

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re:	
Power Home Solar, LLC	Chapter 7
Debtor(s).	Case No. 22-50228
CLAUDE MUMPOWER, ET AL., for themselves and all others similarly situated,	
Plaintiffs,	
v.	Adversary Proceeding No. 23-03005
POWER HOME SOLAR, LLC, ET AL.,	
Defendant.	

**DEFENDANT TECHNOLOGY CREDIT UNION'S
MOTION TO COMPEL ARBITRATION AND TO STAY**

Defendant Technology Credit Union, by and through the undersigned counsel, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, respectfully moves the Court for an Order compelling arbitration of claims against it in Plaintiffs' Amended Complaint (ECF No. 34). In support of this motion, TCU files herewith copies of the following documents:

- Exhibit 1 – Ciccone and Mank Loan Agreement¹
- Exhibit 2 – Craighead Loan Agreement
- Exhibit 3 – Fucci Loan Agreement
- Exhibit 4 – Harrell Loan Agreement

¹ Exhibits 1-15 are redacted for privacy considerations. If this Court requires unredacted copies of any redacted document in order to address this Motion to Compel Arbitration, TCU can do so upon entry of an order directing it to file a unredacted version of any document under seal.

- Exhibit 5 – Dumont and Jeannette Jones Loan Agreement
- Exhibit 6 – Jordy Loan Agreement
- Exhibit 7 – Kennedy Loan Agreement
- Exhibit 8 – Medlin Loan Agreement
- Exhibit 9 – Prasongphime Loan Agreement
- Exhibit 10 – Ray Loan Agreement
- Exhibit 11 – Roberts Loan Agreement
- Exhibit 12 – Shelley Loan Agreement
- Exhibit 13 – Ashley and Matt Sustek Loan Agreement
- Exhibit 13 – Ashley and Matt Sustek Loan Agreement
- Exhibit 14 – Ward Loan Agreement
- Exhibit 15 – Watson Loan Agreement
- Exhibit 16 – Declaration of David Charlesworth
- Exhibit 17 – Technology Credit Union Member Handbook

Defendant Technology Credit Union files, contemporaneously herewith, its notice of hearing.

Wherefore, Technology Credit Union moves this Court for an order:

1. Granting its Motion to Compel Arbitration, requiring plaintiffs to proceed pursuant to their arbitration agreement requiring individualized arbitration of claims, outside of any class or representative group;
2. Staying all proceedings in the above-captioned matter pending arbitration;
3. Alternatively, dismissing all claims against TCU; and
4. For any other relief this Court deems just and proper.

Respectfully submitted,

This 30th day of June, 2023.

GORDON REES SCULLY MANSUKHANI, LLP

By: /s/ Samuel G. Thompson, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **DEFENDANT TECHNOLOGY CREDIT UNION'S MOTION TO COMPEL ARBITRATION AND TO STAY** using the CM/ECF system, which will send notification of such filing to all attorneys of record using the CM/ECF system.

This 30th day of June, 2023.

GORDON REES SCULLY MANSUKHANI, LLP

By: /s/ Samuel G. Thompson, Jr.
Samuel G. Thompson, Jr

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POWER HOME SOLAR, LLC, ET AL.,	
Defendant.	

**DEFENDANT TECHNOLOGY CREDIT UNION’S MEMORANDUM IN
SUPPORT OF ITS MOTION TO COMPEL ARBITRATION**

Defendant Technology Credit Union, LLC (“TCU”) submits this Memorandum of Law in Support of its Motion to Compel Arbitration of disputes described in Plaintiffs’ First Amended Complaint. TCU seeks this relief pursuant to the Federal Rules of Civil Procedure, Rules 12(b)(1) and 12(b)(6), the Federal Arbitration Act (9 U.S.C. §§ 1-4) (“FAA”), contractual arbitration and class action waiver agreements, LCvR 16.3(a) and 16.3(b)(3), and Local Rule 9013-2.¹

INTRODUCTION

Plaintiffs are individuals who purchased solar panel systems for their home. Eighteen Plaintiffs (“TCU Plaintiffs”) financed their solar panel system purchase with funding from TCU, a state chartered financial institution. Each TCU Plaintiff signed a loan agreement in which they

¹ “Federal courts have traditionally entertained certain types of pre-answer motions not specifically provided for in the Federal Rules of Civil Procedure. Included among these are motions to stay proceedings pending arbitration.” *Smith v. Pay-Fone Sys., Inc.*, 627 F. Supp. 121, 122–23 (N.D. Ga. 1985) (citations omitted). TCU reserves the right to raise any and all available defenses outside this Motion to Compel Arbitration.

agreed to arbitrate disputes arising between them and TCU. The loan agreement contains an enforceable arbitration provision (“Arbitration Provision”). On March 10, 2023, TCU Plaintiffs filed this adversary proceeding against TCU and others. (Bankr. W.D.N.C., Bankr. Pet. #22-50228, ECF No. 376; Bankr. W.D.N.C. Adv. Pro. #23-03005, ECF No. 1.) TCU timely elects to arbitrate all claims alleged against it in Plaintiffs’ First Amended Complaint (*Id.* at Adv. Pro. #23-03005, ECF No. 34) (“Amended Complaint”).

TCU’s Motion to Compel Arbitration should be granted because the Arbitration Provision is enforceable and all claims alleged by TCU Plaintiffs against TCU are within the scope of claims both parties agreed to arbitrate. None of the claims against TCU arise in or are related to the Bankruptcy Code or underlying bankruptcy proceedings; four of the claims are based on state law and one claim is based on a federal consumer protection statute. Arbitration will not interfere with this Court’s administration of the Bankruptcy Code. Therefore, this Court should grant TCU’s Motion to Compel Arbitration.

FACTUAL BACKGROUND

There are certain facts related to TCU’s arbitration motion not in dispute. First, each Plaintiff purchased a photovoltaic solar panel system from Power Home Solar, LLC (“PHS”). (Am. Compl. at ¶ 15, ECF No. 34.)² Second, as part of the solar panel system purchase, each Plaintiff signed an agreement with PHS (“PHS Agreement”) for a solar panel system to be installed at their residence. (*Id.* at ¶¶ 15-16.) Third, between the spring of 2020 and spring of 2022, TCU Plaintiffs signed credit contracts with TCU (“Loan Agreement”) to finance their solar panel system. (*Id.* at ¶¶ 20, 74, 80.) Fourth, the solar panel systems were installed at Plaintiffs’ residences. (*Id.* at ¶¶ 94-95.) Fifth, there is now a lawsuit filed in this Court against TCU.

² For this motion only, TCU treats allegations in the Amended Complaint as true. TCU reserves the right to deny any or all allegations and/or assert any defenses in arbitration (or elsewhere).

A table listing the TCU Plaintiffs and identifying each TCU Plaintiff's Loan Agreement is set forth, below.³ The table also identifies, by pinpoint citation, key pages within each Loan Agreement, including the location of the relevant arbitration and class action waiver language:

	Name of each TCU Plaintiff	Loan Agreement⁴ (Exhibit No.- Exhibit Name; Reference to Declaration ¶ of Charlesworth Decl.)	Pinpoint Location of: each Plaintiff's Signature, the Arbitration Notice, and the Class Action Waiver Notice in the Loan Agreement	Pinpoint Location of: Arbitration and Waiver of Class Action Waiver Provisions in Loan Agreement
1.	Teresa Ciccone	Exhibit 1 – Ciccone and Mank Loan Agreement See Ex. 16, at ¶ 8(a)	p. 14 of Ex. 1	pp. 24-25 of Ex. 1
2.	Elizabeth Mank	Exhibit 1 – Ciccone and Mank Loan Agreement See Ex. 16, at ¶ 8(a)	p. 14 of Ex. 1	pp. 24-25 of Ex. 1
3.	Michael Craighead	Exhibit 2 – Craighead Loan Agreement See Ex. 16, at ¶ 8(b)	p. 11 of Ex. 2	pp. 21-22 of Ex. 2
4.	Anthony Fucci	Exhibit 3 – Fucci Loan Agreement See Ex. 16, at ¶ 8(c)	p. 9 of Ex. 3	pp. 19-20 of Ex. 3
5.	Richard Harrell	Exhibit 4 – Harrell Loan Agreement See Ex. 16, at ¶ 8(d)	p. 11 of Ex. 4	pp. 21-22 of Ex. 4
6.	Dumont Jones	Exhibit 5 – Dumont and Jeannette Jones Loan Agreement See Ex. 16, at ¶ 8(e)	p. 9 of Ex. 5	pp. 19-20 of Ex. 5

³ Although TCU Plaintiffs did not attach their Loan Agreement to their Amended Complaint, Plaintiffs concede they each signed an agreement with TCU. (Am. Compl. ¶¶ 15, 74, ECF No. 34.) A court may consider matters outside the pleadings in the context of a motion to compel arbitration. *See Campbell v. Five Star Quality Care - N. Carolina, LLC*, No. 3:21-CV-95-FDW-DCK, 2021 WL 5442221, at *2 (W.D.N.C. Nov. 19, 2021) (“In determining a motion to compel arbitration, the court may consider matters outside of the pleadings, if necessary.”)

⁴ A true and accurate copy of each Loan Agreement, as identified in the table, is filed with this memorandum as Exhibits 1-15. Each is redacted to comply with privacy requirements. TCU also files **Exhibit 16**, the Declaration of David Charlesworth (“Charlesworth Decl.”), Vice President, Credit Risk, Special Assets Group for Technology Credit Union, setting forth statements regarding the authenticity of TCU Exhibits 1-15: generally, that each is a fully-executed (via DocuSign) Loan Agreement containing the arbitration and class action waiver agreements TCU Plaintiffs agreed to when each financed their solar panel system purchase. Charlesworth Decl., Ex. 16, at ¶¶ 3, 8(a-q).

7.	Jeanette Jones	Exhibit 5 – Dumont and Jeannette Jones Loan Agreement <i>See Ex. 16, at ¶ 8(e)</i>	p. 9 <i>of Ex. 5</i>	pp. 19-20 <i>of Ex. 5</i>
8.	Kami Jordy	Exhibit 6 – Jordy Loan Agreement <i>See Ex. 16, at ¶ 8(f)</i>	p. 9 <i>of Ex. 6</i>	pp. 19-20 <i>of Ex. 6</i>
9.	Marc Kennedy	Exhibit 7 – Kennedy Loan Agreement <i>See Ex. 16, at ¶ 8(g)</i>	p. 9 <i>of Ex. 7</i>	pp. 19-20 <i>of Ex. 7</i>
10.	Heather Medlin	Exhibit 8 – Medlin Loan Agreement <i>See Ex. 16, at ¶ 8(h)</i>	p. 14 <i>of Ex. 8</i>	pp. 24-25 <i>of Ex. 8</i>
11.	Vichitra Prasongphime	Exhibit 9 – Prosongphime Loan Agreement <i>See Ex. 16, at ¶ 8(i)</i>	p. 11 <i>of Ex. 9</i>	pp. 21-22 <i>of Ex. 9</i>
12.	Erin Ray	Exhibit 10 – Ray Loan Agreement <i>See Ex. 16, at ¶ 8(j)</i>	p. 9 <i>of Ex. 10</i>	pp. 19-20 <i>of Ex. 10</i>
13.	Daniel Roberts	Exhibit 11 – Roberts Loan Agreement <i>See Ex. 16, at ¶ 8(k)</i>	p. 9 <i>of Ex. 11</i>	pp. 19-20 <i>of Ex. 11</i>
14.	Ashley Shelley	Exhibit 12 – Shelley Loan Agreement <i>See Ex. 16, at ¶ 8(l)</i>	p. 11 <i>of Ex. 12</i>	pp. 21-22 <i>of Ex. 12</i>
15.	Ashley Sustek	Exhibit 13 – Ashley and Matt Sustek Loan Agreement <i>See Ex. 16 at ¶ 8(m)</i>	p. 9 <i>of Ex. 13</i>	pp. 19-20 <i>of Ex. 13</i>
16.	Matt Sustek	Exhibit 13 – Ashley and Matt Sustek Loan Agreement <i>See Ex. 16, at ¶ 8(m)</i>	p. 9 <i>of Ex. 13</i>	pp. 19-20 <i>of Ex. 13</i>
17.	Anthony Ward	Exhibit 14 – Ward Loan Agreement <i>See Ex. 16, at ¶ 8(n)</i>	p. 9 <i>of Ex. 14</i>	pp. 19-20 <i>of Ex. 14</i>

18.	Jerry Watson	Exhibit 15 – Watson Loan Agreement <i>See Ex. 16, at ¶ 8(o)</i>	p. 9 <i>of Ex. 15</i>	pp. 19-20 <i>of Ex. 15</i>
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ARBITRATION LANGUAGE IN LOAN AGREEMENT

Turning to the text of the arbitration language forming the basis for TCU’s Motion to Compel Arbitration, TCU Plaintiffs each signed their name on a signature page containing the following arbitration notices:

BY SIGNING BELOW, YOU AGREE TO THE TERMS OF THIS NOTE, INCLUDING THE ADDITIONAL TERMS AND CONDITIONS BELOW AND IN THE ATTACHED ARBITRATION PROVISION. YOU AGREE BOTH INDIVIDUALLY AND FOR PURPOSES OF THE NOTE PROVISIONS UNDER THE CAPTION ... “ARBITRATION PROVISION,” AS A PERSON AUTHORIZED TO SIGN THIS NOTE ON BEHALF OF ANY ENTITY OWNER ... YOU ACKNOWLEDGE THAT, BEFORE SIGNING THIS NOTE, YOU RECEIVED A LEGIBLE, SIGNED, DATED AND COMPLETELY FILLED-IN COPY OF THIS NOTE (INCLUDING THE ATTACHMENTS).

THE ARBITRATION PROVISION ATTACHED AS EXHIBIT A WILL HAVE A SUBSTANTIAL IMPACT ON YOUR RIGHTS IN THE EVENT OF A DISPUTE BETWEEN YOU AND US OR BETWEEN YOU AND CONTRACTOR. FOR EXAMPLE, WE (OR CONTRACTOR) MAY REQUIRE YOU TO ARBITRATE ANY CLAIM YOU INITIATE. IF SO, YOU WILL NOT HAVE THE RIGHT TO A JURY TRIAL OR THE RIGHT TO PARTICIPATE IN A CLASS ACTION IN COURT OR IN ARBITRATION.

(emphasis in originals) (See Ex. 1-15 and the pinpoint cites in the fourth column of the table, above, titled “**Pinpoint Location of: each Plaintiff’s Signature, the Arbitration Notice, and**

the Class Action Waiver Notice in the Loan Agreement” referencing the exhibit and page where each TCU Plaintiff signed and agreed to arbitration language).

In addition to the arbitration notice, the Loan Agreement signed by each TCU Plaintiff contained a comprehensive Arbitration Provision containing, in relevant part, this language:

ARBITRATION PROVISION (EXHIBIT A)

THIS ARBITRATION PROVISION (“PROVISION”) MAY HAVE A SUBSTANTIAL IMPACT ON THE WAY YOU OR WE WILL RESOLVE ANY CLAIM WHICH YOU OR WE MAY HAVE AGAINST EACH OTHER NOW OR IN THE FUTURE.
(emphasis in original.)

(a) *Effect of Provision.* Unless prohibited by applicable law, you and we agree that either party may elect to require arbitration of any Claim under this Provision.

(b) *Certain Definitions.* As used in this Provision, the following terms have the following meanings:

(ii) “Claim” means any claim, dispute or controversy between you and us (or any Related Party) that arises from or relates in any way to this Note (including any amendment, modification or extension of this Note), the Contractor Agreement, the work performed by the Contractor or a subcontractor; the System, including maintenance and servicing of the System; the arrangements between and among us, Sunlight and the Contractor; any of our marketing, advertising, solicitations and conduct relating to your request for credit or the System; our collection of any amounts you owe; or our disclosure of or failure to protect any information about you. **“Claim” is to be given the broadest reasonable meaning and includes claims of every kind and nature, including but not limited to, initial claims, counterclaims, cross-claims and third-party claims, and claims based on constitution, statute, regulation, ordinance, common law rule (including rules relating to contracts, torts, negligence, fraud or other intentional wrongs) and equity.** It includes disputes that seek relief of any type, including damages and/or injunctive, declaratory or other equitable relief ... “Claim” does not include disputes about the validity, enforceability, coverage or scope of this Provision or any part thereof (including, without limitation, subsections (f)(iii), (f)(iv), and/or (f)(v) (the “Class Action and Multi-Party Claim Waiver”), the last sentence of subsection (j) and/or this sentence; all such disputes are for a court and not an arbitrator to decide. **However,**

any dispute or argument that concerns the validity or enforceability of this Note as a whole is for the arbitrator, not a court, to decide ... (emphasis added.)

(iii) “Proceeding” means any judicial or arbitration proceeding regarding any Claim. “Complaining Party” means the party who threatens or asserts a Claim in any Proceeding and “Defending Party” means the party who is a subject of any threatened or actual Claim ...

(c) *Arbitration Election; Administrator; Arbitration Rules.*

(i) A Proceeding may be commenced after the Complaining Party complies with subsection (k)...**If a lawsuit is filed, the Defending Party may elect to demand arbitration under this Provision of the Claim(s) asserted in the lawsuit.** If the Complaining Party initially asserts a Claim in a lawsuit on an individual basis but then seeks to assert the Claim on a class, representative or multi-party basis, the Defending Party may then elect to demand arbitration. **A demand to arbitrate a Claim may be given in papers or motions in a lawsuit.** (emphasis added.)

(ii) Any arbitration Proceeding shall be conducted pursuant to this Provision and the applicable rules of the arbitration administrator...[which will be the] ... “AAA” ... JAMS ... or any other company selected by mutual agreement of the parties ...Notwithstanding any language in this Provision to the contrary, no arbitration may be administered, without the consent of all parties to the arbitration, by any Administrator that has in place a formal or informal policy that is inconsistent with the Class Action and Multi-Party Claim Waiver [defined in subsection (f)(v), below]...

(d) *Non-Waiver* ... This Provision will apply to all Claims, even if the facts and circumstances giving rise to the Claims existed before the effective date of this Provision.

(f) *No Class Actions Or Similar Proceedings; Special Features Of Arbitration.* **IF YOU OR WE ELECT TO ARBITRATE A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO: (i) HAVE A COURT OR A JURY DECIDE THE CLAIM; (ii) OBTAIN INFORMATION PRIOR TO THE HEARING TO THE SAME EXTENT THAT YOU OR WE COULD IN COURT; (iii) PARTICIPATE IN A CLASS ACTION IN COURT OR IN ARBITRATION, EITHER AS A CLASS REPRESENTATIVE, CLASS MEMBER OR CLASS OPPONENT; (iv) ACT AS A**

PRIVATE ATTORNEY GENERAL IN COURT OR IN ARBITRATION; OR (v) JOIN OR CONSOLIDATE CLAIM(S) INVOLVING YOU WITH CLAIMS INVOLVING ANY OTHER PERSON. THE RIGHT TO APPEAL IS MORE LIMITED IN ARBITRATION THAN IN COURT. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION. (emphasis in original.)

(i) *Governing Law.* **Your credit purchase of the System involves interstate commerce and this Provision shall be governed by the FAA,** and not Federal or state rules of civil procedure or evidence or any state laws that pertain specifically to arbitration. The arbitrator is bound by the terms of this Provision. **The arbitrator shall follow applicable substantive law to the extent consistent with the FAA,** applicable statutes of limitation and applicable privilege rules, and shall be authorized to award all remedies available in an individual lawsuit under applicable substantive law, including, without limitation, compensatory, statutory and punitive damages (which shall be governed by the constitutional standards applicable in judicial proceedings), declaratory, injunctive and other equitable relief, and attorneys' fees and costs. The arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based. (emphasis added.)

(k) *Pre-Dispute Resolution Procedure*⁵. Before a Complaining Party asserts a Claim in any Proceeding (including as an individual litigant or as a member or representative of any class or proposed class), the Complaining Party shall give the Defending Party: (i) a Claim Notice providing at least 30 days' written notice of the Claim and explaining in reasonable detail the nature of the Claim and any supporting facts; and (ii) a reasonable good faith opportunity to resolve the Claim on an individual basis without the necessity of a Proceeding...

(See Ex. 1-15 and pinpoint cites in the fifth column of the table, above, titled "**Pinpoint**

Location of: Arbitration and Waiver of Class Action Waiver Provisions in Loan

⁵ Upon information and belief, no TCU Plaintiff complied with the required Pre-Suit Dispute Resolution Procedure set forth in Section (k) of the Arbitration Provision prior to filing the Complaint March 10, 2023.

Agreement” referencing the exhibit and page where each TCU Plaintiff signed and agreed to arbitration language).⁶

TCU bases its Motion to Compel Arbitration on the above-referenced language agreed to by both parties: to resolve disputes between them by arbitration, and, further, to arbitrate on an individual basis and not as part of a class.

PROCEDURAL HISTORY

On October 7, 2022, PHS filed a bankruptcy petition. (W.D.N.C., Bankr. Pet. #22-50228, ECF No. 1.) On March 10, 2023, Plaintiffs filed this adversary proceeding. (*Id.* at ECF No. 376; *also* #23-03005, Compl., ECF No. 1.) On May 3, 2023, Plaintiffs filed an Amended Complaint. (Am. Compl., ECF No. 34.) All of the allegations against TCU involve alleged conduct *prior to* PHS’s bankruptcy filing. (*Id.* at ¶ 80) (alleging the last contract signed by any TCU Plaintiff was Anthony Ward: May 7, 2022). TCU obtained Plaintiffs’ consent and court approval to file a response to the Amended Complaint by June 30, 2023. (ECF No. 13; ECF No. 46.)

The Loan Agreement grants TCU the option to elect arbitration: **“If a lawsuit is filed, the Defending Party may elect to demand arbitration under this Provision of the Claim(s) asserted in the lawsuit...A demand to arbitrate a Claim may be given in papers or motions in a lawsuit...”** (*See* Ex. 1-15, each TCU Plaintiff’s Loan Agreement found contained, therein, at Exhibit A, Sec. (c)(i)) (emphasis added).

⁶ TCU Plaintiffs also agreed to abide by the TCU Member Handbook attached as **Exhibit 17**. The TCU Member Handbook includes an agreement stating, in its introductory part: **“Agreement to Arbitrate Disputes on An Individual Basis...Please read this arbitration agreement carefully. Any dispute related to your Tech CU accounts or loans (except disputes subject to small claims court jurisdiction or disputes from which consumers are exempt from arbitration under applicable law) may be resolved by binding arbitration. You give up your right to go to court and assert your rights or defenses before a jury or court judge. You also give up your right to assert claims on a class or representative basis. You are entitled to a fair hearing before a neutral arbitrator. An arbitrator’s ruling can be entered as a judgment in court, and is subject to appeal only under very limited circumstances.”** (*See* Ex. 17, p. 2, ¶ 1) (*See, also*, Charlesworth Decl., Ex. 16, ¶¶ 9(a-e) setting forth a statement regarding the authenticity of TCU **Exhibit 17**) (emphasis in original). Here, again, TCU Plaintiffs agreed, as TCU members, to *arbitrate* claims on an *individual* basis. (*See* Ex. 17, p. 3, ¶ 5) (emphasis added).

TCU elects arbitration of all claims brought by TCU Plaintiffs. TCU timely files this Motion to Compel Arbitration pursuant to Rule 12(b)(1) and Rule 12(b)(6).

LEGAL ARGUMENT

This Court should grant TCU's Motion to Compel Arbitration because: (1) All TCU Plaintiffs signed an enforceable Loan Agreement containing an Arbitration Provision; (2) all claims asserted by TCU Plaintiffs in the Amended Complaint are covered within the scope of the Arbitration Provision; and (3) there is no inherent conflict between ordering TCU Plaintiffs' claims to arbitration and the underlying purposes of the Bankruptcy Code. *In re Barker v. Fox Den Acres, Inc.* (“*In re Barker*”), 510 B.R. 771 (2014). The “simplicity, informality, and expedition of arbitration” will likely help the bankruptcy court exercise its bankruptcy jurisdiction. *Id.* at 778 (citations omitted).

A. The Arbitration Provision is Governed by the Federal Arbitration Act (“FAA”).

Section 2 of the FAA provides in relevant part: “A written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2012); *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 232, 133 S. Ct. 2304, 2308–09, 186 L. Ed. 2d 417 (2013). The FAA is broad and applies to any transaction involving or affecting interstate commerce.⁷ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–274 (1995). The FAA embodies a national policy favoring arbitration. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346

⁷ The Loan Agreement specifically characterizes TCU Plaintiffs' activity with TCU as involving interstate commerce: “(i) *Governing Law. Your credit purchase of the System involves interstate commerce and this Provision shall be governed by the FAA...*” (emphasis added) (*See* Ex. 1-15, Sec. (i)).

(2011). “[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The purpose of the FAA is simple. The principal purpose of the FAA, evidenced in the text of 9 U.S.C. §§ 2, 3 and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. *Concepcion*, 536 U.S. at 344. Section 3 of the FAA requires courts to stay litigation of arbitral claims pending arbitration of those claims in accordance with the terms of their agreement. *Id.* at 344. Section 4 of the FAA “requires courts to compel arbitration ‘in accordance with the terms of the agreement’ upon the motion of either party to the agreement ...” *Id.* at 344. “... [T]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered,” a concern which “requires that we rigorously enforce agreements to arbitrate.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3353, 87 L. Ed. 2d 444 (1985) (citations omitted). The Fourth Circuit has observed: “Thus, [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989) (internal quotations omitted).

All of the TCU Plaintiffs’ Loan Agreements contain an Arbitration Provision expressly invoking the FAA. TCU’s Motion to Compel Arbitration is properly before this Court.

B. TCU Plaintiffs and TCU Entered into a Valid Loan Agreement.

Courts must compel arbitration if: “(i) the parties have entered into a valid agreement to arbitrate, and (ii) the dispute in question falls within the scope of the arbitration agreement.”

Roberts v. Cox Commc'ns Inc., No. 320CV00392FDWDSC, 2021 WL 2678198, at *2

(W.D.N.C. May 19, 2021), report and recommendation adopted, No. 320CV00392FDWDSC, 2021 WL 2673667 (W.D.N.C. June 29, 2021) (citing *Chorley Enter., Inc. v. Dickey's Barbecue Rest., Inc.*, 807 F.3d 553, 563 (4th Cir. 2015)); See *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989) (observing a court “must focus on whether or not the company was bound to arbitrate, as well as what issues it must arbitrate ...”).

Pursuant to the FAA, in determining whether the parties have an enforceable agreement to arbitrate, courts apply state law principles governing the formation of contracts. 9 U.S.C. § 2; *Roberts v. Cox Commc'ns Inc.*, No. 320CV00392FDWDSC, 2021 WL 2678198, at *2 (W.D.N.C. May 19, 2021), report and recommendation adopted, No. 320CV00392FDWDSC, 2021 WL 2673667 (W.D.N.C. June 29, 2021) (allowing defendant’s motion to compel arbitration) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). In this case, TCU Plaintiffs reside either in North Carolina or Virginia. The legal analysis under NC or VA state law is inconsequential: the Loan Agreement is a valid and enforceable contract in both.

1. Under North Carolina Law, the Arbitration Provision Is Valid and Enforceable.

North Carolina uses the law of contracts to evaluate whether there is a valid and enforceable agreement to arbitrate. *Goldstein v. American Steel Span, Inc.*, 181 N.C. App. 534, 536, 640 S.E.2d 740, 742 (2007) (reversing trial court ruling denying defendant’s motion to compel). North Carolina has examined the impact of *Concepcion* and *Italian Colors* on contract interpretation relating to arbitration provisions under North Carolina law. *Torrence v. Nationwide Budg. Fin.*, 232 N.C. App. 306, 753 S.E.2d 802 (2014). *Torrence* examined the FAA, *Concepcion*, and *Italian Colors*, and reversed the trial court ruling denying a defendant’s motion to compel arbitration. *Id.* The *Torrence* court wrote:

We further note the United States Supreme Court's assertion that “[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.” *Concepcion*, — U.S. at —, 131 S.Ct. at 1748, 179 L.Ed.2d at 753. The United States Supreme Court has made it clear that it will no longer tolerate State courts or laws which seek to frustrate the intent of Congress in enacting the FAA.

Torrence at 313, 807. “*Concepcion* and *Italian Colors* clearly state that the United States Supreme Court is weary of state and federal trial courts assisting plaintiffs in getting around the mandatory provisions of the FAA.” *Torrence* at 321, 811. As evidenced by the Arbitration Provision in the Loan Agreement found in Exhibits 1-15, both parties exchanged promises to submit to arbitration, if either party elected to do so. Therefore, TCU Plaintiffs from North Carolina signed and entered into a valid arbitration agreement.

2. Under Virginia Law, the Arbitration Provision Is Valid and Enforceable.

“The law of contracts governs the question whether there exists a valid and enforceable agreement to arbitrate. Such an agreement must contain the essential elements of a valid contract at common law.” *Mission Residential, LLC v. Triple Net Properties, LLC*, 275 Va. 157, 160–61, 654 S.E.2d 888, 890 (2008). “We adhere to the view that the public policy of Virginia favors arbitration.” *Id.* at 161, 890. “A presumption in favor of arbitrability arises only after the existence of such an agreement has been proved, and the remaining question is whether the scope of the agreement is broad enough to include the disputed issue.” *Id.* (citing *Kaplan* at 945-46). As evidenced by both parties signing the Arbitration Provision in the Loan Agreement, the parties exchanged promises to submit to arbitration, if either party elected to do so. (See Ex. 1-15.) As such, TCU Plaintiffs from Virginia signed and entered into a valid arbitration agreement.

C. TCU Plaintiffs' Claims are Within the Scope of the Arbitration Provision.

The five claims asserted by TCU Plaintiffs are within the scope of the Arbitration Provision contained in the Loan Agreement to which all TCU Plaintiffs agreed.

1. Scope of the Arbitration Provision.

Plaintiffs broadly complain they were misled during their solar panel system purchase. (Am. Compl. at ¶¶ 150, 153, ECF No. 34.) Out of these alleged misleading statements, Plaintiffs' Amended Complaint alleges TCU, among others, are liable. The Amended Complaint sets forth these claims: the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"); the Virginia Consumer Protection Act ("VCPA"); the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"); common law fraud; and, the Truth in Lending Act ("TILA"). (*See id.* at ¶¶ 9, 111-129 (RICO), ¶¶ 130-139 (VCPA), ¶¶ 140-148 (UDTPA), ¶¶ 149-157 (fraud), ¶¶ 158-169 (TILA).) These five claims are clearly within the scope of the TCU Plaintiffs' Arbitration Provision.

Specifically, Section (b)(ii) of the Arbitration Provision in the Loan Agreement broadly define the types of claims subject to arbitration. (*See* Ex. 1-15, Loan Agreement, at Exhibit A, Section (b)(ii).) Section (b)(ii) states that a "Claim" is to be given "...the **broadest** reasonable meaning and includes claims of every kind and nature, including but not limited to, initial claims, counterclaims, cross-claims and third-party claims, and claims based on constitution, **statute**, regulation, ordinance, **common law rule** (including rules relating to contracts, **torts, negligence, fraud or other intentional wrongs**) and equity." *Id.* (emphasis added).

The Loan Agreement goes on to broadly define claims as "any claim, dispute or controversy between you and us (or any Related Party) that arises from or relates in any way to this Note (including any amendment, modification or extension of this Note), the Contractor Agreement, the work performed by the Contractor or subcontractor; the System, including

maintenance and servicing of the System; the arrangements between and among us, Sunlight and Contractor; any of our marketing, advertising, solicitations and conduct relating to your request for credit or the System...” *Id.* (See Ex. 1-15, Loan Agreement, at Exhibit A, Section (b)(ii).)

“An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989). There is a “heavy presumption of arbitrability” so when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. *Id.* Following the reasoning in *Peoples*, TCU’s Motion to Compel Arbitration should be granted.

2. The Arbitration Provision Includes a Delegation Clause.

Plaintiffs have not challenged the arbitration clause in their pleadings. However, if they do, as a general rule, a court should grant a motion to compel arbitration even if there is a challenge to arbitrability, if: (1) there is a written agreement to arbitrate, (2) the agreement to arbitrate is signed by the parties, and (3) the agreement to arbitrate includes a delegation clause. *In re Barker* at 777. In *In re Barker*, plaintiff in the adversary proceeding lodged claims for breach of contract, statutory unfair and deceptive trade practices, fraud, conversion, Fair Debt Collection Practices Act violations, various state law collections statutes, personal injury claims, civil conspiracy, and one improper proof of claim filed in the main bankruptcy case. *Id.* at 775. The arbitration provision in *In re Barker* had a delegation clause. *Id.* at 775-76. This Court ordered all the claims to arbitration, except an objection to the proof of claim filed in the bankruptcy case, invoking the delegation clause and sending any issues of arbitrability to the arbitrator. *Id.*

In this case, Section (b)(ii) of the Arbitration Provision, similarly, has a delegation clause. (See Ex. 1-15, Loan Agreement, at Exhibit A, Section (b)(ii).) This clause delegates any gatekeeper questions about enforceability to an arbitrator: “...any dispute or argument that concerns the validity or enforceability of this Note as a whole is for the arbitrator, not a court, to decide.” (See *id.*) Any challenge by TCU Plaintiffs – that their claims against TCU fall outside the scope of claims to be arbitrated – should be delegated to an arbitrator.

D. There Is No Inherent Conflict Between the Arbitration Provision and the Bankruptcy Code.

TCU Plaintiffs filed their lawsuit against TCU in another entity’s (PHS’s) bankruptcy case. This Court in *In re Barker* observed that, in some adversary proceedings filed in bankruptcy, further analysis is necessary to determine the propriety of compelling arbitration. *In re Barker* at 777. The text of the Bankruptcy Code does not preclude arbitration; therefore, congressional intent to override arbitration must be found, if at all, on a case-by-case basis only if there is an inherent conflict between arbitration and the Bankruptcy Code’s underlying purposes. (*Id.*) (cleaned up) (citing *Phillips v. Congleton, LLC (In re White Mounting Mining Co., LLC)* 403 F.3d 164, 168, (4th Cir.2005) (quoting *McMahon*, 482 U.S. at 237)).

1. TCU Plaintiffs’ Claims Are Non-Core.

In determining whether there is an inherent conflict between arbitration and the underlying purposes of the Bankruptcy Code, courts generally ask, first, if a claim is core or non-core. *In re Barker* at 777. If a claim is non-core, it generally must be submitted to arbitration. *Id.* (See *The Whiting-Turner Contracting Co. v. Elec. Mach. Enters, Inc. (In re Elec. Mach. Enters. Inc.)*, 479 F.3d 791, 796 (11th Cir.2007) (holding (at p. 798) that while the determination of whether Whiting–Turner actually owes EME part of the settlement proceeds that Whiting–Turner received from UCDP could affect EME’s estate, actions that are merely related to a

bankruptcy case are non-core proceedings and subject to arbitration). All five claims TCU Plaintiffs allege in their Amended Complaint exist on their own independent of the Bankruptcy Code. Since all claims against TCU are non-core, TCU's Motion to Compel Arbitration should be granted.

2. TCU Plaintiffs' Claims Are Not Statutorily Core.

28 U.S.C. § 157(b) lists sixteen "core" proceedings in bankruptcy. *In re Barker* at 779 (analyzing various state court causes of action and concluding those claims were not core pursuant to 28 U.S.C. § 157(b)). An adversary proceeding claim is not statutorily core when the claim is not among the sixteen categories of proceedings and does not turn on bankruptcy law or affect the uniform administration of bankruptcy law. *See id.*; *See, also, Rodgers v. Preferred Carolinas Realty, Inc. (In re Rodgers)*, No. 5:13-CV-764-FL, 2014 WL 12918871, at *17 (E.D.N.C. June 24, 2014) (analyzing numerous common law and statutory claims in an adversary proceeding and concluding all were non-core).

In *In re Barker*, the Debtor objected to the adversary defendant's motion to compel arbitration of state law claims arguing that arbitration would be inconsistent with the Bankruptcy Code. *In re Barker* at 779. This Court rejected that argument finding that the claims in the adversary proceeding were state law claims, except one claim related to a bankruptcy proof of claim, where the defendant party seeking arbitration was not a current creditor of Debtor, and there was no claim submitted against the bankruptcy estate. *Id.* "Accordingly, Debtor's causes of action against CMH are not core." *Id.* (citing 28 U.S.C. § 157(b)(2)).

In this case, the five claims asserted by TCU Plaintiffs are effectively the same as those claims raised in *In re Barker* – minus the (clearly core) proof of claim raised in *In re Barker*. In this case, none of the five state/federal law claims against TCU arise in or exist solely within bankruptcy. TCU has not filed a proof of claim against PHS. TCU has not asserted claims, cross-

claims, or counterclaims against PHS. And, all five claims at issue involve, solely, alleged pre-petition conduct. TCU Plaintiffs' claims, therefore, are unrelated to the Bankruptcy Code or its purposes. This Court should conclude the five claims are not statutorily core and grant TCU's arbitration request.

3. TCU Plaintiffs' Claims Are Not Constitutionally Core.

The United States Supreme Court has defined what matters are constitutionally core. *Stern v. Marshall*, 564 U.S. 462 (2011) (discussing Article III's impact adjudicating bankruptcy matters). A matter is constitutionally core under *Stern* if it: (1) arises from the bankruptcy itself; or (2) necessarily needs to be resolved in the claims allowance process. *Id.* at 499 ("...Congress may not bypass Article III simply because a[n adversary] proceeding may have *some* bearing on a bankruptcy case[.]") (emphasis in original).)

Acknowledging *Stern*, *In re Barker*, this Court observed: "Even if a matter is constitutionally core, a bankruptcy court possesses broad discretion to grant a motion to compel arbitration if there is a written agreement to arbitrate and if doing so would be helpful to the court and would assist the bankruptcy court in exercising its bankruptcy jurisdiction." *In re Barker* at 778. In concluding that adjudicating claims asserted in an adversary proceeding involving a consumer transaction – via arbitration – was appropriate, this Court held that it would be helpful to the court and more efficient and cost-effective for the parties if Debtor's state law causes of action proceeded in arbitration. *Id.* at 779. The court went on to find that "after [arbitration]...this court can address any bankruptcy implications of the arbitrator's decision concerning state law claims." *Id.* at 779-80; *See Edwards v. Vanderbilt Mortgage & Fin., Inc. (In re Edwards)*, 2013 WL 5718565, at *2 (Bankr. E.D.N.C. Oct. 21, 2013) (observing the claim in *Stern* was an unconstitutional core proceeding because the counterclaim was based on state law and would not be resolved in the claims allowance process; consequently, the matter

could not be finally determined by a bankruptcy judge; when an unconstitutional core proceeding as in *Stern* is implicated, the arbitration agreement should control).

This Court should follow the reasoning in *In re Barker*. It should conclude that TCU Plaintiffs' claims are not constitutionally core and that sending them to arbitration does not present an inherent conflict with the underlying purposes of the Bankruptcy Code. TCU's Motion to Compel Arbitration should be granted.

4. TCU Plaintiffs' Claims Must Be Arbitrated.

The relief sought by TCU – referral to arbitration – is not in conflict with the purposes of the Bankruptcy Code nor does referral interfere with the Bankruptcy Court exercising its duties administering PHS's case. *In re Barker* at 777. Notably, none of the five claims asserted in the Amended Complaint against TCU are core bankruptcy claims or proceedings.

Specifically, all allegations in the Amended Complaint against TCU arise pre-PHS's bankruptcy petition; all the TCU Plaintiffs' claims are rooted in state law or federal law and, importantly, regularly exist on their own independently outside the Bankruptcy Code. Further, TCU is not a party to PHS's bankruptcy; TCU has not filed a proof of claim in PHS's bankruptcy; PHS has not filed a claim against TCU; TCU has not filed a cross-claim or counterclaim against PHS in this adversary proceeding.

Moreover, even if this Court concluded TCU Plaintiffs' claims were statutorily core, or even constitutionally core, arbitration is still appropriate since arbitration would be helpful to the Court exercising its bankruptcy jurisdiction and there is a written agreement between TCU and TCU Plaintiffs. *In re Barker* at 778.

E. TCU Plaintiffs Affirmatively Waived Their Right To Class Action Participation.

In addition to agreeing to arbitrate, TCU Plaintiffs also affirmatively waived their right to proceed in any forum as a class representative or class member. The Loan Agreement states:

(f) No Class Actions Or Similar Proceedings; Special Features Of Arbitration. **IF YOU OR WE ELECT TO ARBITRATE A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO: (i) HAVE A COURT OR A JURY DECIDE THE CLAIM; (ii) OBTAIN INFORMATION PRIOR TO THE HEARING TO THE SAME EXTENT THAT YOU OR WE COULD IN COURT; (iii) PARTICIPATE IN A CLASS ACTION IN COURT OR IN ARBITRATION, EITHER AS A CLASS REPRESENTATIVE, CLASS MEMBER OR CLASS OPPONENT; (iv) ACT AS A PRIVATE ATTORNEY GENERAL IN COURT OR IN ARBITRATION; OR (v) JOIN OR CONSOLIDATE CLAIM(S) INVOLVING YOU WITH CLAIMS INVOLVING ANY OTHER PERSON. THE RIGHT TO APPEAL IS MORE LIMITED IN ARBITRATION THAN IN COURT. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.**

(emphasis in original) (See Ex. 1-15, Loan Agreement, Exhibit A, Sections (f)(iii-v); Ex. 16 at ¶¶ 8(a-q)).

The Supreme Court has held that “[r]equiring the availability of a class wide arbitration interferes with fundamental attributes of arbitration and thus create a scheme inconsistent with the FAA.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011); see *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 133 S. Ct. 2304 (2013) (holding that absent a clear federal statutory command to the contrary, class action waivers are valid.) Additionally, Section 4 of the FAA provides that a party may obtain an order compelling arbitration “in the manner provided for [in the parties’] agreement.” 9 U.S.C. § 4; see *Concepcion*, 131 S. Ct. at 1748 (“the principal purpose of the FAA is to ensur[e] that private arbitration agreements are enforced according to their terms.”) (internal quotations and citations omitted).

Section (f)(iii-v) of the Arbitration Provision contains a clear class action waiver agreement. As such, TCU Plaintiffs are barred from proceeding in any forum as a class, as requested in their amended pleadings.

CONCLUSION

TCU's Motion to Compel Arbitration should be granted. The five claims asserted against TCU in the adversary proceeding should be resolved in arbitration because TCU Plaintiffs agreed to arbitration. TCU Plaintiffs affirmatively agreed they would not resolve disputes against TCU in any state or federal court if TCU (or they) elected arbitration.

Plaintiffs also waived the right to seek or participate in class-wide relief, relief expressly sought in the Amended Complaint. Accordingly, TCU Plaintiffs must arbitrate their claims against TCU and do so on an individual basis.

Wherefore, for the foregoing reasons, Defendant TCU requests that this Court enter an order compelling TCU Plaintiffs to individually arbitrate their claims against TCU. TCU further request this Court enter an order staying the action pending such arbitration pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the FAA, and the contractual agreements cited herein.⁸ Or, in the alternative, TCU requests dismissal of this action pending arbitration.

Respectfully submitted,

This 30th day of June, 2023.

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⁸ This Court, in *In re Barker*, stayed the proceedings pending arbitration of the state law claims.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **DEFENDANT TECHNOLOGY CREDIT UNION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION** using the CM/ECF system, which will send notification of such filing to all attorneys of record using the CM/ECF system.

This 30th day of June, 2023.

GORDON REES SCULLY MANSUKHANI, LLP

/s/ Samuel G. Thompson, Jr.
Samuel G. Thompson, Jr