agreement.

For the foregoing reasons, in Interlocutory Appeal No. 09-16703, we REVERSE the district court's denial of KeyBank's motion to compel arbitration, VACATE the judgment, and REMAND to the district court with instructions to enter an order staying the case and compelling arbitration.

We DISMISS Appeal No. 10-15934 as MOOT.

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

March 21, 2012

THE STURDEVANT LAW FIRM

/s/ James C. Sturdevant
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No. 09-16703 (Consolidated with No. 10-15934)
Published Opinion Filed March 7, 2012
(Trott, Bea, Pallmeyer)

United States Court of Appeals for the Ninth Circuit

MATTHEW C. KILGORE, individually and on behalf of all others similarly situated; WILLIAM BRUCE FULLER, individually and on behalf of all others similarly situated; KEVIN WILHELMY, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

KEYBANK, NATIONAL ASSOCIATION, successor in interest to KEYBANK USA, N.A.; KEY EDUCATION RESOURCES, a division of KEYBANK, NATIONAL ASSOCIATION; GREAT LAKES EDUCATIONAL LOAN SERVICES, INC., a Wisconsin corporation,

Defendants-Appellants.

RESPONSE TO PETITION FOR REHEARING *EN BANC*

On Appeal from the United States District Court for the Northern District of California, San Francisco Division – The Honorable Thelton E. Henderson
D. Ct. No. 3:08-cv-02958-TEH

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INTRODUCTION

Plaintiffs' Petition for Rehearing En Banc ("Petition") seeks rehearing of the Panel Decision issued March 7, 2012. The Petition should be denied because the Panel properly applied the preemption principles under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*., as recently explicated by the Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The operative rule of preemption is simply stated and simply applied in this case: state laws that "prohibit outright the arbitration of a particular type of claim" – in this case, so-called "public injunction" claims – are displaced by the FAA's national policy of enforcing agreements to arbitrate in accordance with their terms. *See id*. at 1747.

Plaintiffs' Petition, and the briefs of *Amici Curiae* submitted in support thereof, all suffer from the same fundamental flaw: they depend upon the premise that, because California state law would otherwise authorize each Plaintiff to bring a so-called "public injunction" action in court, that rule of state public policy trumps the FAA's requirement that Plaintiffs' agreement to arbitrate their own disputes privately be enforced according to its terms. That premise is mistaken. As the Supreme Court reiterated earlier this year, "a categorical rule prohibiting arbitration of a particular type of claim . . . is contrary to the terms and coverage of the FAA." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012)

(citing *Concepcion*). Because the Panel's decision follows directly from *Concepcion* and *Marmet*, Plaintiffs' petition for en banc review should be denied.

BACKGROUND

Plaintiffs, on behalf of themselves and a putative class of just over 100 student loan borrowers who attended a vocational flight school, sued lenders KeyBank, National Association, and Great Lakes Educational Loan Services, Inc. (collectively "KeyBank") to prohibit enforcement of student loan promissory notes after the flight school closed its doors and filed for bankruptcy. Each class member had borrowed between $50,000 and $60,000 from KeyBank to finance flight training. The Plaintiffs' theories evolved over time, but in the Third Amended Complaint, Plaintiffs settled on the contention that KeyBank should be held derivatively liable for the flight school's alleged fraudulent course of conduct because KeyBank had allegedly violated California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, by failing to include the holder in due course notice required by the Federal Trade Commission's Holder Rule, 16 C.F.R. § 433.2.[1] Plaintiffs sought an order enjoining KeyBank from (i) making adverse reports concerning class members to the credit reporting agencies, (ii)

[1] After denying KeyBank's motion to compel arbitration, the District Court dismissed Plaintiffs' Third Amended Complaint with prejudice, ruling that Plaintiffs could not prove a direct violation of the Holder Rule and that Plaintiffs' proposed application of the UCL to imply the Holder notice into the promissory notes is preempted by the National Bank Act and its implementing regulations.

enforcing collection under the promissory notes, and (iii) engaging in false and deceptive acts and practices with respect to consumer credit contracts.

The promissory note for each class member contained an identical arbitration clause, which provided, *inter alia*, that any claims between the lender and the borrower would be subject to binding arbitration upon election of either party, unless the borrower had first elected to opt-out of the arbitration provision. There is no dispute that the plaintiffs did not opt out of the arbitration provision, and KeyBank properly invoked the arbitration clause.[2]

I. THE PANEL OPINION CORRECTLY APPLIED SUPREME COURT PRECEDENT AND SHOULD NOT BE DISTURBED

The Panel astutely declined to apply California's "public injunction rule." That rule was created by California's Supreme Court in *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67 (Cal. 1999), and *Cruz v. PacifiCare Health Sys.*, 66 P.3d 1157 (Cal. 2003). Although an earlier panel of the Ninth Circuit acknowledged the *Broughton/Cruz* rule in *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007), that decision did not control the Panel's consideration here.

As a threshold matter, the *Davis* panel did not squarely address the argument presented here, that the public injunction rule is preempted by the FAA. The *Davis* panel was asked to consider whether an arbitration agreement was unenforceable

[2] For purposes of their Petition, Plaintiffs dropped their argument, which was also rejected by the Panel, that KeyBank's arbitration clause is unconscionable. [*See* Petition, p. 4, n.1] Thus, Plaintiffs do not challenge that they agreed to arbitration.

as procedurally and substantively unconscionable. *See* 485 F.3d at 1070. After finding that the agreement was unconscionable in three respects, the panel then acknowledged *Broughton* and *Cruz*, noting in passing that the arbitration agreement's prohibition against administrative actions would be unenforceable under California law insofar as it bars "public injunctive relief." *Id*. at 1082. The panel went on, however, and specifically struck that clause of the agreement, not based on the public injunction rule, but rather based on state and federal Supreme Court precedent barring enforcement of arbitration agreements that purport to interfere with an independent regulatory agency's authority to vindicate public rights. *See id*. at 1082-83 (citing, *inter alia*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *EEOC v. Waffle House, Inc*., 534 U.S. 279, 295-96 (2002) (discussed *infra*, pp. 13-14)). Because the public injunction rule was not squarely at issue, the *Davis* panel never considered whether the *Broughton* and *Cruz* rulings are preempted by the FAA.[3] Accordingly, the Panel in this case was not bound by the panel's statements in *Davis*.

In any event, the Panel in this case correctly applied the Supreme Court's FAA precedent to hold that California's public injunction rule is no longer good law following Supreme Court's recent FAA preemption holdings in *Concepcion*

[3] Indeed, neither of the parties in the *Davis* appeal so much as mentioned *Broughton* or *Cruz*. *See* Appellant's Opening Brief, 2004 WL 2416113 (Sept. 22, 2004); Appellee's Response Brief, 2004 WL 5469534 (Oct. 21, 2004).

and *Marmet*. *See Kilgore v. KeyBank, N.A.*, 673 F.3d 647, 960 (9th Cir. 2012). The Panel's decision is mandated by the plain language of the FAA,[4] the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, and the Supreme Court's consistent application of those dual federal mandates. As the Supreme Court has stated time and time again, Congress enacted the FAA to displace the historic "judicial hostility to arbitration agreements" with a "'liberal federal policy favoring arbitration.'" *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also, e.g., Preston v. Ferrer*, 552 U.S. 346, 349 (2008); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55 (1995).

That national policy imposes on courts a duty to "rigorously enforce agreements to arbitrate," and that duty "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Moreover, the national policy "'appli[es] in state

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[4] The relevant provision of the FAA provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such contract [or] transaction, . . . 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.

as well as federal courts' and 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.'" *Preston*, 552 U.S. at 353 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)); *see also id*. ("The FAA's displacement of conflicting state law is now well-established . . . and has been repeatedly reaffirmed [by the Supreme Court].") (internal quotations omitted).

There is only one narrow exception to this national policy. The FAA's savings clause provides that all agreements to arbitrate should be enforced, *except* "upon such grounds as exist at law or in equity for the revocation of *any contract*." 9 U.S.C. § 2 (emphasis added). "This savings clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, 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." *Concepcion*, 131 S. Ct. at 1746 (internal quotations omitted).

As the Panel correctly recognized here, this case falls squarely within the rule, not the exception to Section 2 of the FAA. The Supreme Court clarified this principle in *Concepcion*: "[w]hen a 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 (citing *Preston*, 552 U.S. at 353). During the current term (just weeks before the Panel decision in this case), the Supreme Court applied this principle to preempt a West Virginia rule that prohibited pre-dispute

agreements to arbitrate personal-injury and wrongful-death claims against nursing homes because such a prohibition is "a categorical rule prohibiting arbitration of a particular type of claim, and that is contrary to the terms and coverage of the FAA." *Marmet*, 132 S. Ct. at 1203-04 (citing to a line of cases where the Supreme Court found the FAA preempted a state law). Inasmuch as California's public injunction rule purports to prohibit the arbitration of a particular type of claim – public injunctions – it must yield to the FAA. While this rule of preemption existed before *Concepcion* and *Marmet*, the Supreme Court's clear and unequivocal application of the rule in those cases so undermined the Ninth Circuit's previous reliance on the *Broughton/Cruz* public injunction rule that the Panel in this case correctly concluded that *Davis* no longer constitutes good law.

Plaintiffs nevertheless argue that the Supreme Court's FAA precedent carves out another exception to the FAA's pro-arbitration policy. According to Plaintiffs, these cases hold that arbitration agreements will not be enforced where the arbitral forum would prevent a party from effectively vindicating his or her substantive statutory rights. [*See* Petition, pp. 6-7.] Plaintiffs concede that all of the Supreme Court cases stating this exception have done so in the context of a *federal* statutory right, but argue that the same logic applies to *state* statutory rights. Because the Supremacy Clause creates a critical distinction between federal and state legislation, however, Plaintiffs' argument is simply wrong.

The cases cited by Plaintiffs all concern instances where the Supreme Court was asked to resolve a perceived conflict between two competing *federal* policies. The focal point of Plaintiffs' argument, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), is illustrative. The question presented in that case was whether claims under the federal antitrust statutes could be submitted to arbitration pursuant to the parties' agreement. *See id.* at 616. At the outset, the Supreme Court rejected the notion that federal statutory claims should be any less susceptible to arbitration than other types of claims. *See id.* at 627 (stating that the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability"). At the same time, the Court recognized Congress's prerogative to choose to make certain *federal* claims non-arbitrable:

> Just as it is the *congressional* policy manifested in the [FAA] that requires courts to liberally construe the scope of arbitration agreements covered by that Act, it is the *congressional* intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

Id. (emphasis added).

In short, *Congress* retains the power to override the FAA's mandate. *See id*. at 628. But short of a showing of such congressional intent, the parties to an arbitration agreement must be held to their bargain. *See id*. As the Supreme Court recently put it, Section 2 of the FAA "requires courts to enforce agreements to

arbitrate according to their terms . . . . That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quoting *McMahon*, 482 U.S. at 226). Accordingly, any party opposing arbitration bears the burden to "show that *Congress* intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227 (emphasis added); *see also Gilmer*, 500 U.S. at 27 (1991). Analyzing the FAA and the Sherman Act, the Supreme Court ultimately concluded that the two federal statutes could be harmonized inasmuch as the antitrust litigant is able to "vindicate its statutory cause of action in the arbitral forum," and, thus, the FAA's pro-arbitration policy will not frustrate the remedial and deterrent functions of the Sherman Act. *Mitsubishi Motors*, 473 U.S. at 636. The Supreme Court came to similar conclusions in the other cases cited by Plaintiffs.[5]

Thus, the *Mitsubishi Motors* precedent upon which Plaintiffs rely, stands only for the unremarkable proposition that another *federal* statute can potentially trump the FAA's mandate. Because of the Supremacy Clause, the same cannot be

[5] *See, e.g.*, *CompuCredit*, 132 S. Ct. at 671-72 (holding that civil-liability provision of the Credit Repair Organizations Act does not override the FAA's mandate); *Gilmer*, 500 U.S. at 35 (concluding that claims under the ADEA are arbitrable); *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995) (holding that Carriage of Goods by Sea Act does not forbid selection of a foreign arbitral forum); *McMahon*, 482 U.S. at 238, 240 (finding that claims under § 10(b) of the Securities Exchange Act of 1934 and the civil provisions of the RICO Act are subject to arbitration).

said of a state statute. Both the Panel in this case and a subsequent panel of this Court have come to the same conclusion: "Plaintiffs assert primarily state statutory rights, but *Mitsubishi, Gilmer, Green Tree* [*Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000)] and similar decisions are limited to federal statutory rights." *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 n.2 (9th Cir. 2012) (citing panel decision in this case); *accord Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011); *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 346 (6th Cir. 2006) (noting that the Supreme Court decisions regarding the vindication of statutory rights "are limited by their plain language to the question of whether an arbitration clause is enforceable where federal statutorily provided rights are affected"); *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 873 (8th Cir. 2004) ("In [*Randolph*], the Supreme Court addressed arbitration of federal statutory claims, and did not analyze the unconscionability of an arbitration agreement under state law."); *see also, e.g., S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518, 1525-26 (7th Cir. 1993) ("The Supreme Court has rejected the argument that a state statute can void the choice of private parties to arbitrate a dispute."); *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1121-24 (1st Cir. 1989) ("[O]nly Congress, not the states, may create exceptions to [the FAA.]").

II. PLAINTIFFS HAVE MADE NO SHOWING THAT THEY ARE UNABLE TO VINDICATE THEIR SUBSTANTIVE STATUTORY RIGHTS IN ARBITRATION

Even if Plaintiffs could invoke the "vindication of federal statutory rights" theory to resist arbitration of their state-law claims, their argument would fail. Despite their characterization of the arbitration clause as a liability waiver (rather than simply a forum selection), Plaintiffs cannot establish that they confront any obstacle to vindicating their substantive statutory rights because Plaintiffs *can* pursue the relief they seek in arbitration. It is well established that by "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." *Mitsubishi Motors*, 473 U.S. at 628. Thus, the Supreme Court has "repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *CompuCredit Corp.*, 132 S. Ct. at 671 (citing *Gilmer*, 500 U.S. at 28; *McMahon*, 482 U.S. at 240).

Plaintiffs acknowledge that the proposition that a prospective litigant will be unable to vindicate its statutory rights in arbitration is ordinarily a factual issue that the opponent of arbitration bears the burden of establishing. [*See* Petition, pp. 3, 8 ("The answer lies in whether the party claiming that enforcement of the arbitration clause would bar the vindication of substantive statutory rights is able to prove that fact.")] Plaintiffs further concede that in *Randolph*, the Supreme Court enforced

the parties' arbitration clause because the plaintiff failed to make any factual showing that the existence of large arbitration costs precluded the plaintiff from effectively vindicating her rights. [*See* Petition, p. 8 (citing 531 U.S. at 91 & n.6).]

So too here. Other than the conclusory assertion that arbitrators cannot effectively administer the kind of "public injunctions" envisioned by *Broughton* and *Cruz*, Plaintiffs have not presented any evidence to establish that the arbitrator or arbitrators of Plaintiffs' individual claims will be unable to grant the relief they seek. Indeed, even the California Supreme Court in *Broughton* conceded that courts have "generally affirmed the ability of arbitrators to issue injunctions." 21 988 P.2d at 77; *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451 (2003) (parties can grant equitable powers to arbitrator); *Gilmer*, 500 U.S. at 32 ("arbitrators do have the power to fashion equitable relief"). As in *Concepcion*, 131 S. Ct. at 1753, the class members here have plenty of incentive to pursue their individual arbitrations as each member seeks relief on a loan exceeding $50,000.

Finally, the fact that Plaintiffs purport to seek a "public injunction"[6] does not change the analysis. In *Mitsubishi Motors*, the Supreme Court rejected the notion that the "pervasive public interest in enforcement of the antitrust laws" made antitrust claims inappropriate for arbitration. 473 U.S. at 629 (internal quotations

[6] KeyBank disputes this characterization as well. [*See* KeyBank's Initial Appellate Brief, Dkt. No. 7, pp. 19-25 (arguing that Plaintiffs' lawsuit is nothing more than an ordinary putative class action seeking private remedies (i.e., debt relief).]

omitted). The Court recognized that the treble-damages remedy of the antitrust laws served a deterrent function for the broader public interest. But the Court concluded that "[n]othwithstanding its important incidental policing function, the treble-damages cause of action . . . seeks primarily to enable an injured competitor to gain compensation for that injury." *Id*. at 635. Thus, the Court ruled that so long as the prospective litigant can vindicate its own individual cause of action, *both* the remedial *and* deterrent functions of the law will be served. *See id*. at 637; *see also Gilmer*, 500 U.S. at 27-28 (finding the arbitral forum just as capable of serving the public interest as the courts in the context of an ADEA claim); *McMahon*, 482 U.S. at 240 (applying same reasoning in the context of a RICO claim). As argued above, Plaintiffs have made no showing that they will be unable to vindicate their own individual claims in arbitration.

The Supreme Court's decision in *Equal Employment Opportunity Commission v. Waffle House, Inc.* underscores this point in the context of an injunction claim. In that case, the Supreme Court analyzed a potential conflict between the FAA's pro-arbitration policy and the public remedy provisions of Title VII of the Civil Rights Act of 1964. The question presented was whether an agreement to arbitrate between an employee and his employer would preclude the EEOC from bringing its own "victim-specific" enforcement action seeking damages and injunctive relief in federal court. *Waffle House*, 534 U.S. at 282.

Trying to balance the statutory priorities, the Fourth Circuit split the difference and ruled that the EEOC could not seek victim-specific relief (e.g., damages, back pay), but could seek broad injunctive relief in court because the EEOC's public function outweighed the FAA's pro-arbitration policy. *See id*. at 290.

The Supreme Court rejected that approach for the simple reason that the EEOC was not a party to the arbitration agreement and brought its enforcement action independently from the employee. *See id*. at 294-96. The Court paused to observe, however, that, to the extent "the federal policy favoring arbitration trumps the plain language of Title VII[,]" then "the EEOC [would] be barred from pursuing *any* claim outside the arbitral forum." *Id*. at 295. In other words, if the EEOC were a party to the arbitration agreement, it would have been barred from bringing *any* claim, including a public injunction claim, outside the arbitral forum.

III. RESPONSE TO *AMICI CURIAE* BRIEFS

The arguments presented in the *Amici* briefs in support of Plaintiffs' Petition are largely redundant, and, therefore, a separate response is largely unnecessary. KeyBank does, however, wish to set the record straight with regard to the "parade of horribles" argument advanced by the *Amici* "Arbitration Professors." [*See* Brief of *Amici Curiae* Arbitration Professors (Dkt. No. 103), pp. 6-9 (stating that the Panel's interpretation of the FAA "has no sensible limits" and "knows no bounds").] The Arbitration Professors' argument grossly overreaches. They

would have this Court believe that the Panel opinion will open the door to the arbitration of virtually any dispute, including criminal and child custody proceedings. These fears ignore a threshold limit on the FAA's scope: the FAA's enforcement provision is only triggered with respect to contracts "evidencing a transaction involving commerce." 9 U.S.C. § 2; *see also Preston*, 552 U.S. at 349 (holding that the FAA rests on Congress' authority under the Commerce Clause); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 582 (2008) (finding that Section 2 applies to agreements to arbitrate "so long as their subject involves 'commerce'"). Accordingly, the Panel's decision will only apply to agreements to arbitrate in a commercial setting.

CONCLUSION

The flawed theme that runs throughout all the briefs filed in support of the Petition is the unsupported premise that prospective litigants may evade arbitration by simply styling their claims as actions for a public injunction. *Concepcion*, and the Supreme Court precedent upon which it relies, makes clear that plaintiffs cannot avoid their agreements to arbitrate by artful drafting. Plaintiffs have a remedy for their alleged injuries: they can seek injunctive relief against KeyBank in arbitration. But state law cannot create a new doctrine that frustrates the national policy of enforcing agreements to arbitrate in accordance with their terms. For these reasons, Plaintiffs' Petition for Rehearing En Banc should be denied.

Date: May 16, 2012

Respectfully submitted,

NIXON PEABODY LLP

/s/ W. Daniel Deane
W. Scott O'Connell
W. Daniel Deane
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Attorneys for Defendants-Appellants KeyBank, National Association and Great Lakes Educational Loan Services, Inc.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants-Appellants hereby state that they are not aware of any related cases pending or previously heard in by Court involving the same or closely related issues or the same transaction or event, beyond the two cases identified by Plaintiffs/Appellees in their Statement of Related Cases.

Date: May 16, 2012

Respectfully submitted,

NIXON PEABODY LLP

/s/ W. Daniel Deane
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Attorneys for Defendants-Appellants KeyBank, National Association and Great Lakes Educational Loan Services, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 35-4 or 40-1, the attached Response to the Petition for Rehearing *En Banc*:

(1) was prepared using 14-point Time New Roman font;

(2) is proportionally spaced; and

(3) consists of 3,756 words and 15 pages, excluding portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consistent with this Court's order of April 4, 2012 (ECF No. 118).

Date: May 16, 2012

Respectfully submitted,

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