ARBITRATION & MEDIATION IN BANKRUPTCY

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A. Arbitration in Bankruptcy

> *When will mankind be convinced and agree to settle their difficulties by arbitration?*
>
> —Benjamin Franklin

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, requires judges to refer parties to arbitration on any arbitrable matter as to which the parties have signed a valid arbitration agreement. The Supreme Court has long acknowledged "a national policy favoring arbitration," *Preston v. Ferrer*, 552 U.S. 346, 349 (2008), and "the fundamental principle that arbitration is a matter of contract," *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010); *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) ("[C]ourts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms."). The Supreme Court recently reaffirmed these principles in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

An agreement to arbitrate, in essence, is a waiver of the right of the parties to have their claims and defenses litigated in court. The FAA makes an agreement to arbitrate enforceable—backed by the remedy of specific performance—when it is included as a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. §§ 2-3. Section 1 of the FAA provides that the FAA does not apply to certain "contracts of employment." 9 U.S.C. § 2; *see New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019). To avoid

[1] These materials are designed to provide general educational information regarding the subject matters covered and do not reflect the personal views and opinions of the author or the presenter.

arbitration of a dispute that falls within the ambit of section 2 and does not arise out of an employment contract excluded under section 1, a party has two options. First, she can demonstrate that there is no agreement, that the agreement to arbitrate is invalid, or that the arbitration agreement does not cover the particular dispute. Second, she can show that notwithstanding the existence of a valid arbitration agreement covering the parties' dispute, there is an inherent conflict between arbitration and the federal statute on which the claim is based that renders the claim not arbitrable. This second option, challenging the enforceability of an otherwise valid arbitration clause, has generated more litigation in the bankruptcy arena than the first.

1. Validity & Scope of Arbitration Agreement

Whether parties agreed to arbitrate a particular dispute requires consideration of both whether the parties entered into any arbitration agreement at all and whether the particular dispute falls within the scope of that agreement. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

a. Did the parties enter into a valid agreement to arbitrate *some* set of claims?

To be enforceable, an agreement to arbitrate must be the product of mutual assent between the parties, as determined under state-law principles that govern the formation of contracts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). "[B]efore the [FAA]'s heavy hand in favor of arbitration swings into play, the parties themselves must *agree* to have their disputes arbitrated." *Howard v. Ferrellgas Partners, LP*, 748 F.3d 975, 977 (10th Cir. 2014); *see Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."). Courts will not compel arbitration if a party is not

bound by the arbitration agreement when, for example, she was not an original party to the agreement. *Larsen v. Citibank FSB*, 871 F.3d 1295, 1303 (11th Cir. 2017); *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95 (2d Cir. 1999) ("[W]hether an entity is a party to the arbitration agreement also is included within the broader issue of whether the parties agreed to arbitrate"). Although the Supreme Court in *Henry Schein, Inc.*, recently reaffirmed the enforceability of an agreement to have the arbitrator decide whether a given claim must be arbitrated, the Supreme Court made it clear that any preliminary issue about the validity of the arbitration agreement itself must be resolved by the court.[2] 139 S. Ct. at 530 ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists").

(1.) Debtor-Derived Claims

Courts have found that whether a trustee is bound by a pre-petition arbitration agreement depends on whether the claim asserted by the trustee is derivative of the debtor's rights. When a claim asserted by a trustee is debtor-derived, courts have imputed to the trustee the debtor's agreement to arbitrate the dispute. *E.g., Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1155 (3d Cir. 1989). When a claim asserted by a trustee arises under the Bankruptcy Code, however, courts have held that the trustee is not a party to the arbitration agreement. *E.g., Gandy v. Gandy (In re Gandy)*, 299 F.3d 489, 497 (5th Cir. 2002).

[2] As noted previously, the validity and scope of an arbitration agreement requires a twofold inquiry. First, did the parties enter into a valid agreement to arbitrate *some* set of claims? Second, did the parties agree to arbitrate the given claim before the court? The first question is decided by the court, but the second question is decided by the arbitrator when the arbitration agreement contains a valid delegation clause. *See infra* at 11-13.

(2.) Non-Signatories

Although arbitration is a matter of contract, the absence of a written arbitration agreement is not always an impediment to arbitration. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631-32 (2009). There are legal theories that will allow a non-signatory to a contract to compel arbitration against a signatory. Courts addressing whether a non-signatory to a contract can enforce an arbitration clause rely on traditional state-law principles of contract and agency. *Id.* (holding that a litigant who was not a party to an arbitration agreement may seek relief under the FAA if relevant state law allows him to enforce the agreement). A non-signatory, for example, could argue for the enforcement of an arbitration agreement "through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Id.*

The Eleventh Circuit Court of Appeals has taken the lead in applying the state-law doctrine of equitable estoppel to allow a non-signatory to a contract to compel arbitration. *E.g., McBro Planning & Dev. Co. v. Triangle Elect. Constr. Co.*, 741 F.2d 342 (11th Cir. 1984); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993). The Eleventh Circuit applies equitable estoppel under two different circumstances, first, when the signatory "must rely on the terms of the written agreement in asserting [its] claims against the non-signatory" and, second, "when the signatory raises allegations of . . . substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (quotations & citation omitted); *see Kroma Makeup EU v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1355 (11th Cir. 2017) (equitable estoppel applies to compel arbitration only if the plaintiff's claims are

covered by the arbitration clause). The Eleventh Circuit's intertwined-claims test has been adopted by other Circuit Courts. *See, e.g., Grigson v. Creatives Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000).

(3.) Meeting of the Minds

A meeting of the minds or mutual assent is a basic requirement for contract formation. In *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016), the Tenth Circuit Court of Appeals held that conflicting arbitration provisions in inter-related contracts meant that there was no meeting of the minds with respect to the arbitration of claims that fell within the scope of the contracts. *Id.* at 1138. As a result, the Tenth Circuit refused to compel arbitration.

When the parties entered into a business relationship, they executed six inter-related agreements, including a consulting agreement, a purchase agreement, an operating agreement, an assignment agreement, an employment agreement, and a non-disclosure agreement. *Id.* at 1136. Each one contained its own arbitration agreement that inexplicably conflicted with the others as to: (1) which rules would govern, (2) how the arbitrator would be selected, (3) the notice required to arbitrate, and (4) who would be entitled to attorneys' fees and on what showing. *Id.* A few years later, plaintiff sued the defendants for misrepresentation, among other claims. *Id.* The district court found that all six agreements governed plaintiff's claims but denied the defendants' motion to compel arbitration after "concluding that there was no actual agreement to arbitrate as there was no meeting of the minds as to how claims would be arbitrated." *Id.* The defendants appealed.

Applying Colorado law, the Tenth Circuit noted that contract formation required the parties to reach a meeting of the minds on all essential terms. *Id.* at 1137. Because no Colorado court had addressed whether parties can be compelled to arbitrate when there are conflicting

arbitration provisions, the Tenth Circuit looked to the factually-analogous case of *NAACP of Camden County East v. Foulke Management Corporation*, 24 A.3d 777 (N.J. Super. Ct. App. Div. 2011), rendered by the New Jersey Superior Court.

In *NAACP*, the parties presented the trial court with three form contracts signed by the plaintiff in connection with the purchase of a new car. *NAACP of Camden Cnty. E.*, 24 A.3d at 781-82. Each contract contained an arbitration agreement that included inconsistent provisions. *Id.* at 794. For example, "the documents d[id] not clearly and consistently express the nature and locale of the arbitration forum itself." *Id.* The first agreement provided that the venue of the arbitration would lie in the federal district in which the purchaser resided, the second agreement provided that venue would lie in the customer's county of residence, and the third agreement provided that venue would lie in New Jersey, unless otherwise agreed upon by the parties. *Id.* Further, "[t]he form documents . . . d[id] not make clear the time limit in which arbitration must be initiated." *Id.* The first agreement did not contain a time limitation, the second agreement indicated that all applicable statutes of limitation applied, and the third agreement required the purchaser to bring all claims within 180 days from the date of the agreement, while also providing that it would not affect applicable statutes of limitation. *Id.* at 794-95. "Equally murky," the agreements contained various provisions describing the arbitration costs. *Id.* at 795-96. The cost provisions in one agreement were "in some respects potentially less favorable to the purchaser, . . . in some respects potentially more favorable, and in some respects unclear." *Id.* at 795. Despite these inconsistencies, the trial court found that these provisions could be harmonized to reflect mutual assent and, therefore, concluded that the arbitration agreements were enforceable.

On appeal, the New Jersey Superior Court held that the conflicting arbitration provisions were "unenforceable for lack of mutual assent." *Id.* at 798. "[T]he arbitration provisions . . . are too plagued with confusing terms and inconsistencies to put a reasonable consumer on fair notice of their intended meaning." *Id.* at 794. Because of the Supreme Court's finding in *AT&T Mobility LLC* that "the FAA does not require an arbitration provision to be enforced if the provision is defective for reasons other than public policy or unconscionability," the Tenth Circuit was persuaded by the New Jersey Superior Court's decision in *NAACP*, which it found to be factually similar,[3] and affirmed the district court's holding that the parties did not achieve a meeting of the minds with respect to arbitration.[4] *Ragab*, 841 F.3d at 1138; *see AT&T Mobility LLC*, 563 U.S. at 344.

Associate Justice Neil Gorsuch, former Circuit Judge for the Tenth Circuit, dissented. *Ragab*, 841 F.3d at 1139-41 (Gorsuch, J., dissenting). As a preliminary matter, Justice Gorsuch argued that *Ragab* was factually distinguishable from *NAACP* because it involved sophisticated parties to a commercial deal. *Id.* at 1139. Indeed, plaintiff's counsel in *Ragab* drafted three of the agreements containing the arbitration clauses. *Id.* Although acknowledging that the agreements differed on "the details concerning *how* arbitration should proceed," Justice Gorsuch

[3] The Tenth Circuit noted that New Jersey was not the only jurisdiction to hold that conflicting terms in multiple arbitration provisions eliminate the duty to arbitrate. *Id.* at 1141 n.3 (citing *In re Toyota Motor Corp. Unintended Acceleration Mktg. Sales Practices, & Prods. Liab. Lit.*, 838 F. Supp. 2d 967, 992 (C.D. Cal. 2012); *Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1156 (Fla. 2014).

[4] The Tenth Circuit emphasized that none of the agreements had a merger clause or other language suggesting that one contract superceded the others in the event of a conflict. *Ragab*, 841 F.3d at 1138; *see Ex parte Palm Harbor Homes, Inc.*, 798 So. 2d 656, 660 (Ala. 2001) (compelling arbitration when a contract includes a merger clause because the merger clause enables the arbitration provision in that contract to supersede all others).

maintained that "treating the procedural details surrounding the arbitration . . . as *non*essential terms would do a good deal more to 'effectuate[] the intent of the parties' before us, itself always the goal of contract interpretation." *Id.* (citing *Lane v. Urgitus*, 145 P.3d 672, 677 (Colo. 2006)). To do this, Justice Gorsuch proposed two courses of action. First, the plaintiff could initiate arbitration under the agreement of his choosing because "the defendants have expressly acknowledged that his claims f[ell] within the scope of every single agreement." *Ragab*, 841 F.3d at 1139 (Gorsuch, J. dissenting). Second, New Jersey's preference for arbitration has led it to enforce arbitration clauses stating only that claims "shall be submitted to binding arbitration" without any mention of procedural details. *Id.* Under that scenario, the FAA or state statutory law could fill any gaps. *Id.* at 1139-40.

Next, Justice Gorsuch explained a "battle of the forms" analogy where "purchasers and vendors agree to transact but each side memorializes the deal on its own standard forms." *Id.* at 1140. When these forms contain conflicting terms, they "knock each other out but do not void the contract." *Id.* Under the Uniform Commercial Code, "a meeting of the minds occurs with respect to the fundamentals of the deal even if not with respect to the details." *Id.* Since *Ragab* involved sophisticated parties who mutually contributed to drafting the agreements, Justice Gorsuch argued that a "battle of the forms" approach would better serve the parties' intent to arbitrate their claims rather than "allowing the plaintiff to escape the consequences of a choice he once so clearly preferred but now simply regrets." *Id.*

Citing *Ragab*, the bankruptcy court in *Willis v. Tower Loan (In re Willis)*, 579 B.R. 381 (Bankr. S.D. Miss. 2017), *aff'd*, 3:17-cv-01024-CWR-FKB (S.D. Miss. Apr. 11, 2018), *appeal filed*, No. 18-60344 (5th Cir. May 7, 2018), similarly ruled that no agreement to arbitrate existed

because the parties did not reach a meeting of the minds as to how to arbitrate claims. Copies of the bankruptcy court's decision and the affirmance of that decision by the district court are attached as an addendum.

b. Did the parties agree to arbitrate the given claim before the court?

After applying contract-law principles and determining that the parties entered into a valid arbitration agreement, the next step is determining whether the particular dispute falls within the scope of that agreement. Before reaching this step, however, a court must consider who has the primary power to decide whether the particular claim is arbitrable. *See Henry Schein, Inc.*, 139 S. Ct. at 531 ("Under our cases courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'") (quoting *First Options*, 514 U.S. at 944). The answer hinges on whether the arbitration agreement contains a valid delegation clause giving the arbitrator the power to rule on the threshold arbitrability question as well as the merits of the parties' underlying dispute. *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201-02 (5th Cir. 2016). The presence of both a valid agreement to arbitrate and "a valid delegation clause requires the court to refer a claim to arbitration to allow the arbitrator to decide gateway arbitrability issues." *Id.* at 202; *see Rent-A-Center, W., Inc.*, 561 U.S. at 68-69.

Language that courts have deemed sufficient to demonstrate an intent to arbitrate gateway issues includes provisions that commit to arbitration: "any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement," *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1148 (11th Cir. 2015); "any disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination," *Martinez v.*

Carnival Corp., 744 F.3d 1240, 1245 (11th Cir. 2014); "any issue regarding whether a particular dispute or controversy is . . . subject to arbitration," *In re Checking Account Overdraft Litg. MDO No. 2036*, 674 F.3d 1252, 1255 (11th Cir. 2012); and "any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement," *Jones v. Waffle House, Inc.*, 866 F.2d 1257, 1271 (11th Cir. 2017). Courts also have found evidence of the parties' intent to arbitrate arbitrability from language that expressly incorporates arbitration rules that empower the arbitrator to decide that issue. *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763-64 (3d Cir. 2016) ("Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability"); *Arnold v. Homeaway, Inc.*, 890 F.3d 546 (5th Cir. 2018); *Terminix Int'l Co. LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2011). *But see Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 777 & n.1, 780 (10th Cir. 1998). As a practical matter, once a party seeking arbitration points to a purported delegation clause, courts limit their analysis to the question of "whether the parties entered into a valid agreement to arbitrate *some* set of claims." *Kubala*, 830 F.3d at 202.

Before *Henry Schein, Inc.*, the question as to who decides the arbitrability of a given claim in some Circuit Courts did not end with a finding that the contract at issue in fact delegated that question to an arbitrator. The Fifth and Sixth Circuits proceeded further to determine whether the assertion of arbitrability was "wholly groundless." *Douglas v. Regions Bank*, 757 F.3d 460, 463 (5th Cir. 2014); *Turi v. Main Street Adoption Servs., LLP*, 633 F.3d 496, 507 (6th Cir. 2011). If so, courts could ignore the delegation clause and deny enforcement of the arbitration agreement. Recently, in *Henry Schein, Inc.*, the Supreme Court held that federal courts may not decide the

arbitrability of a given claim themselves when the contract delegates that issue to an arbitrator—even when the argument that an arbitration agreement applies to a particular dispute is "wholly groundless." *Henry Schein, Inc.*, 139 S. Ct. at 531.

2. Enforceability of Valid Arbitration Agreements in Bankruptcy

Assuming the parties have agreed to arbitration and the claim falls within the scope of that arbitration agreement, the next step undertaken by courts is determining whether enforcement of the arbitration clause would conflict with the purpose or provisions of the Bankruptcy Code. Courts recognize an apparent conflict between the policy favoring the enforcement of arbitration agreements embodied in the FAA and the Bankruptcy Code's policy favoring the centralization of bankruptcy disputes. Yet these two federal statutes do not refer to each other or specify how they are to interact, leaving bankruptcy courts without statutory guidance as to whether to enforce an otherwise valid arbitration agreement or to refuse enforcement because of a conflicting policy and decide the merits of the dispute themselves. Understanding the intersection when there is a conflict between the policies behind the Bankruptcy Code and the FAA requires an understanding of the FAA, as interpreted by the Supreme Court.

In a series of cases beginning in the mid-1980s, the Supreme Court has given the FAA a broad reach. In *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Supreme Court held that the FAA governs the enforceability of arbitration agreements within its coverage in both federal and state courts, notwithstanding any state substantive or procedural policies to the contrary. *Id.* at 24; *see Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (holding that the FAA preempts Kentucky's clear-statement rule requiring an express statement that an attorney-in-fact has authority to enter into an argument agreement). Next, in

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985), the Supreme Court ruled that judges must compel arbitration "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." Then, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626-27 (1985), the Supreme Court ruled that all claims, even statutory claims not expressly mentioned in an arbitration agreement, are potentially arbitrable.

In its decisions, the Supreme Court has considered the primary purpose of the FAA to be the enforcement of private contracts, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002), and has insisted that courts place arbitration agreements upon the same footing as other contracts, *AT&T Mobility LLC*, 563 U.S. at 339. "Having made the bargain to arbitrate, parties 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." *Mitsubishi Motors*, 473 U.S. at 628.

The Supreme Court has recognized an exception to arbitration when a countervailing federal statute preempts the FAA. In its landmark decision in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), the Supreme Court promulgated a three-part test for evaluating whether Congress intended for another federal statute to preempt the FAA's policy favoring arbitration. In *McMahon*, the Supreme Court held that such an intent could be deduced from: (1) the text of the statute on which the claim was based; (2) the statute's legislative history; or (3) "an inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 227. The party opposing arbitration had the burden of proving that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* In the absence of statutory or legislative guidance in the Bankruptcy Code as to the interplay between bankruptcy jurisdiction

and the FAA, determining the enforceability of arbitration clauses in bankruptcy under *McMahon* requires application of the "inherent conflict" prong of the test. Will arbitrating the dispute pose an irreconcilable conflict with the Bankruptcy Code? The Supreme Court has not yet addressed the enforceability of arbitration clauses in bankruptcy, leaving bankruptcy courts to resolve the "inherent conflict" prong of the *McMahon* test. *See Henderson v. Legal Helpers Debt Resolution, LLC (In re Huffman)*, 486 B.R. 343, 356 (Bankr. S.D. Miss. 2013).

Before 1984, courts favored bankruptcy jurisdiction over arbitration in settling disputes. *Zimmerman v. Continental Airlines, Inc.*, 712 F.2d 55, 58-59 (3d Cir. 1983), *overruled by Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989). After the 1984 amendments to the Bankruptcy Code and the Supreme Court's recent decisions, the Third Circuit recognized that it could "no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of super priority over" the FAA. *Hays*, 885 F.2d at 1161.

In determining when courts may refuse to compel arbitration under the *McMahon* test,[5] courts have relied on the distinction between core and non-core proceedings as providing a relatively bright-line rule. This distinction between core and non-core proceedings initially served a different purpose. Its genesis can be traced to the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code"), Pub. L. No. 95-598, 92 Stat. 2549 (1978), which Congress enacted in 1978 to centralize all bankruptcy-related disputes in the bankruptcy court. Congress gave district courts original jurisdiction over all civil proceedings arising under the Bankruptcy Code, or arising in or

[5] Not all courts consider the core/noncore distinction relevant in applying the *McMahon* test. *See In re U.S. Lines, Inc., v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re U.S. Lines, Inc.)*, 197 F.3d 631-39 (2d Cir. 1999) (evaluating the competing policies of the FAA and the Bankruptcy Code without mentioning the origin of the claim).

related to a bankruptcy case, 28 U.S.C. § 147(b), and granted bankruptcy judges "all of the jurisdiction conferred by this section on the district courts," 28 U.S.C. § 147(c). As a result, once a debtor commenced a bankruptcy case, "all civil proceedings arising under title 11 or arising in or related to a case under title 11" could be heard and decided by a bankruptcy judge. Despite this broad expansion of bankruptcy court jurisdiction, Congress did not afford bankruptcy judges Article III status, limiting their appointment only to a term of fourteen years. 28 U.S.C. §§ 152-153.

In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Supreme Court held that the Bankruptcy Code's broad grant of jurisdiction to bankruptcy judges who did not have life tenure or other protections of Article III constituted an unconstitutional encroachment by Congress into the province of the judiciary. *Id.* at 87. The Supreme Court objected to the bankruptcy court's power to adjudicate disputes that involved no issues under bankruptcy law but which "related to" a bankruptcy case only because a litigant happened to be a debtor. *Id.* at 76. According to the Supreme Court, bankruptcy judges could decide matters involving "the restructuring of debtor-creditors relations" but could not adjudicate "state-created private rights, such as the right to recover contract damages." *Id.* at 71. Although the Supreme Court struck down the Bankruptcy Code as unconstitutional, it stayed its judgment for about three months to allow Congress time to amend the act. *Id.* at 88.

Congress responded to the Supreme Court's decision in *Marathon* by building a jurisdictional scheme around a distinction between core and non-core proceedings. Under the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 346 (1984), the broad jurisdiction of district courts over all bankruptcy cases remained unchanged. 28

U.S.C. §1334(a). Congress, however, reconstituted bankruptcy courts as "units" of district courts and gave district courts authority to refer all bankruptcy-related cases to bankruptcy judges.[6] 28 U.S.C. § 157(a). To avoid adjudication of state-created private rights by non-Article III judges in the absence of consent, Congress created a distinction between core and non-core matters, allowing bankruptcy courts to continue exercising full adjudicative authority over core matters but requiring bankruptcy judges to submit proposed findings of fact and conclusions of law to the district court in non-core matters, unless the parties consented to the bankruptcy court's full exercise of jurisdiction. 28 U.S.C. § 157(b)(1), (c)(1). From 1984 until *Stern v. Marshall*, 564 U.S. 462 (2011), discussed later, the core/non-core distinction has been the key to the jurisdictional structure of the bankruptcy courts in effect.

a. Arbitration of Non-Core Claims

A non-core claim is a civil proceeding that is merely "related to" a bankruptcy case. A "related to" matter is one that "could conceivably have an effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). An example of a noncore proceeding is a breach of contract action against a party to a pre-bankruptcy contract. These types of proceedings resemble the type of "state-created private rights" at issue in *Marathon*, rather than the substantive rights created by the Bankruptcy Code.

Most courts agree that bankruptcy courts must enforce an otherwise valid arbitration clause covering a non-core claim. In *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989), for example, the Third Circuit Court of Appeals found that bankruptcy

[6] The referral of bankruptcy cases to bankruptcy courts is accomplished routinely by a general order of the district court that automatically refers all cases within its bankruptcy jurisdiction to the bankruptcy court in its judicial district.

courts lack discretion to deny enforcement of an arbitration clause as to non-core proceedings since, by their nature, non-core proceedings do not present an irreconcilable conflict with the underlying purposes of the Bankruptcy Code. In reaching this decision, the Third Circuit overruled *Zimmerman*, 712 F.2d at 59-60, where it had granted bankruptcy courts broad discretion in denying enforcement of arbitration claims in bankruptcy. *See Ins. Co. of N. Amer. v. NGC Settlement Tr. & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1066 (5th Cir. 1997) (finding the analysis in *Hays* persuasive, especially given that bankruptcy courts do not have adjudicative authority over non-core claims). Other courts have followed the same approach as the Third Circuit in *Hays* and, consequently, find it unnecessary to engage in an irreconcilable conflicts analysis when confronted with non-core claims. *See* 10 COLLIER ON BANKRUPTCY ¶ 9019.05[2] ("Although the law is still developing, certain preliminary conclusions can be dispensed. First, arbitration provisions are far more likely to be enforced in non-core than in core matters.").

b. Arbitration of Core Claims

Core matters are civil proceedings that either "arise under" the Bankruptcy Code or "arise in" the bankruptcy case. Core proceedings are directly related to a bankruptcy court's central functions. A core claim arises in a bankruptcy case when it is "not based on any right expressly created by Title 11, but nevertheless, would have no existence outside of the bankruptcy." *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987). Examples of core proceedings are an objection to a creditor's proof of claim, a motion to terminate the automatic stay, or an adversary proceeding to determine the dischargeability of a particular debt. A non-exhaustive list of core proceedings is found in 28 U.S.C. § 157(b)(2).

The nexus between core proceedings and the bankruptcy case suggests an "irreconcilable conflict." Circuit Courts, including the Fifth Circuit, have rejected any *per se* rule that finds arbitration of core bankruptcy issues inherently irreconcilable with the Bankruptcy Code. *In re National Gypsum*, 118 F.3d at 1067. Instead, courts will inquire about the reason for the "coreness" of the claim and consider any potential underlying conflicts as dictated by *McMahon*. *Id.* Courts have constructed a distinction between core proceedings, "substantially core" and "procedurally core" to assist in this inquiry.

(1.) Arbitration of Substantially Core Claims

Substantially core proceedings are those claim that are either pure creatures of the Bankruptcy Code or pure bankruptcy issues whose resolution in arbitration would jeopardize both the "need to protect creditors and reorganizing debtors from piecemeal litigation and the undisputed power of a bankruptcy court to enforce its own orders." *In re Nat'l Gypsum*, 118 F.3d at 1069. Such proceedings include avoidance actions or equitable subordination claims and disputes dealing exclusively with priorities and ranking of creditors. *In re Gandy*, 299 F.3d at 497. The Fifth Circuit has held that courts have "significant" discretion to deny enforcement of an arbitration clause as to a cause of action "derived entirely from the federal rights conferred by the Bankruptcy Code" since a substantially core matter presents a strong potential for conflict between the Code and FAA. *In re Nat'l Gypsum*, 118 F.3d at 1069. In such circumstances, the "importance of the federal bankruptcy forum provided by the Code [is] at its zenith." *Id.* at 1068.

(2.) Arbitration of Procedurally Core Claims

Procedurally core proceedings encompass most claims that qualify as "arising in" proceedings. They are the garden variety of claims that vindicate rights that arise out of

non-bankruptcy law that do not jeopardize the core functions of the Bankruptcy Code, though they would have no existence outside of bankruptcy. These matters are usually deemed core only "because of how the dispute arises or gets resolved." *Kittay v. Landegger (In re Hagerstown Fiber Ltd. P'ship)*, 277 B.R. 181, 203 (Bankr. S.D.N.Y. 2002). Examples mainly include pre-petition contract disputes that may arise upon objections to proofs of claims and counterclaims asserted by the estate. *Pardo v. Akai Elec. Co. (In re Singer Co. N.V.)*, No. 00 Civ. 6793 LTS, 2001 WL 984678, at *6 (S.D.N.Y. Aug. 27, 2001). The Courts of Appeals are split as to whether bankruptcy courts have discretion to deny enforcement of an arbitration clause as to a procedurally core claim.

The Third and Fifth Circuits have developed a two-prong test that limits a bankruptcy court's discretion to refuse to compel arbitration as to procedurally core claims. *Hays*, 885 F.2d at 1159; *In re Nat'l Gypsum*, 118 F.3d at 1067-68. To avoid an arbitration clause, the proceeding must "derive[] exclusively from the provisions of the Bankruptcy Code and . . . arbitration of the proceeding [must] conflict with the purposes of the Code." 118 F.3d at 1067. Because procedurally core claims are proceedings that vindicate rights based on non-bankruptcy law provisions, courts have found that such claims fail the first prong of the test. *See Mintze v. Am. Gen. Fin. Serv. (In re Mintze)*, 434 F.3d 222, 223 (3d Cir. 2006).

The Second, Fourth, and Ninth Circuits have adopted a different approach to the discretion of the bankruptcy court to deny arbitration in core proceedings. They apparently allow a party opposing arbitration of a procedurally core claim to show that compelling arbitration of the dispute would necessarily jeopardize the objectives of the Code. *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108-10 (2d Cir. 2006); *In re White Mountain Mining Co.*, 403 F.3d 164, 168-70 (4th Cir.

2005); *Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1015 (9th Cir. 2012).

(3.) Arbitration of *Stern* Claims

Should the bankruptcy court compel arbitration on the grounds that the proceeding presents a *Stern* claim? In *Stern*, 564 U.S. at 495, the Supreme Court cast doubt on the constitutional propriety of the core/non-core distinction that Congress adopted in response to *Marathon*. The Supreme Court declared that a bankruptcy court's exercise of jurisdiction over the debtor's state-law counterclaim, although a statutorily core proceeding under 28 U.S.C. § 157(b)(2)(C), ran afoul of the constitutional requirements of Article III. *Stern*, 564 U.S. at 482-84. Simply put, the Supreme Court found that the statutorily designated core proceedings did not coincide perfectly with the constitutional principles of Article III. *Id.* Under *Stern*, there is a risk that a bankruptcy court may deny arbitration of a core claim that is not within the scope of its adjudicative power.

In *Stern*, the Supreme Court applied the public rights doctrine, which works as an exception to the principle stemming from Article III of the U.S. Constitution that disputes in the federal judicial system must be adjudicated by Article III Judges. The public rights doctrine justifies the constitutional adjudicative authority of tribunals consisting of non-Article III judges, like bankruptcy courts, over claims that qualify as public rights. Whether the public right doctrine applies turns on whether the claim qualifies as a public right or a private right. Under *Stern*, a core matter is a public right if the claim "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern*, 564 U.S. at 499. Under this test, some claims that are substantially core for purposes of arbitrability also will be deemed core

for purposes of the constitutionality of the adjudicative authority of bankruptcy courts. Procedurally core claims are more problematic. For example, the Supreme Court has held that a fraudulent transfer action against a creditor who had not filed a proof of claim is a private right. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55 (1989). Thus, a claim that does not qualify as a public right might be a core claim for purposes of arbitrability over which the bankruptcy court would lack adjudicative authority in the absence of the parties' consent. Another example is an avoidance action, which also may fall outside the adjudicative authority of bankruptcy courts if the creditor whom such claim is asserted against did not file a proof of claim. *Langenkamp v. Culp*, 498 U.S. 42, 43-45 (1990).

A bankruptcy court that denies enforcement of an arbitration clause with respect to a *Stern* claim has several options. Under *Executive Benefits Insurance Agency v. Arkison,* 573 U.S. 25 (2014), bankruptcy courts can treat core claims that they cannot constitutionally full adjudicate in the same manner that they do non-core claims. They can still hear the case and submit proposed findings of fact and conclusions of law to the district court, subject to de novo review. *Id.* at 39-40. District courts can treat any unconstitutional dispositive order or judgment entered by the bankruptcy court as proposed findings of fact and conclusions of law. FED. R. BANKR. P. 8018.1. The parties may be shown to have consented to the bankruptcy court's authority, either expressly or impliedly. *Wellness Int'l Network, Ltd. v. Sharif,* 135 S. Ct. 1932, 1947-48 (2015).

(4.) Arbitration Clauses as Executory Contracts

An alternative approach to applying the *McMahon* test is to treat arbitration clauses as executory contracts. Can the debtor-in-possession ("DIP") or the trustee in bankruptcy avoid arbitration by rejecting, pursuant to 11 U.S.C. § 365, the arbitration agreement and/or the

pre-petition contract that contains the arbitration agreement? Such an outcome turns on whether an arbitration clause is deemed a separate executory contract and whether its rejection terminates the arbitration clause.

Under 11 U.S.C. § 365, a DIP or trustee may reject or assume its obligations. The assumption of an executory contract entitles the DIP or trustee to benefits under the contract but at the same time renders it responsible for performing its obligations. By statute, the rejection of an executory contract constitutes a breach that relates back to the date immediately preceding the filing of the bankruptcy petition. 11 U.S.C. § 365(g)(1); *see N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 530 (1984). One of the difficulties in treating an arbitration agreement as an executory contract is that arbitration agreements rarely stand alone, and an executory contract generally must be assumed or rejected under 11 U.S.C. § 365 in its entirety. *Thompkins v. Lil' Joe Records Inc.*, 476 F.3d 1294 (11th Cir. 2007). When a contract contains provisions that are severable from the rest of the contract, however, the possibility of "selective rejection" arises. Unless the arbitration agreement is considered an entirely separate contract, the DIP or trustee cannot treat the arbitration clause differently from the rest of the contract.

The argument that arbitration agreements are entirely separate from the contracts in which they are contained rests on the Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). There, a party alleged that the contract containing the arbitration clause was procured by fraud. The Supreme Court held that "arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded, and . . . where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." *Id.* at

402; *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."). This separability explains why, in the context of bankruptcy, a pre-petition arbitration clause could survive the rejection of the container contract. Courts have found that an arbitration clause is a contract severable from the underlying agreement in which it is embedded and that the rejection of the container contract does not operate as a rejection of the arbitration clause. *See Societe Nationale Algerienne v. Distrigas Corp.*, 80 B.R. 606, 609 (D. Mass. 1987); *In re Statewide Realty Co.*, 159 B.R. 719 (D.N.J. 1993).

Under 11 U.S.C. § 365(a), a contract is deemed executory when "the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Vern Countryman, *Executory Contracts in Bankruptcy, Part I*, 57 MINN. L. REV. 439, 460 (1963). Simply put, executory contracts are contracts in which neither party has completed performance. Assuming no arbitration proceeding was initiated before the commencement of the bankruptcy case, some courts have reasoned that the reciprocal obligations of the parties remain outstanding at the time the bankruptcy petition is filed, and the failure of either party to abide by their duty to arbitrate would constitute a material breach. Other courts, however, have held that arbitration clauses alone should not be considered executory since the obligations that remain unperformed are passive rather than active. *Hays*, 885 F.2d at 1150 (noting bankruptcy court's ruling that arbitration clause alone did not render customer agreement executory when neither party had any other obligations). Additionally, the FAA, protects arbitration agreements from breach by providing for specific performance. 9 U.S.C. § 3. For this reason, a question arises as whether

the FAA precludes arbitration agreements from being treated as executory contracts since an unperformed arbitration agreement would not result in a material breach.

Assuming that arbitration agreements are executory contracts, what does rejection mean? Generally, the rejection of an executory contract "both cuts off any right of the contracting creditor to require the estate to perform the remaining portions of the contract and limits the creditor's claim to breach of contract." *Univ. Med. Ctr. v. Sullivan*, 973 F.2d 1065, 1075 (3d Cir. 1992). Because the rejection of an arbitration contract is a breach of that contract and not a revocation or rescission, courts have reasoned that the arbitration agreement survives rejection and should be enforced unless it falls under the *McMahon* standard. *Selby's Mkt., Inc. v. PCT (In re Fleming Cos.)*, Civ. No. 05-749-SLR, 2007 WL 788921, at *4 (D. Del. Mar. 16, 2007). Consequently, according to these courts, the arbitration agreement survives for purposes of determining any damages owed by the debtor as a consequence of her failure to perform.

B. Mediation in Bankruptcy

> *Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees.*
>
> —Abraham Lincoln

Judicial authority to order parties to participate in mandatory, non-binding mediation derives from: (a) an applicable statute; (b) the court's local rules; (c) the Federal Rules of Civil Procedure; and (d) the court's inherent powers. As to statutory authority, courts cite the Alternative Dispute Resolution Act ("ADR Act"), 28 U.S.C. §§ 651-658, enacted by Congress to promote the use of alternative dispute resolution ("ADR") by federal courts. The ADR Act lists mandatory mediation as an appropriate ADR process but does not authorize its use. 28 U.S.C. § 651(a). Instead, the ADR Act directs each district court to "devise and implement its own

alternative dispute resolution program, by local rule adopted under [28 U.S.C.] section 2071(a), to encourage and promote the use of alternative dispute resolution in its district." 28 U.S.C. § 651(b). Most federal district courts and some bankruptcy courts responded to the ADR Act by adopting local rules authorizing mandatory mediation. *See, e.g.,* FLA. BANKR. L.R. 9019-2 (Bankr. M.D. Fla.); FLA. BANKR. L.R. 7016-1 & Addendum B (Bankr. N.D. Fla.); FLA. BANKR. L.R. 9019-2 (Bankr. S.D. Fla.); Mediation Procedures (Bankr. N.D. Ga.) (addressing only consensual mediation), available at www.ganb.uscourts.gov.[7] These local rules provide a source of authority for ordering parties to participate in mediation. *See Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 268-69 (6th Cir. 1985). As to those bankruptcy courts that have not adopted a local mediation rule, Rule 9029(b) of the Federal Rules of Bankruptcy Procedure provides a mechanism for a bankruptcy court to exercise its discretion to use the district court's local mediation rule.

Courts also find authority to require mediation as part of pre-trial proceedings authorized under Federal Rule of Civil Procedure 16 ("Rule 16"), which is made applicable to adversary proceedings by Rule 7016 of the Federal Rules of Bankruptcy Procedure. Rule 16(c)(2)(I) provides, in pertinent part, that "the court may take appropriate action[] with respect to . . . settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." FED. R. CIV. P. 16(c)(2)(I). According to the advisory committee note, however, Rule 16(c)(2)(I) contains an important limitation:

> The rule acknowledges the presence of statutes and local rules of plans that may authorize use of some [ADR] procedures even when not agreed to by the parties. The rules does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

Fed. R. Civ. P. 16 advisory committee's note to 1993 Amendment (citations omitted).

[7] Alabama bankruptcy courts have not adopted any local rules on mediation.

Apart from the ADR Act, local rules, and Rule 16, district courts have inherent power to manage and control their calendars. *Brockton Savs. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11 (1st Cir. 1985) ("[T]he rules of civil procedure do not completely describe and limit the power of district courts"). The inherent power of judges to order non-consensual, non-binding mediation has been the subject of debate. *See* Campbell C. Hutchinson, *The Case for Mandatory Mediation*, 42 Loy. L. Rev. 85, 89-90 (1996); Richard A. Posner, *The Summary Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366, 369-72 (1986). Courts have found that the inherent power of a trial judge includes the judicial authority to order non-consensual mediation. *See, e.g., G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989). The topics below discuss the selection of bankruptcy judges as mediators and the requirement of good faith in the mediation process.

1. Mediators as "Professionals" & Bankruptcy Judges as Mediators

Addressing an issue of first impression, a bankruptcy court ruled that a mediator is a "professional person" within the meaning of 11 U.S.C. § 327(a) whom the trustee could not employ without first seeking the bankruptcy court's approval. *In re Smith*, 524 B.R. 689 (Bankr. S.D. Tex. 2015). The underlying dispute involved the interest of a chapter 7 debtor in a limited partnership through which the debtor and two family members shared ownership of a large Texas ranch that generated significant cash flow. The chapter 7 trustee sought to obtain a large cash distribution from the limited partnership. The family members objected. The trustee, the trustee's counsel, and counsel for the limited partnership agreed to mediate the dispute and retained a retired bankruptcy judge to serve as the mediator. No one mentioned the agreement to mediate to the bankruptcy court until the trustee filed a motion seeking additional time to file

pleadings because of the scheduled mediation. At the hearing on the trustee's motion, the bankruptcy judge inquired into the scheduled mediation and learned that the estate would pay a portion of the mediation costs. The bankruptcy court denied the motion and informed the parties that they could not proceed with the scheduled mediation because they had failed to obtain the bankruptcy court's prior approval in violation of 11 U.S.C. § 327(a) and Rule 2014(a) of the Federal Rules of Bankruptcy Procedure. *In re Smith*, 524 B.R. at 693.

The bankruptcy court noted that to qualify as a "professional person," a person must be a professional in the ordinary sense of the word—that is, "a person must perform high-level specialized services requiring discretion or autonomy." *Id.* at 694. Mediators are usually attorneys with a highly specialized skilled set. They are by definition playing a central role in resolving bankruptcy disputes, which is "sufficiently significant to the overall administration of the estate to require court approval." *Id.* at 695. The bankruptcy court did not consider whether a mediator is a "professional person" when the estate is not asked to pay for the mediation.

The bankruptcy court in *In re Smith* discussed whether the employment of a retired bankruptcy judge as a mediator would open the door to the appearance of "cronyism."[8] *Id.* at

[8] The concerns of the bankruptcy court regarding the selection of a retired or sitting bankruptcy judge as a mediator did not arise from any alleged misconduct by the mediator. There are numerous cases, however, where parties have sought to set aside mediated agreements because of alleged mediator misconduct. For example, in *Everett v. Morgan*, No. E207-01491-COA-R3-CV, 2009 WL 113262 (Tenn. Ct. App. Jan. 16, 2009), the Tennessee Appellate Court set aside a mediated agreement on the basis of fraud because of evidence that the mediator concealed his friendship with one of the litigants and misrepresented to the other litigant that he was connected to the court's mediation program. *See Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1096 (Fla. Dist. Ct. App. 2011) (discussing unique role of a mediator in a court-ordered case). In suits brought by disappointed litigants, mediators may claim that quasi-judicial immunity protects them from damages. *See, e.g., Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994) (extending quasi-judicial immunity to mediators performing tasks within the scope of their official duties).

697-700. The retired bankruptcy judge retained by the trustee had served on the bench at the same time as the presiding bankruptcy judge, and they were long-time colleagues "in the innermost circle of the bankruptcy profession." *Id.* at 699. The bankruptcy court ruled that under those circumstances, the retired bankruptcy judge (and his mediation fee) must be approved under 11 U.S.C. § 327, regardless of whether a mediator within the statutory definition of "professional persons." The bankruptcy court reasoned that "[a] hearing must be held vetting the ex-judge's relationship with the sitting judge so that the . . . sun shines brightly on the appointment in the event anyone subsequently questions the selection of the ex-judge and use of estate funds to pay his fee. In cowboy parlance, the process of selecting an ex-judge as a mediator must be 'clean as a hound's tooth.'" *In re Smith*, 524 B.R. at 700.

2. Good Faith

Most litigants and lawyers do not abuse the mediation process. Some lawyers arguably view mediation as an opportunity to prolong litigation or gain an unfair advantage, as demonstrated by this litigator's description of his approach to mediation:

> The worst, negative aspect of it is, if . . . I act for the Big Bad Wolf against Little Red Riding Hood and I don't want this dispute resolved, I want to tie it up as long as I possibly can, and mandatory mediation is custom made. I can waste more time, I can string it along. I can make sure this think never gets resolved because as you've already figured out, I know the language. I know how to make it look like I'm heading in that direction. I make it look like I can make all the right noises in the world, like this is the most wonderful thing to be involved in when I have no intention of ever resolving this. I have the intention of making this the most expensive, longest process but is it going to feel good. It's going to feel so nice, we're going to be here and we're going to talk the talk but we're not going to walk the walk. You can tie anybody up and keep them farther away from getting their dispute resolved through mandatory mediation process or a mediation process than anything else.

Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected*

Mediation, 2002 JOURNAL OF DISPUTE RESOLUTION 241, 267 (2002). What can be done to prevent litigants and their lawyers from engaging in behavior that interferes with the objectives of mediation? There are bankruptcy courts that have included good-faith participation requirements in the same local rules that authorize mandatory mediation. *See, e.g.*, FLA. BANKR. L.R. 9019-2 (Bankr. M.D. Fla.); FLA. BANKR. L.R. 9019-2 (Bankr. S.D. Fla.). The Uniform Mediation Act ("UMA"), however, contains no requirement mandating good faith in mediation. The absence of such a requirement in the UMA is due in part to the uncertainty in defining "good faith" in mediation. Another reason is the concern that the enforcement of a good-faith requirement could violate the confidentiality of the mediation process. The official comments to the UMA recognize the tension between the confidentiality surrounding mediation and enforcement of a "good faith" mediation requirement. Comment 1 to Section 7 of the UMA, titled "Disclosures by the mediator to an authority that may make a ruling on the dispute being mediated," states in part:

> The provisions would not permit a mediator to communicate, for example, on whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement. Section 7(b)(1), however, does permit disclosure of particular facts, including attendance and whether a settlement was reached. For example, a mediator may report that one party did not attend and another attended only for the first five minutes. States with "good faith" mediation laws of court rules may want to consider the interplay between such laws and this Section of the Act.

UMA, § 7, comment 1.

Courts impose sanctions for violations of objectively-determinable bad faith conduct, such as the failure of a party, attorney, or insurance representative to attend mediation or to provide written memoranda prior to the mediation. Some courts also impose sanctions for violations of subjectively-determinable bad faith behavior, such as the failure of a party to engage sufficiently in negotiations, to have a representative present at the mediation with sufficient settlement authority,

or to make a reasonable settlement offer. The cases below discuss subjective bad-faith conduct in mediation in the categories of participation, full attendance, settlement authority, and "sabotage."

a. Participation

In *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76 (Bankr. S.D.N.Y. 2010), *rev'd*, 452 B.R. 374 (S.D.N.Y. 2011), Wells Fargo Bank, N.A. ("Wells Fargo") provided the debtor with a cash collateral account to use in connection with the sale of the debtor's assets. After the sale, a dispute arose as to whether Wells Fargo was required to reimburse the purchaser for certain wages paid to the debtor's former employees. The bankruptcy court ordered the debtor, its purchaser, and Wells Fargo to mediate the dispute. The bankruptcy court's mediation order incorporated its general standing order governing medication procedures, which provided, in part:

> The mediator shall report any willful failure to attend or participate in good faith in the mediation process or conference. Such failure may result in the imposition of sanctions by the court.

Id. at 86.

After the mediation failed, the mediator filed a report with the bankruptcy judge alleging that Wells Fargo had failed to mediate in good faith. *Id.* at 80-81. The bankruptcy judge issued an order to show cause why Wells Fargo should not be held in contempt of the mediation and standing orders. The mediator testified at the hearing that during mediation, Wells Fargo had resisted in engaging in any "risk-analysis" of the claims asserted against it but had insisted on reiterating its position that it was not open to any compromise that would involve "taking a single dollar out of [its] pocket." *Id.* at 80, 83-84. After the hearing, the bankruptcy court sanctioned Wells Fargo for its passive participation in the mediation. *Id.* at 93-94. In the bankruptcy judge's view, Wells Fargo's behavior constituted a "failure to participate in good faith" and

warranted sanctions under Rule 7016 of the Federal Rules of Bankruptcy Procedure. According to the bankruptcy judge:

> Passive attendance at mediation cannot be found to satisfy the meaning of participation in mediation, because mediation requires listening, discussion and analysis among the parties and their counsel Adherence to a predetermined resolution, without further discussion or other participation, is irreconcilable with risk analysis, a fundamental practice in mediation. While it goes without saying that a court may not order parties to settle, this court has authority to order the parties to participate in the process of mediation, which entails discussion and risk analysis.

Id. at 85-86.

On appeal, the district court viewed Wells Fargo's conduct differently from the bankruptcy court and reversed the contempt sanction. *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374 (S.D.N.Y. 2011). Central to the district court's determination was the elusive nature of what constitutes good-faith participation in mediation. The district court considered "objective criteria as attendance, exchange of pre-mediation memoranda, and settlement authority" to be elements of good faith in court-ordered mediation but balked at requiring a greater level of participation on the ground that courts may not force a party to settle. *Id.* at 383. For that reason, the district court found that Wells Fargo was within its rights in refusing to budge from its contention that it was not liable. Wells Fargo had not foregone a risk analysis, as the bankruptcy court found, but had determined that its risk was zero. The district court observed that "[m]ost courts that have addressed allegations of insufficient 'participation' during mediation proceedings (i.e., the degree to which a party discusses the issues, listens to opposing viewpoints, analyzes its risk of liability, and generally participates in the 'process' of mediation) have declined to find a lack of good faith." *Id.* at 381-82.

b. Attendance

In *Brooks v. Lincoln Nat'l Life Ins. Co.*, No. 8:05CV118, 2006 WL 2487937, at *4 (D. Neb. Aug. 25, 2006), mediation began at 9:30 a.m. After the plaintiff rejected the defendant's initial settlement offer, the mediator informed the plaintiff that the defendant's representative had reservations for a 2:30 p.m. flight. *Id.*, at *2. Counsel for the plaintiff instructed the mediator to inform the defendants that "they had five minutes to put a 'serious' settlement offer on the table, or that [he] and his client were leaving." *Id.* When the mediator returned with another settlement offer, counsel for the plaintiff immediately rejected the defendants' proposal, stating that it was "unacceptable and unworthy of response." *Id.* Plaintiff's counsel refused to listen to the mediator's explanation for the offer and ended the mediation. The magistrate judge concluded that both parties failed to comply fully with the mediation order and ordered the defendants and defendants' counsel to jointly pay the plaintiff $200.00. *Id.*, at *3. The magistrate judge also ordered plaintiff's counsel to: (1) send letters of apology to the plaintiff, the mediator, the defendants' representative (through counsel), and the defendants' attorney; and (2) enroll and complete an educational seminar or counsel in how to represent a client at a mediation. *Id.*

c. Settlement Authority

In *A.T. Reynolds & Sons., Inc.*, 424 B.R. 76, the bankruptcy court sanctioned Wells Fargo because its representative had limited settlement authority of $35,000.00 and had no "authority to enter into creative solutions that might have been brokered." *Id.* at 93-94. On appeal, the district court agreed that a failure to send a representative with settlement authority to a mediation may constitute a lack of good faith but concluded that the bankruptcy court had applied "an unworkable and overly stringent standard" by requiring the representative to have the ability to settle the

dispute for any amount, discuss any legal theory, and enter into undefined "creative solutions." *A.T. Reynolds & Sons., Inc.*, 452 B.R. at 384. "[W]here a mediation order requires the presence of a person with 'settlement authority,' a party satisfies this requirement by sending a person with authority to settle for the anticipated amount in controversy and who is prepared to negotiate all issues that can be reasonably expected to arise." *Id.*

In *Pittman v. Brinker International Inc.*, 216 F.R.D. 481 (D. Ariz. 2003), the district court expressed its displeasure at a party for bringing a "biased corporate employee with extremely limited authority." *Id.* at 485. The representative attended a mediation with settlement authority of only up to $175,00.00 when the plaintiff's last pre-settlement conference demand was $450,000.00. *Id.* at 484. In imposing sanctions of $3,126.00 against the defendant and its attorney, the district court found that the defendant decided not to have the appropriate representative "physically present because it was cheaper to violate the court's order and to have her standby telephonically rather than to attend the conference in person." *Id.* at 486.

d. "Sabotage"

In *Baek v. Halvorson (In re Halvorson)*, 581 B.R. 610, 613 (Bankr. C.D. Cal.), *rev'd*, No. 8:18-cv-00525, 2018 WL 6728484 (C.D. Cal. Dec. 21, 2018), the bankruptcy court ordered the parties to mediate two separate but related adversary proceedings. Four days before mediation was scheduled to take place in a California federal courtroom, plaintiffs' counsel contacted the deputy district attorney in Oregon to arrange for the debtor's arrest and extradition from California to Oregon on criminal charges of forgery, identity theft, and perjury. *Id.* at 619. Following a telephone conference, counsel sent this email to the district attorney: "Thanks for talking with me. Please let me know if there is anything you can do to help pick him up in California." *Id.* at

620. Other emails exchanged between plaintiffs' counsel and the district attorney discussed payment of the extradition costs by the plaintiffs and the logistics of the debtor's arrest. *Id.* at 620. Notably, the district attorney questioned whether a copy of the indictment should be provided to the bankruptcy judge and counsel for the debtor prior to the arrest, but plaintiffs' counsel, who had a copy of the indictment, ignored the suggestion. *Id.* at 621.

The mediation began on May 27, 2016, at 10:00 a.m. in a federal courtroom. At 11:57 a.m., plaintiffs' counsel sent the district attorney the following text message during the mediation, "He's here." *Id.* at 612. At the request of the district attorney, a U.S. Marshal arrested the debtor at 3:00 p.m. while the mediation was ongoing. The mediator, a bankruptcy judge (not the presiding bankruptcy judge), ended the mediation without a settlement.

After a status conference, the bankruptcy court stayed the adversary proceedings except as to the issue of whether any party to the mediation had "unclean hands" based on the arrest of the debtor, which had the effect of "sabotaging" the mediation. The bankruptcy court ruled that the plaintiffs were guilty of "unclean hands" against the debtor on the ground that their conduct: (1) was undertaken for the express purpose and with the specific intention of humiliating and embarrassing the debtor; (2) substantially prejudiced the bankruptcy case and related proceedings; (3) adversely affected the public interest in encouraging mediation; and (4) fatally undermined the court's mediation. *Id.* at 640. "He that hath committed iniquity shall not have equity." *Id.* As a remedy, the bankruptcy court dismissed most of the claims asserted by the plaintiffs against the debtor in the adversary proceedings. *Id.* at 644. On appeal, the plaintiffs successfully challenged the bankruptcy court's subject matter jurisdiction based on the trustee's flawed removal of the case from the district court under 28 U.S.C. § 1452, resulting in the bankruptcy

court's decision being vacated. *Baek v. Halvorson (In re Halvorson)*, No. 8:18-cv-00525, 2018 WL 6728484 (C.D. Cal. Dec. 21, 2018).

In *Richard v. Spradlin*, Civil No. 12-127, 2013 WL 1571059 (E.D. Ky. Apr. 12, 2013), the defendants circulated a draft copy of a state-court complaint against the plaintiffs before the mediation. The defendants' representative arrived at the mediation three hours late because of issues with his flight. When he did arrive, he requested several hours to speak with his attorneys and additional time to make several telephone calls. He then demanded a one-on-one meeting with one of the named plaintiffs who was not the designated plaintiffs' representative. Before the mediation formally ended, the defendants filed the state-court complaint against the plaintiffs. The bankruptcy court considered the defendants' decision to file their state-court complaint bad faith. On appeal, the district court agreed. "If they were committed to following the Bankruptcy Court's order to mediate in good faith, the defendants would have honored the ceasefire created by the mediation." *Id.*, at *7.

C. Conclusion

Over the last decade or so, ADR, and in particular arbitration and mediation, has become an acceptable method of resolving bankruptcy disputes. Parties enter into arbitration agreements because they recognize that they cannot anticipate all possible disputes that might arise from their contractual relationship. Parties do not anticipate, however, that one of them might become a debtor in bankruptcy. The interplay between the FAA and the Bankruptcy Code has created challenging questions for both the courts and bankruptcy practitioners.

Mediation has been used in bankruptcy for a wide range of disputes. As a practical matter,

bankruptcy practitioners should come fully prepared to any court-ordered mediation or risk sanctions.

ADDENDUM

Willis v. Tower Loan (In re Willis), 579 B.R. 381 (Bankr. S.D. Miss. 2017), *aff'd*, 3:17-cv-01024-CWR-FKB (S.D. Miss. Apr. 11, 2018), *appeal filed*, No. 18-60344 (5th Cir. May 7, 2018).

Willis v. Tower Loan (In re Willis), No. 3:17-cv-01024-CWR-FKB (S.D. Miss. Apr. 11, 2018), *appeal filed*, No. 18-60344 (5th Cir. May 7, 2018).

Proffitt's right to receive support was expressly reserved for a period of six years, suggesting that if circumstances changed, she could ask the state court to revisit matters. The other cases cited by Ms. Proffitt ruling in favor of a support obligation can be similarly distinguished. The Divorce Decree does not provide for any "common necessities" which would bring the mortgage obligation within the scope of a priority claim.

Finally, Ms. Proffitt presented no evidence of overbearing on the part of the Debtor at the time the Divorce Decree was entered. Both parties were represented by able counsel in its negotiation and entry.

Given all of the factors above, the Court finds the purpose of the Debtor's obligation was not to provide common necessities for Ms. Proffitt, but rather, to provide the parties with an equitable division of the marital debts and property. Therefore, the mortgage payments contemplated by the Divorce Decree are not "in the nature of alimony, maintenance, or support," and thus, are not domestic support obligations under the Bankruptcy Code. Hence, Ms. Proffitt is not entitled to priority treatment under the Code.[4]

CONCLUSION

For the foregoing reasons, the Court will sustain the Debtor's Objection to Claim No. 7 of Tracy Lynne Proffitt, and Claim No. 7 shall be disallowed. A separate Order will be entered contemporaneously herewith.

4. As argued in the Chapter 13 Trustee's brief, Ms. Proffitt has not (1) filed a motion for relief from the automatic stay, or (2) filed an application for payment of an administrative expense. Thus, those issues are not before the Court. Further, because the Court finds Ms. Proffitt's claim is not entitled to priority, it need not address the lack of explanation as to its calculation.

IN RE: Chuck WILLIS, Debtor.

Chuck Willis, Plaintiff

v.

Tower Loan of Mississippi, LLC, d/b/a Tower Loan of Crystal Springs, Defendant

CASE NO. 17-00160-NPO
ADV. PROC. NO. 17-00025-NPO

United States Bankruptcy Court, S.D. Mississippi.

Signed: December 12, 2017

Background: Chapter 7 debtor brought adversary proceeding against creditor, alleging creditor violated the Truth in Lending Act (TILA) by providing misleading and incorrect disclosures in installment loan agreement. Creditor filed motion to dismiss or, alternatively, to compel arbitration.

Holding: The Bankruptcy Court, Neil P. Olack, J., held that conflicting arbitration provisions indicated that there was no meeting of the minds with respect to arbitration.

Motion denied.

1. Contracts ⇐245(1)

A merger clause signals to the courts that the parties agree that the contract is to be considered completely integrated.

2. Contracts ⇐245(1)

A standard merger clause achieves the purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, as well as negates the

apparent authority of an agent to later modify the contract's terms.

3. Alternative Dispute Resolution ⇐178

In light of the liberal federal policy favoring arbitration courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms. 9 U.S.C.A. § 2.

4. Alternative Dispute Resolution ⇐175

Enforcement of an arbitration agreement is a matter of both contract formation and contract interpretation.

5. Alternative Dispute Resolution ⇐200

When an arbitration agreement contains a delegation clause giving the arbitrator the primary power to rule on the arbitrability of a specific claim, the court's power to decide arbitrability questions transfers to the arbitrator.

6. Alternative Dispute Resolution ⇐199

When a party seeking arbitration points to a purported delegation clause, the court limits its analysis to that of contract formation and answers only the question of whether the parties entered into an agreement to arbitrate some set of claims; if the court finds both a valid agreement to arbitrate and a delegation clause within that agreement, the motion to compel arbitration should be granted in almost all cases.

7. Alternative Dispute Resolution ⇐113

The federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties. 9 U.S.C.A. § 2.

8. Federal Courts ⇐3053

State contract law determines whether parties entered into a valid agreement to arbitrate a set of claims.

9. Contracts ⇐9(1)

Under Mississippi law, a contract is unenforceable if the material terms are not sufficiently definite.

10. Contracts ⇐9(1)

Under Mississippi law, a contract is sufficiently definite when it contains enough information to enable the court under proper rules of construction to ascertain its terms.

11. Contracts ⇐15

Under Mississippi law, a meeting of the minds is essential for an agreement to be valid and binding upon the parties.

12. Alternative Dispute Resolution ⇐132

Under Mississippi law, as predicted by bankruptcy court, conflicting arbitration provisions in two agreements indicated that there was no meeting of the minds with respect to arbitration, and thus no actual agreement to arbitrate existed.

13. Contracts ⇐9(1), 15

Under Mississippi law, to form a contract, the material terms must be sufficiently definite, and the parties must achieve a meeting of the minds with respect to the agreement.

Richard R. Grindstaff, Bryce Kunz, Byram, MS, for Plaintiff.

Jeffrey Ryan Barber, Kaytie M. Pickett, Adam Stone, Jones Walker LLP, Jackson, MS, for Defendant.

MEMORANDUM OPINION AND ORDER ON DEFENDANT TOWER LOAN'S MOTION TO DISMISS OR, ALTERNATIVELY, TO COMPEL ARBITRATION AND TO DISMISS OR STAY CLAIMS PENDING ARBITRATION

Judge Neil P. Olack, United States Bankruptcy Judge

This matter came before the Court for hearing on October 25, 2017 (the "Hear-

ing"), on the Defendant Tower Loan's Motion to Dismiss or, Alternatively, to Compel Arbitration and to Dismiss or Stay Claims Pending Arbitration (the "Motion to Dismiss or to Compel Arbitration") (Adv. Dkt. 8)[1] filed by Tower Loan of Mississippi, LLC ("Tower Loan"), the Defendant Tower Loan's Memorandum in Support of Motion to Dismiss or, Alternatively, to Compel Arbitration and to Dismiss or to Stay Pending Arbitration ("Tower Loan's Brief") (Adv. Dkt. 9) filed by Tower Loan, the Plaintiff's Response to Defendant's Motion to Dismiss and to Compel Arbitration (the "Debtor's Response") (Adv. Dkt. 17) filed by the debtor, Chuck Willis (the "Debtor"), the Memorandum Brief in Support of Plaintiff's Response to Defendant's Motion to Dismiss and to Compel Arbitration (the "Debtor's Brief") (Adv. Dkt. 18) filed by the Debtor, and the Defendant Tower Loan's Reply in Support of its Motion to Compel Arbitration and to Dismiss or to Stay Pending Arbitration ("Tower Loan's Reply") (Adv. Dkt. 21) filed by Tower Loan in the Adversary. At the Hearing, Bryce Kunz represented the Debtor, and Jeffrey Ryan Barber represented Tower Loan. During the Hearing, the Debtor and Tower Loan (collectively, the "Parties") introduced into evidence two (2) stipulated exhibits. The issues in the Adversary are: (1) whether the Parties formed an agreement to arbitrate and (2) whether the arbitration agreement actually contains a delegation clause requiring the Parties' claims to proceed to arbitration. The Court, having considered the pleadings, evidence, and arguments of counsel, finds that the Parties did not agree to arbitrate for the reasons set forth below.[2]

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this Adversary pursuant to 28 U.S.C. § 1334. Notice of the Motion to Dismiss or to Compel Arbitration was proper under the circumstances.

Facts

1. On November 8, 2016, the Debtor entered into the Installment Loan Agreement and Disclosure Statement (the "Loan Agreement") with Tower Loan (Ex. 1). The Debtor financed $4,481.98 with a 37.36% annual rate of interest to be paid in twenty-six (26) equal installments of $254.00 for a total payment to Tower Loan of $6,604.00. (*Id.*) Additionally, the Debtor obtained from Tower Loan credit life insurance at $228.94 per annum, credit disability insurance at $303.78 per annum, and credit property insurance at $429.26 per annum. (*Id.*)

[1, 2] 2. The Loan Agreement consists of one (1) page and does not contain a merger clause.[3] The Debtor's signature ap-

1. Citations to the record are as follows: (1) citations to docket entries in the above-styled adversary proceeding (the "Adversary") are cited as "(Adv. Dkt. ___)"; and (2) citations to docket entries in the above-styled bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. ___)".

2. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, as made applicable to the Adversary by Rule 7052 of the Federal Rules of Bankruptcy Procedure, the following constitutes the findings of fact and conclusions of law of the Court.

3. A merger clause "signal[s] to the courts that the parties agree that the contract is to be considered completely integrated." *Grand Legacy, LLP v. Gant*, 66 So.3d 137, 145 (Miss. 2011). A standard merger clause "achieves the purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, as well as negat[es] the apparent authority of an agent to later modify the contract's terms." *LHC Nashua P'ship, Ltd. v. PDNED Sagamore Nashua, L.L.C.*, 659 F.3d 450, 460 (5th Cir. 2011) (quoting *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 334 (Tex. 2011)).

pears at the bottom of the document, and the following language, in all capital letters, appears directly above the Debtor's signature: "Arbitration Agreement: By signing below and obtaining this [l]oan, [b]orrower agrees to the Arbitration Agreement on the additional pages of this [a]greement. You should read it carefully before you sign below. Important provisions, including our privacy policy, are contained on additional pages and incorporated herein." (the "Arbitration Disclaimer") (Ex. 1).

3. The reverse side of the Loan Agreement contains the Arbitration Agreement (the "First Arbitration Agreement") (Ex. 1). The First Arbitration Agreement "applies to all claims and disputes between [b]orrower and [l]ender," including "[t]he loan [b]orrower is obtaining from [l]ender today and any other loans or retail installment contracts with [l]ender" and "[a]ny insurance purchased in connection with this loan or any previous loan or retail installment sales contract." (Ex. 1).

4. The Loan Agreement provides that "[t]he construction, validity, and enforcement of this loan agreement shall be governed by the laws of the State of Mississippi, without regard to the principles of conflicts of laws." (Ex. 1).

5. In Tower Loan's Brief, Tower Loan asserts that the First Arbitration Agreement contains a delegation clause.

6. On January 17, 2017, the Debtor filed a petition for relief under chapter 7 of the U.S. Bankruptcy Code (Bankr. Dkt. 1).

7. On May 12, 2017, the Debtor filed the Complaint in this Adversary alleging that Tower Loan violated the Truth in Lending Act, 15 U.S.C. § 1600 *et seq.*, and Regulation 2 by providing misleading and incorrect disclosures on the Loan Agreement (Adv. Dkt. 1 at 4–5). For example, the Debtor alleges that Tower Loan did not pay to the appropriate insurance company the amounts required for the Debtor's life insurance, disability insurance, and property insurance (Adv. Dkt. 1 at 3, ¶ 15). The Debtor further asserts that Tower Loan "received an undisclosed commission from these charges." (*Id.*)

8. On June 22, 2017, Tower Loan filed the Answer and Affirmative Defenses to Complaint [Adv. Proc. Dkt. # 3] [*sic*] (Adv. Dkt. 6). Tower Loan filed the Amended Answer and Affirmative Defenses to Complaint [Adv. Proc. Dkt. # 3] [*sic*] (the "Amended Answer") on October 30, 2017, denying that it violated the Truth in Lending Act (Adv. Dkt. 22).[4]

9. On July 6, 2017, Tower Loan filed the Motion to Dismiss or to Compel Arbitration. In support of dismissal, Tower Loan asserted that the chapter 7 trustee (the "Trustee") is the only party with standing to pursue the Debtor's claims against Tower Loan because those claims became property of the estate upon commencement of the Bankruptcy Case (Adv.

4. The first paragraph of the Amended Answer states: "Further, in accordance with Federal Rules of Bankruptcy Procedure 7012(b) and 9015(a), Miss. Bank. L.R. 7012–1 and 9015–1, and Federal Rule of Civil Procedure 38, *Country Credit, LLC* demands a jury trial on all of the claim [*sic*] raised in the Adversary Proceeding Complaint, and *Country Credit, LLC* does not consent to having a jury trial conducted by a Bankruptcy Judge under 28 U.S.C. § 157(e) or to the entry of final orders or judgment by the Bankruptcy Court." (Adv. Dkt. 22 at 1) (emphasis added). In light of the pleadings and arguments made by counsel at the Hearing, the Court notes that this language in the Amended Answer is clearly the result of a typographical error on behalf of Tower Loan. Country Credit, LLC is not a party to the Adversary, and Tower Loan has requested the Court to compel arbitration in lieu of litigation.

Dkt. 9). In support of compelling arbitration, Tower Loan asserted that the Debtor signed the Loan Agreement containing the Arbitration Disclaimer. (*Id.*)

10. On September 26, 2017, the Trustee filed the Notice of Ratification of Real Party in Interest (Adv. Dkt. 16).

11. On September 26, 2017, the Debtor filed the Debtor's Response. In support of denying dismissal, the Debtor asserted that the Trustee, as the real party in interest, ratified the Adversary. In support of litigation, the Debtor asserted that it was unclear whether he actually agreed to the arbitration agreement and that procedural unconscionability precluded enforcing the First Arbitration Agreement. The Debtor attached the Affidavit of Chuck Wills to the Debtor's Response.

12. On October 10, 2017, Tower Loan filed Tower Loan's Reply withdrawing its contention that the Debtor lacked standing. Tower Loan further asserted that the Parties formed a valid agreement to arbitrate and that the First Arbitration Agreement is not unconscionable. Additionally, Tower Loan argued that unconscionability is an issue for the arbitrator to decide since the First Arbitration Agreement contains a delegation clause.

13. At the Hearing, the Parties presented to the Court, for the first time, the Endorsement to Require Binding Arbitration (the "Second Arbitration Agreement") (together with the First Arbitration Agreement, the "Arbitration Agreements") (Ex. 2). The Second Arbitration Agreement "applies to all claims and disputes between [b]orrower and the [c]ompany," including "the loan [b]orrower is obtaining from the lender today, any other loans or retail installment contracts with the [l]ender," and "any insurance purchased from the [c]ompany in connection with the loan or any previous loan or retail installment sales contract." (Ex. 2). Tower Loan explained that the Second Arbitration Agreement makes up the "additional pages" referenced in the Loan Agreement's Arbitration Disclaimer.[5]

14. The Arbitration Agreements contain conflicting arbitration provisions. The conflicts involve: (1) the number of arbitrators,[6] (2) how the arbitrator(s) will be selected,[7] (3) the notice required to arbitrate,[8] (4) the location of the arbitration,[9]

5. 10:10:32—10:10:52. The Hearing was not transcribed. References to argument presented at the Hearing is cited by the timestamp of the audio recording.

6. The First Arbitration Agreement provides that "[t]he dispute shall be heard by a single arbitrator," but the Second Arbitration Agreement permits a party to request a panel of three arbitrators.

7. The First Arbitration Agreement provides that "[i]f an answering statement is filed and the parties cannot agree upon the arbitrator, then the provisions of the Federal Arbitration Act (9 U.S.C. § 5), shall apply," but the Second Arbitration Agreement provides that "[i]f an answering statement is filed and the parties cannot agree upon the arbitrator, the National Arbitration Forum shall appoint the arbitrator."

8. The First Arbitration Agreement requires a thirty (30)-day notice period before proceeding to arbitration, whereas the Second Arbitration Agreement requires only twenty (20) days. Additionally, under the Arbitration Agreements, if a party files an answering statement after the expiration of the notice period, the opposing party selects the arbitrator.

9. The First Arbitration Agreement provides that "[t]he arbitration shall be held in Rankin County, Mississippi, unless the [b]orrower requests in the demand for arbitration or the answering statement, the arbitration to be held in his, her, or its county of residence or principal place of business," but the Second Arbitration Agreement provides automatically for the arbitration to be held in the borrower's county of residence.

(5) who pays the costs of the arbitration,[10] (6) who would be entitled to attorneys' fees and on what showing,[11] and (7) when arbitration proceedings need not be initiated.[12] (Ex. 1; Ex. 2).

15. At the Hearing, the Debtor argued that because the Arbitration Agreements govern "all claims and disputes between the Parties" but contain different and conflicting terms, there was no meeting of the minds between the Parties with respect to arbitration.[13] In response, Tower Loan asserted that the Parties reached a meeting of the minds with respect to arbitration.[14] More specifically, Tower Loan argued that the First Arbitration Agreement governs the Loan Agreement, and the Second Arbitration Agreement relates only to disputes concerning insurance companies and policies.[15] With respect to the Adversary, Tower Loan asserted that it would proceed only under the First Arbitration Agreement because the Complaint does not raise any insurance-related claims.[16]

Discussion

[3] The Supreme Court of the United States has long acknowledged "a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston v. Ferrer*, 552 U.S. 346, 349, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). Indeed, the Federal Arbitration Act (FAA) provides that "[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... 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. With this policy in mind, however, "courts must place arbitration agreements on an equal footing with other contracts ... and enforce them according to their terms." *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); *see Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006); *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

[4–6] Thus, the enforcement of an arbitration agreement is a matter of both contract formation and contract interpretation. *Kubala v. Supreme Prod. Srvs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016). The Fifth

10. The First Arbitration Agreement provides that the "[l]ender shall pay the arbitrator's fees and expenses for the first two days of hearings." Further, the First Arbitration Agreement provides that "[i]n his decision or award, the arbitrator shall direct the parties to pay his or her fees and other costs according to the relative fault of the parties." Additionally, the Second Arbitration Agreement provides that "the [c]ompany shall pay all costs of the arbitration," excluding attorneys, experts, and witness fees and expenses.

11. The First Arbitration Agreement does not address which party is responsible for paying attorneys, experts, and witness fees and expenses. The Second Arbitration Agreement, however, provides that "each party must bear the cost of its own attorneys, experts and witness fees and expenses," unless the arbitrator chooses to award otherwise.

12. Under the First Arbitration Agreement, the "[l]ender is not required to initiate arbitration proceedings for collection matters of $10,000 or less or before repossessing collateral or foreclosing upon real property. However, disputes arising out of or relating to foreclosure or repossession of collateral shall be arbitrated." The Second Arbitration Agreement, however, contains no such carve out.

13. 10:22:40—10:22:57.

14. 10:30:45—10:30:54.

15. 10:30:58—10:31:17.

16. 10:31:18—10:31:29.

Circuit Court of Appeals has established a two-prong test for courts to follow when ruling on a motion to compel arbitration: (1) "whether the parties entered into *any arbitration agreement at all*" and (2) "whether *this* claim is covered by the arbitration agreement." *Id.* When an "arbitration agreement contains a delegation clause giving the arbitrator the primary power to rule on the arbitrability of a specific claim ... the court's power to decide arbitrability questions [transfers] to the arbitrator." *Id.* at 201–02. In other words, "a valid delegation clause requires the court to refer a claim to arbitration to allow the arbitrator to decide gateway arbitrability issues." *Id.* at 202; *see Rent–A–Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). When a "party seeking arbitration points to a purported delegation clause," the court limits its analysis to that of contract formation and answers only the question of whether the parties entered into an agreement to arbitrate some set of claims. *Kubala*, 830 F.3d at 202. If the court finds both a valid agreement to arbitrate and a delegation clause within that agreement, "the motion to compel arbitration should be granted in almost all cases." *Id.*

Here, Tower Loan contends that the First Arbitration Agreement contains a valid and enforceable delegation clause (Adv. Dkt. 9). As a result, the Court will address two issues: first, whether the Parties entered into a valid agreement to arbitrate a set of claims; and second, whether that agreement contains a delegation clause requiring the Parties' claims to proceed to arbitration "for gateway rulings on threshold arbitrability issues." *Id.*

A. Did the Parties enter into a valid agreement to arbitrate a set of claims?

[7, 8] The "federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073–74 (5th Cir. 2002); *see also Volt Info. Scis., Inc.*, 489 U.S. at 478, 109 S.Ct. 1248 ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."). Instead, state contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. *Kubala*, 830 F.3d at 202. Since the Loan Agreement provides that Mississippi law governs "[t]he construction, validity and enforcement of th[e] loan agreement" and the Parties directed the Court to Mississippi law in their pleadings and at the Hearing, the Court will apply Mississippi law to determine whether the Parties entered into a valid agreement to arbitrate their claims.

[9–11] Under Mississippi law, "[a] contract is unenforceable if the material terms are not sufficiently definite." *Rotenberry v. Hooker*, 864 So.2d 266, 270 (Miss. 2003). A contract is sufficiently definite when it contains enough information to "enable the court under proper rules of construction to ascertain its terms." *Hunt v. Coker*, 741 So.2d 1011, 1014 (Miss. 1999) (quoting *Leach v. Tingle*, 586 So.2d 799, 802 (Miss. 1991)). Additionally, a meeting of the minds is essential for an agreement to be valid and binding upon the parties. *Davis v. Davis (Estate of Davis)*, 832 So.2d 534, 537 (Miss. App. Ct. 2001); *see Union Planters Bank, Nat'l Ass'n v. Rogers*, 912 So.2d 116, 120 (Miss. 2005) ("A cardinal rule of construction of a contract is to ascertain the mutual intentions of the parties."). While no Mississippi court [17] has

17. In the Motion to Dismiss or to Compel Arbitration, Tower Loan references this Court's Memorandum Opinion and Order Granting Motion of the Bilco Company for Relief from the Automatic Stay to Complete Arbitration, *In re Katon, Inc.*, No. 08–02266–

addressed whether parties can be compelled to arbitrate under conflicting arbitration agreements, other courts have found that conflicting arbitration agreements eliminate the duty to arbitrate.[18]

1. The Tenth Circuit Court of Appeals' Decision

In *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016), the Tenth Circuit Court of Appeals held that "conflicting details in the multiple arbitration provisions indicate that there was no meeting of the minds with respect to arbitration." *Id.* at 1138. In *Ragab*, the parties entered into a business relationship evidenced by six agreements containing conflicting arbitration provisions. *Id.* at 1136. The conflicts involved the following: "(1) which rules will govern,[19] (2) how the arbitrator will be selected,[20] (3) the notice required to arbitrate,[21] and (4) who would be entitled to attorneys' fees and on what showing."[22] *Id.* A few years later, plaintiff sued the defendants for misrepresentation and violation of consumer credit repair statutes. The district court found that all six agreements governed plaintiff's claims. The defendants moved to compel arbitration, and the district court denied the motion, "concluding that there was no actual agreement to arbitrate as there was no meeting of the minds as to how claims that implicated the numerous agreements would be arbitrated." *Id.* The defendants appealed.

Upon review, the Tenth Circuit applied Colorado law to determine whether the parties agreed to arbitrate. *Id.* at 1137. The applicable state law required the parties to achieve a meeting of the minds with respect to the agreement and agree on all essential terms. *Id.* The Tenth Circuit looked to the New Jersey court's decision in *NAACP of Camden County East v. Foulke Management Corporation*, 421 N.J.Super. 404, 24 A.3d 777 (2011), for guidance on whether the parties achieved a meeting of the minds on the decision to arbitrate their claims.[23]

In *NAACP*, the parties presented the court with three agreements that each contained an arbitration provision. *NAACP of Camden Cty. E.*, 24 A.3d at 781–82. Simi-

NPO (Dkt. 73) (Bankr. S.D. Miss. Nov. 13, 2008). *In re Katon, Inc.* is not factually analogous to the Adversary because it does not involve conflicting arbitration agreements, but rather a single arbitration agreement executed by the parties after the execution of the underlying agreements in which the parties agreed to arbitrate the non-core proceeding filed in state court. Accordingly, the Court does not find *In re Katon, Inc.* persuasive in the Adversary.

18. See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig., 838 F.Supp.2d 967, 992 (C.D. Cal. 2012); Basulto v. Hialeah Auto., 141 So.3d 1145, 1156 (Fla. 2014).

19. One agreement provided that Colorado's Uniform Arbitration Act of 1975 would govern, three agreements provided that the AAA Commercial Arbitration Rules would govern, and one agreement provided that the "Rules of the Colorado Court" would govern the arbitration. *Ragab*, 841 F.3d at 1136 n.1.

20. One agreement provided that the parties would choose the arbitrator. If the parties could not agree upon an arbitrator, a state court would appoint one. Three agreements provided that the American Arbitration Association (AAA) would choose the arbitrator. *Id.*

21. One agreement required a thirty (30)–day notice period, and two agreements required only a ten (10)–day notice period before beginning arbitration. *Id.*

22. One agreement required each party to pay its own costs and fees, but three agreements allowed for the arbitrator to award costs and fees to the prevailing party. *Id.*

23. The Tenth Circuit considered *NAACP* because there were no factually analogous cases in Colorado.

lar to the arbitration agreements in *Ragab*, these arbitration provisions contained several inconsistencies. *Id.* at 794. For example, "the documents d[id] not clearly and consistently express the nature and locale of the arbitration forum itself." *Id.* The first agreement provided that the venue of the arbitration would lie in the federal district in which the purchaser resided, the second agreement more narrowly provided that venue would lie in the customer's county of residence, and the third agreement more broadly provided that venue would lie in New Jersey, unless otherwise agreed upon by the parties. *Id.* Further, "[t]he form documents ... d[id] not make clear the time limit in which arbitration must be initiated." *Id.* The first agreement did not contain a time limitation, the second agreement indicated that all applicable statutes of limitation applied, and the third agreement required the purchaser to bring all claims within 180 days from the date of the agreement, while also providing that it would not affect applicable statutes of limitation. *Id.* at 794–95. "Equally murky," the agreements contained various provisions describing the arbitration costs. *Id.* at 795–96. The cost provisions in one agreement were "in some respects potentially less favorable to the purchaser, ... in some respects potentially more favorable, and in some respects unclear." *Id.* at 795.

Based on these conflicts, the New Jersey court found that "the arbitration provisions ... [were] too plagued with confusing terms and inconsistencies to put a reasonable consumer on fair notice of their intended meaning." *Id.* at 794. Thus, the New Jersey court held that the conflicting arbitration provisions were "unenforceable for lack of mutual assent." *Id.* at 798. Because of *NAACP*'s factual similarities to *Ragab* and the Supreme Court of the United States' finding in *AT & T Mobility LLC* that "the FAA does not require an arbitration provision to be enforced if the provision is defective for reasons other than public policy or unconscionability," the Tenth Circuit adopted the reasoning of the court in *NAACP* and affirmed the district court's decision, holding that the parties did not achieve a meeting of the minds with respect to arbitration.[24] *Ragab*, 841 F.3d at 1138; *see AT & T Mobility LLC*, 563 U.S. at 344, 131 S.Ct. 1740.

Associate Justice Neil Gorsuch, former Circuit Judge for the Tenth Circuit Court of Appeals, dissented in *Ragab*, arguing that the parties formed a valid agreement to arbitrate their claims. *Ragab*, 841 F.3d at 1139 (Gorsuch, J., dissenting). As a preliminary matter, Justice Gorsuch noted that *Ragab* involved sophisticated parties to a commercial deal. In fact, plaintiff's counsel drafted three of the agreements containing arbitration clauses. *Id.* While acknowledging that the agreements differed on "the details concerning *how* arbitration should proceed," Justice Gorsuch argued that "treating the procedural details surrounding the arbitration ... as *non*essential terms would do a good deal more to 'effectuate[ ] the intent of the parties' ... itself always the goal of contract interpretation." *Id.* (citing *Lane v. Urgitus*, 145 P.3d 672, 677 (Colo. 2006)). To do this, Justice Gorsuch proposed two courses of action. First, the plaintiff could initiate arbitration under the agreement of his

24. The Tenth Circuit noted that "[c]ourts have granted motions to compel despite the existence of conflicting arbitration provisions when the contracts themselves provide the solution." *Ragab*, 841 F.3d at 1138; *see Ex parte Palm Harbor Homes, Inc.*, 798 So.2d 656, 660 (Ala. 2001) (compelling arbitration when a contract includes an arbitration provision and a merger clause because the merger clause enables the arbitration provision to supersede other, conflicting provisions). None of the agreements in *Ragab*, however, contained merger clauses. *Ragab*, 841 F.3d at 1138.

choosing because "the defendants have expressly acknowledged that his claims f[ell] within the scope of every single agreement." *Ragab*, 841 F.3d at 1139 (Gorsuch, J. dissenting). Second, the state's preference for arbitration has caused it to enforce arbitration clauses stating only that claims "shall be submitted to binding arbitration" with no mention of procedural details. *Id.* The procedural details can later be established by the FAA or state statutory law. *Id.* at 1139–40.

Next, Justice Gorsuch explained a "battle of the forms" analogy where "purchasers and vendors agree to transact but each side memorializes the deal on its own standard forms." *Id.* at 1140. When these forms contain conflicting terms, they "knock each other out but do not void the contract." *Id.* Under the Uniform Commercial Code, "a meeting of the minds occurs with respect to the fundamentals of the deal even if not with respect to the details." *Id.* Since the case involved sophisticated parties who mutually contributed to drafting the agreements, Justice Gorsuch argued that a "battle of the forms" approach would better serve the parties' intent to arbitrate their claims rather than "allowing the plaintiff to escape the consequences of a choice he once so clearly preferred but now simply regrets." *Id.*

To protect consumers, New Jersey courts stress a "need for clarity" in arbitration agreements and take "particular care" in assessing mutual asset because of a consumer's inferior bargaining power. *Id.*; *see NAACP of Camden Cty. E.*, 24 A.3d at 790–91, 97. Justice Gorsuch, however, did not find *NAACP* persuasive because *Ragab* "involve[d] parties to a commercial, not a consumer, transaction, with contracts actively negotiated by both sides, not contracts of adhesion thrust upon the plaintiff." *Ragab*, 841 F.3d at 1140. When a state has not adopted a public policy statute requiring clarity in a consumer contract, Justice Gorsuch argues that the court should further the national policy favoring arbitration and not create barriers to arbitration, particularly in a commercial setting where the parties are represented by counsel and "have so clearly and repeatedly demonstrated their desire to arbitrate." *Id.* Justice Gorsuch did not provide any citations to cases where courts compelled arbitration when an agreement contained materially inconsistent and conflicting arbitration provisions. With *NAACP*, *Ragab*, and Justice Gorsuch's dissent in *Ragab* in mind, the Court now turns to the Adversary to determine precisely the same issue—whether the Parties formed a valid agreement to arbitrate their claims.

2. The Adversary

[12] In its opening remarks at the Hearing, Tower Loan argued that the First Arbitration Agreement contains a delegation clause and, therefore, the Court's analysis is limited to whether the Parties entered into a valid agreement to arbitrate their claims and whether the agreement actually contains a delegation clause requiring the claims to proceed to arbitration for gateway rulings.[25] Tower Loan argued that the Parties undisputedly agreed to arbitrate their claims because the Debtor signed both the Loan Agreement containing the First Arbitration Agreement and the Second Arbitration Agreement.[26] Additionally, Tower Loan explained that Mississippi law requires a borrower to read documents before applying his signature, and the Debtor cannot avoid arbitration simply because he did not

25. 10:13:36—10:15:15; *see Kubala*, 830 F.3d at 202.

26. 10:08:40—10:09:00.

know the terms of the Loan Agreement.[27] In response, the Debtor contended that while he did sign both the Loan Agreement containing the First Arbitration Agreement and the Second Arbitration Agreement, the Arbitration Agreements contain inconsistent and conflicting terms.[28] Because of the inconsistent and conflicting terms, the Debtor argued that the Parties did not achieve a meeting of the minds on the decision to arbitrate their claims.[29] Tower Loan, however, claimed that the Parties reached a meeting of the minds with respect to arbitration.[30] In support its argument, Tower Loan contended that the Arbitration Agreements govern different issues and/or parties, and the Second Arbitration Agreement relates only to claims against insurance companies arising out of insurance policies.[31] To the extent that the Arbitration Agreements conflict, Tower Loan argued that the inconsistencies are irrelevant because, in the Adversary, Tower Loan is proceeding only under the First Arbitration Agreement.[32] Because Tower Loan asserted that the Arbitration Agreements govern separate issues and/or parties, and the Debtor maintained that the Arbitration Agreements encompass all parties and claims but contain inconsistent and conflicting procedural provisions, the Court will first address whether the Arbitration Agreements govern separate issues and/or parties to determine if the inconsistent and conflicting provisions should impact the Court's analysis on whether the Parties achieved a meeting of the minds with respect to arbitration.

After reviewing the Loan Agreement and the Arbitration Agreements, the Court finds that the Arbitration Agreements govern claims against Tower Loan both arising under the Loan Agreement and out of insurance policies. For example, the First Arbitration Agreement "applies to *all* claims and disputes between [b]orrower and [l]ender ... includ[ing] ... *all* claims and disputes arising out of ... [t]he loan [b]orrower is obtaining from [l]ender today and ... [a]ny insurance purchased in connection with this loan." (Ex. 1, ¶ 1) (emphasis added). Additionally, the First Arbitration Agreement "applies to *all* disputes and claims between [b]orrower and [l]ender, [l]ender's agents, employees, affiliated corporations and the employees or agents of these affiliated companies." (*Id.* ¶ 2) (emphasis added). The lender is defined as *Tower Loan of Mississippi, LLC*, and the affiliated companies include, without limitation, "*American Federated Insurance Company, American Federated Life Insurance Company*, First Tower Loan LLC, Tower Loan of Mississippi LLC, Gulfco of Mississippi LLC, Gulfco of Alabama LLC, Gulfco of Louisiana LLC, Tower Loan of Missouri LLC, and First

27. 10:13:10—10:13:24.

28. 10:22:40—10:22:57.

29. 10:22:58—10:28:02.

30. 10:30:45—10:30:54.

31. 10:30:58—10:31:17. In support of its argument that the Second Arbitration Agreement applies only to claims against insurance companies arising out of insurance policies, Tower Loan highlighted the following provisions: (1) the title of the agreement is "Endorsement to Require Binding Arbitration;" (2) the Second Arbitration Agreement defines "Company" as "the insurance company or companies as marked below;" (3) the last paragraph of the Second Arbitration Agreement provides that "[t]his endorsement applies to the policy or policies issued by the [c]ompany or [c]ompanies marked below;" and (4) American Federated Life Insurance Company and American Federated Insurance Company are the only companies listed, and both are marked with an "X." (Ex. 2).

32. 10:31:18—10:31:29.

Tower LLC." (*Id.*) (emphasis added). Further, the Second Arbitration Agreement "applies to *all* claims and disputes between [b]orrower and the [c]ompany ... includ[ing] ... *all* claims and disputes arising out of ... the loan [b]orrower is obtaining from the lender today [and] ... any insurance purchased from the [c]ompany in connection with the loan." (Ex. 2, ¶ 1) (emphasis added). The Second Arbitration Agreement also "applies to *all* disputes and claims between [b]orrower and the [c]ompany, the [c]ompany's agents, employees, affiliated corporations and the employees or agents of these affiliated companies." (*Id.* ¶ 2) (emphasis added). The company is defined as both *American Federated Life Insurance Company* and *American Federated Insurance Company*, and the affiliated companies include, without limitation, "First Tower Loan, LLC, FT Finance Holding LLC, *Tower Loan of Mississippi, LLC*, and Gulfco of Mississippi, LLC." (*Id.*) (emphasis added). After drafting the Arbitration Agreements as broadly as possible, Tower Loan cannot now "arbitrarily pick one to enforce [in the Adversary] because doing so could violate the other." *Ragab*, 841 F.3d at 1138. The Court finds that the Arbitration Agreements' inconsistent and conflicting provisions, therefore, are relevant to its determination of whether the Parties achieved a meeting of the minds with respect to arbitration.[33]

Similar to the courts in *Ragab* and *NAACP*, the Court finds that the Arbitration Agreements contain several material conflicts and inconsistencies. The conflicts and inconsistencies concern the following: (1) the number of arbitrators, (2) how the arbitrator(s) will be selected, (3) the notice required to arbitrate, (4) the location of the arbitration, (5) who pays the costs of the arbitration, (6) who would be entitled to attorneys' fees and on what showing, and (7) when arbitration proceedings need not be initiated. The Court will address each in turn.

First, the First Arbitration Agreement provides that "[t]he dispute shall be heard by a single arbitrator." (Ex. 1, ¶ 4). The Second Arbitration Agreement, however, permits a party to request "a panel of three arbitrators instead of a single arbitrator." (Ex. 2, ¶ 4). Thus, the Arbitration Agreements are inconsistent.

Second, and similar to *Ragab*, the First Arbitration Agreement provides that "[i]f an answering statement is filed and the parties cannot agree upon the arbitrator, then the provisions of the Federal Arbitration Act (9 U.S.C. § 5), shall apply." (Ex. 1, ¶ 4). Under this provision, "the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein." 9 U.S.C. § 5. In the Second Arbitration Agreement, however, "[i]f an answering statement is filed and the parties cannot agree upon [the] arbitrator, the National Arbitration Forum [34] shall ap-

33. Since the Loan Agreement does not contain a merger clause, the Court is unable to discern whether one arbitration agreement could potentially supersede the other arbitration agreement. *See Ex parte Palm Harbor Homes, Inc.*, 798 So.2d at 660 (compelling arbitration when a contract includes an arbitration provision and a merger clause because the merger clause enables the arbitration provision to supersede other, conflicting provisions).

34. On July 14, 2009, the Minnesota Attorney General filed a lawsuit against the National Arbitration Forum "(NAF)" for alleged violation of various state consumer protection laws, deceptive trade practices, and false advertising. *See* Complaint, *State of Minnesota v. National Arbitration Forum, Inc., et. al.*, No. 27-CV-09-18550 (Dkt. 1) (D. Minn. July 14, 2009). The Complaint alleged that the NAF, in an attempt to earn revenue, "work[ed] along-

point the arbitrator." (Ex. 2, ¶ 4). The Arbitration Agreements, therefore, conflict with each other.[35]

Third, and similar to *Ragab*, the First Arbitration Agreement requires a thirty (30)–day notice period before proceeding to arbitration (Ex. 1, ¶ 3), whereas the Second Arbitration Agreement requires only twenty (20) days (Ex. 2, ¶ 3). Additionally, under the Arbitration Agreements, if a party files an answering statement after the expiration of the notice period, the opposing party selects the arbitrator. (Ex. 1, ¶ 4; Ex. 2, ¶ 4). Thus, the Arbitration Agreements conflict with each other.

Fourth, and similar to *NAACP*, the First Arbitration Agreement provides that "[t]he arbitration shall be held in Rankin County, Mississippi, unless the [b]orrower requests in the demand for arbitration or the answering statement, the arbitration to be held in his, her, or its county of residence or principal place of business." (Ex. 1, ¶ 5). The Second Arbitration Agreement, however, provides automatically for the arbitration to be held in the borrower's county of residence (Ex. 2, ¶ 5). The Arbitration Agreements, therefore, are inconsistent.

[13] Fifth, and similar to *Ragab* and *NAACP*, the First Arbitration Agreement provides that the "[l]ender shall pay the arbitrator's fees and expenses for the first two days of hearings." (Ex. 1, ¶ 4) Further, the First Arbitration Agreement provides that "[i]n his decision or award, the arbitrator shall direct the parties to pay his or her fees and other costs according to the relative fault of the parties." (*Id.*) Thus, the First Arbitration Agreement is internally inconsistent. While the document requires Tower Loan to pay the arbitrator's fees and expenses for the first two days of hearings, the arbitrator is also required to apportion his fees and costs between the Parties in accordance with their relative fault. In theory, then, the Debtor could be responsible for paying the entirety of the arbitrator's fees and costs. Additionally, the Second Arbitration Agreement provides that "the [c]ompany shall pay all costs of the arbitration," excluding attorneys, experts, and witness fees and expenses (Ex. 2, ¶ 4). The Arbitration Agreements, therefore, conflict with each other. The Court is unable to discern whether Tower Loan pays none, some, or all of the costs under the Arbitration Agreements.[36]

side creditors behind the scenes—against the interests of consumers—to convince creditors to place mandatory pre-dispute arbitration clauses in their customer agreements and to appoint the [NAF] as the arbitrator of any disputes that may arise in the future." *Id.* The Complaint further alleged that the NAF "hid[ ] from the public ... that [it] is financially affiliated with a New York hedge fund group that owns one of the country's major debt collection enterprises." *Id.* Shortly after the filing of the Complaint, the NAF agreed to "permanently stop administering arbitrations involving consumer debt." Press Release, State of Minnesota Office of the Attorney General, National Arbitration Forum Barred from Credit Card and Consumer Arbitrations under Agreement with Attorney General Swanson (July 19, 2009), http://static.cbslocal.com/station/wcco/news/local/09_0719_agsues nationalarbitrationforum.pdf. Accordingly, under the Second Arbitration Agreement, it is unclear how an arbitrator would be appointed if the Parties do not agree upon an individual.

35. The Court acknowledges that this inconsistency could be remedied by the FAA or a statutory gap-filler. See Deaton Truck Line, Inc. v. Local Union 612, Affiliated with the Int'l. Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 314 F.2d 418 (5th Cir. 1962) (compelling arbitration when the agreement did not name an arbitrator because the FAA provides a mechanism for the selection of an arbitrator when the parties are unable to agree upon an individual).

36. At the Hearing, Tower Loan asserted that it will pay the fee to initiate arbitration and all costs and fees of the arbitration. Tower

Sixth, and similar to *Ragab* and *NAACP*, the First Arbitration Agreement does not address which party is responsible for paying attorneys, experts, and witness fees and expenses. The Second Arbitration Agreement, however, provides that "each party must bear the cost of its own attorneys, experts and witness fees and expenses," unless the arbitrator chooses to award otherwise (Ex. 2, ¶ 4). Thus, the Arbitration Agreements are inconsistent.

Seventh, the First Arbitration Agreement does not require the lender "to initiate arbitration proceedings for collection matters of $10,000 or less or before repossessing collateral or foreclosing upon real property. However, disputes arising out of or relating to foreclosure or repossession of collateral shall be arbitrated." (Ex. 1, ¶ 8). The Second Arbitration Agreement contains no such carve out. The Arbitration Agreements, therefore, are inconsistent and suggest that all material terms are not "sufficiently definite."

While Justice Gorsuch raised many concerns in *Ragab*, the Court can distinguish his dissent from the issues raised in the Adversary. First, the Debtor is not a sophisticated party. The Debtor is a truck driver and mechanic who was not represented by counsel when he signed the Arbitration Agreements (Adv. Dkt. 17). Further, and unlike the plaintiff in *Ragab*, the Debtor did not participate in the negotiation or drafting of the Loan Agreement and the Arbitration Agreements—these documents were created by Tower Loan. Accordingly, the claims in the Adversary arise out of a consumer, rather than a commercial, transaction. Second, and unlike the defendants in *Ragab*, Tower Loan has not acknowledged that the Debtor's claims fall within the scope of the Second Arbitration Agreement. Instead, Tower Loan maintains that the Second Arbitration Agreement governs only claims against insurance companies arising out of insurance policies. Tower Loan desires to proceed exclusively under the First Arbitration Agreement. The Debtor, therefore, "would [not] be free to initiate arbitration under the terms of whichever ... agreement[ ] he prefers." *See Ragab*, 841 F.3d at 1139 (Gorsuch, J., dissenting). Additionally, the Arbitration Agreements each contain both favorable and unfavorable provisions with respect to the Debtor. For the Debtor to proceed unprejudiced, he would need to "pick and choose" provisions from each agreement to govern the arbitration. Third, while courts have compelled arbitration where the agreement included only a provision requiring arbitration,[37] the Arbitration Agreements, like those in *Ragab*, contain "multiple, specific, conflicting arbitration provisions, and not one general or vague arbitration clause." *Ragab*, 841 F.3d at 1138. Although the FAA and other statutory authority provide mechanisms to fill gaps in an otherwise valid agreement, they are unable to reconcile the multiple, specific, inconsistent and conflicting provisions contained in the Arbitration Agreements.

Loan cannot, after acknowledging that the Arbitration Agreements contain inconsistencies, arbitrarily choose the provision more favorable to the Debtor in an attempt to force him into arbitration. *See Sullivan v. Protex Weatherproofing, Inc.*, 913 So.2d 256, 265 (Miss. 2005) (quoting *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 10 (1st Cir. 2004) ("No one can seriously argue that clauses can be plucked at random from one agreement and inserted into the other."). To form a contract, the material terms must be "sufficiently definite," and the parties must achieve a meeting of the minds with respect to the agreement. *See Union Planters Bank, Nat'l Ass'n*, 912 So.2d at 120; *Rotenberry*, 864 So.2d at 270.

37. *See Guthrie v. Barda*, 188 Colo. 124, 533 P.2d 487, 487 (1975) (compelling arbitration when the agreement stated only that claims "shall be submitted to binding arbitration").

Lastly, because the Adversary involves a consumer transaction, an analogy to the "mirror image" rule, rather than the "battle of the forms" doctrine or "knockout rule" governed by the Uniform Commercial Code, is more applicable. *See In re Whatever, LLC*, 478 B.R. 700, 709 (Bankr. W.D. Pa. 2012) ("The 'knockout rule' is a statutory exception to the mirror image rule ... [and] only applies to transactions in goods."). The mirror image rule, which controls at common law, states that a contract forms where there is an "unconditional acceptance of the offer." *Sutter–Van Horn Co. v. Miss. Home Tel. Co.*, 110 Miss. 169, 69 So. 996, 997 (1915). Additionally, "not only must the acceptance be unconditional, but it must be identical with the terms of the offer. It must not vary from the proposal, either by way of omission, addition, or alteration. If it does, neither party is bound." *Id.* (quoting 1 ELLIOT ON CONTRACTS §§ 37, 38; LAWSON ON CONTRACTS § 25 (2d ed.)). Thus, consumer transactions are held to a standard of higher specificity and clarity than commercial transactions.

Turning to Tower Loan's argument at the Hearing, Mississippi recognizes the duty-to-read doctrine. *See Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 726 (Miss. 2002) ("In Mississippi, a person is charged with knowing the contents of any document that he executes."); *see also Cont'l Jewelry Co. v. Joseph*, 140 Miss. 582, 105 So. 639, 639 (1925) ("A person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him, and that he supposed its terms were different, unless he was induced not to read it or have it read to him by fraudulent representations made to him by the other party, on which he was entitled to rely."). While the Parties did not present to the Court any evidence of fraudulent misrepresentation on behalf of Tower Loan, the Arbitration Agreements contain numerous materially inconsistent and conflicting provisions. As a result, a prudent purchaser reading the Arbitration Agreements would likely obtain only a generalized sense that arbitration would resolve his or her claims because the Arbitration Agreements "do not plainly convey—with precision and consistency—what the exact terms and conditions of that arbitration process would be." *NAACP of Camden Cty. E.*, 24 A.3d at 794. Since Mississippi law requires a contract's material terms to be "sufficiently definite," the Court follows *Ragab* and finds that the conflicting and inconsistent Arbitration Agreements indicate that the Parties did not achieve a meeting of the minds with respect to arbitration—the dispute could be governed by one or three arbitrators; either the court or a dispute resolution company that has since been renamed and no longer services consumer arbitration disputes will choose the arbitrator if the Parties cannot agree on a candidate; the notice period to deliver an answering statement to the other party is either thirty (30) days or twenty (20) days, and there are consequences if the answering statement is not timely filed; the Debtor might be required to request that the arbitration be held in his county of residence; Tower Loan might pay no costs, two days of costs, or all costs of the arbitration; the Debtor might be responsible for paying all attorneys, experts, and witness fees; and Tower Loan might not be bound to arbitrate claims for collection matters of $10,000 or less, before repossessing collateral or foreclosing upon real property.[38]

38. Having reached this conclusion, it is unnecessary for the Court to consider the unconscionability argument raised by the Debtor

B. Does the Arbitration Agreement contain a delegation clause requiring the Parties' claims to proceed to arbitration?

Because the Court finds that no valid agreement to arbitrate exists, it does not need to reach the issue of whether the Arbitration Agreement actually contains a delegation clause requiring the Parties' claims to proceed to arbitration for the arbitrator to decide gateway arbitrability issues.

Conclusion

For the above and foregoing reasons, the Court concludes that no actual agreement to arbitrate exists because the Parties did not achieve a meeting of the minds as to how to arbitrate claims under the Arbitration Agreements. A separate final judgment shall be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

SO ORDERED.

IN RE: Abdul Karim PIRANI, Debtor.

Abdul Karim Pirani, Plaintiff,

v.

Malik Baharia, Abdul Hamid Gilani, Nadirsha Lalani, and HNM Partners, LLC, Defendants.

Case No. 12–41916
Adv. Proc. No. 12–4114

United States Bankruptcy Court, E.D. Texas, Sherman Division.

Signed 09/29/2017

Background: Chapter 11 debtor filed adversary complaint against investors holding 50-percent stake in business scheme formulated by debtor and his brother to buy, renovate, and operate hotel, asserting a claim for breach of guaranty agreement that had been assigned to him by lender and seeking to recover full amount of alleged deficiency on note. Investors asserted counterclaims for breach of settlement agreement and breach of fiduciary duty. Following trial, the United States Bankruptcy Court for the Eastern District of Texas, Brenda T. Rhoades, Chief Judge, 2013 WL 5219405, entered judgment for investors, and debtor appealed. The District Court, Michael H. Schneider, J., 2015 WL 12941895, affirmed, and debtor appealed. The Court of Appeals, Stephen A. Higginson, Circuit Judge, 824 F.3d 483, affirmed in part, vacated in part, and remanded.

Holdings: The Bankruptcy Court, Rhoades, J., held that:

(1) company was liable to debtor for its contributive share of the $300,000 that debtor paid to lender to purchase deficiency claim;

(2) fair market value of hotel at the time of foreclosure was $1.3 million, for purposes of determining amount of deficiency claim;

(3) investors were entitled to $1,000 in actual damages;

(4) investors were entitled to reasonable attorney fees in the amount of $132,020; and

(5) investors were entitled to recover expenses in the amount of $3,411.77.

Ordered accordingly.

1. Guaranty ⇐105

Under Texas law, company was liable to Chapter 11 debtor for its contributive

in the Debtor's Response but largely abandoned at the Hearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

TOWER LOAN OF MISSISSIPPI, LLC **APPELLANT**

V. **CAUSE NO. 3:17-CV-1024-CWR-FKB**

CHUCK WILLIS **APPELLEE**

ORDER

In this case, the Bankruptcy Court found that Chuck Willis and Tower Loan of Mississippi never formed a sufficiently definite agreement to arbitrate. Tower Loan now appeals. Review is *de novo*.

This is another case where it may cost more to litigate a narrow issue—here, whether the dispute should be heard by private arbitrators or public judges—than the total value of the underlying dispute. *E.g.*, *In re Martin*, 513 B.R. 303 (Bankr. S.D. Miss. 2014) (finding $1,869.95 loan to be dischargeable), *aff'd sub nom. Country Credit, LLC v. Martin*, No. 3:14-CV-709-CWR-LRA, 2015 WL 5656003 (S.D. Miss. Sept. 24, 2015), *aff'd sub nom. Matter of Martin*, 651 F. App'x 279 (5th Cir. 2016).[1] After all, once Tower Loan has paid for this appeal and another to the Fifth Circuit[2], it will still have to defend itself on the merits in one forum or another.

More surprising, perhaps, is Tower Loan's claim that so few terms in its arbitration agreement are material. In different circumstances, one suspects Tower Loan would argue fervently that contractual terms governing the number of arbitrators, the arbitrator selection

[1] The underlying loan amount is not significant to Tower Loan, but the loan amount plus the fees for insurance and the associated extraordinary interest rate charged to the debtor is anything but inconsequential to the debtor, who is not a sophisticated party to the agreement.

[2] Before any ruling was issued, Tower Loan's attorneys had no doubt that they were continuing to the Fifth Circuit, having submitted to this Court briefs noting their compliance with Fifth Circuit Rules 25.2.13 and 32.2.

process, the venue of arbitration, and the cost of arbitration, among others, were all material to its arbitration agreement. But here we are.

In any event, the undersigned has reviewed the arguments and authorities. It concludes that the Bankruptcy Court's thoughtful, meticulous, and well-reasoned opinion should be and hereby is affirmed in its entirety. A separate Final Judgment shall issue this day.

SO ORDERED, this the 11th day of April, 2018.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

TOWER LOAN OF MISSISSIPPI, LLC **APPELLANT**

V. **CAUSE NO. 3:17-CV-1024-CWR-FKB**

CHUCK WILLIS **APPELLEE**

FINAL JUDGMENT

Having entered an Order affirming the Bankruptcy Court, it is appropriate to issue this Final Judgment and close this case on the docket. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED that this case is dismissed with prejudice.

SO ORDERED, this the 11th day of April, 2018.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE