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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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

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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

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