UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:

Ch. 7

POWER HOME SOLAR, LLC,

Debtor **Case No. 22-50228**

CLAUDE MUMPOWER et al., for themselves and on behalf of others similarly situated,

Plaintiffs,

Adv. Pro. No. 23-03005

v.

POWER HOME SOLAR, LLC et al.,

Defendants.

PLAINTIFFS' OPPOSITION MEMORANDUM TO DEFENDANT TECH CREDIT UNION, LLC'S MOTION TO COMPEL ARBITRATION

The Plaintiffs with loans from Defendant Tech Credit Union, LLC ("Tech CU"), on behalf of themselves and all others similarly situated, oppose Tech CU's Motion to Compel Arbitration (ECF No. 79) and brief in support thereof (ECF No. 86). This Court should deny the Motion because arbitration of these issues would substantially interfere with the core bankruptcy functions of this Court. To the extent this Court finds any of the Plaintiffs' claims against Tech CU to not be

constitutionally core, Tech CU's Motion and Memorandum have directly asked this Court to enter a final order on its Motion to Compel and thus consented to this Court deciding it in the first instance. Tech CU's efforts to later withdraw this consent (ECF 113) should be of no effect.

INTRODUCTION

This case concerns a fraudulent scheme orchestrated by Defendants that induced consumers to purchase underperforming solar power systems at secretly inflated prices. Plaintiffs in this case with loans from Tech CU were among the victims of the Defendants' fraud. These Plaintiffs' loans, which were all arranged by the Debtor, Power Home Solar, LLC ("Power Home"), for the purchase of a solar power system. As alleged in the Amended Complaint, all of the Plaintiffs' loans included a hidden fee not disclosed on the loan documents (or anywhere else in the materials Plaintiffs received from Defendants in connection with their purchase and financing of their residential solar power systems). Yet, although it was concealed, this hidden fee was in fact included in the price of the systems sold to Plaintiffs, which increased the total amount of financing that Plaintiffs obtained from Tech CU and the other non-debtor finance entity Defendants.

This class action seeks to remedy that wrong and others. Plaintiffs allege that Power Home, its CEO Jayson Waller, Tech CU, and others violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO), the Virginia

Consumer Protection Act (VCPA), and the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), and that they committed common law fraud. Additionally, Plaintiffs with loans financed by Tech CU assert a Truth in Lending Act (TILA) claim solely against Tech CU. All of Plaintiffs' claims are inextricably intertwined with and will necessarily be resolved by the Court in connection with the Court's adjudication of Plaintiffs' claims against the Debtor. Indeed, even Plaintiffs' TILA claim will necessarily be resolved by the Court's adjudication of Plaintiffs' other claims against the Debtor, as Plaintiffs' claims are all based on the same fraudulent loan transactions.

As with the other Defendants' motions to compel separate individual arbitrations of Plaintiffs' claims in this case, Tech CU's motion to compel arbitration seeks to needlessly multiply and complicate this litigation by severing Plaintiffs' inextricably intertwined claims against Power Home and Tech CU from this unified class action adversary proceeding and sending each Plaintiff to a separate arbitration based on the same facts and legal issues that this Court is already going to be resolving in determining the contested consumer creditors' claims in this case, including Plaintiffs' proofs of claim. So, the Court should deny Tech CU's motion because compelling a separate arbitration of each Plaintiff's claims against Tech CU in this case is incompatible with the efficiency and collective resolution policies that are fundamental to bankruptcy administration.

I.

FACTUAL BACKGROUND

Plaintiffs have filed individual proofs of claim against the Debtor based on their claims asserted in this adversary proceeding; they are also among the named plaintiffs in this adversary proceeding, and they have, together with the other named plaintiffs, filed a class proof of claim in the Power Home bankruptcy, to which no party in interest has objected.

The operative Amended Complaint details the misrepresentations and fraud that were systematically carried out by Power Home in coordination with the financial-entity defendants, including Tech CU. (*See* Am. Compl. ¶¶ 2–7, 28–92, ECF No. 34.) The named Plaintiffs in this action are residents of Virginia or North Carolina who signed separate contracts with Power Home for the installation of a home solar panel system, with financing to be arranged with the financial-entity defendants, and they have filed a class action with both state specific claims and also nationwide federal claims.

The Plaintiffs with loans from Tech CU do not dispute that their Tech CU contract is in the form presented by Tech CU as the attachments to its Memorandum. In those documents, Tech CU is identified as a partner with Power Home and Sunlight Financial, LLC ("Sunlight"). (See e.g., the first sentence of the "Sunlight Financial Summary of Key Loan Terms" ECF 86-1, pg. 2 of 41.) These are the loan

contracts that were arranged for them by a Power Home sales representative. (Am. Compl. ¶ 70.) These contracts all contain the same provision that states: "NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER." (See e.g., bottom of page 23 of 41, ECF 86-1).

The Amended Complaint alleges that the face amount of each loan "was not the true amount of the loan." (Am. Compl. ¶ 7.) "Instead, based on separate contracts between Power Home and the various financial entity defendants, the cash price for each financed installation was inflated to include an undisclosed fee charged by the financial entity defendants, who actually paid less to Power Home for the design, installation, and equipment than the amount of the loan proceeds." (*Id.*) "[T]he same Power Home employee who negotiated the sale of the solar power system also arranged the credit contract." (*Id.* ¶ 6.). "By wearing these two hats, that representative was an agent for Power Home and an agent for the financial entity." (*Id.*) "The dual nature of the agency role of that Power Home employee inextricably ties the valuation of each Plaintiff's claim against Power Home to the determination

of the value of their claim against financial-entity Defendants involved in their transaction." (*Id.*)

As alleged, these solar power systems were sold under a standard sales pitch in conjunction with the "related financing." (*Id.* ¶ 40.) This "pitch misled consumers about the efficiency and effectiveness of the system being sold to them, misrepresented the federal solar tax credit as a guaranteed rebate that would come back to the consumer in one lump sum, and misrepresented the amount of the dollar benefit to the consumer." (*Id.* ¶ 41.) The sales agents were not trained to even determine how much of a credit a consumer might receive. (*Id.* ¶¶ 42–46.) Instead, they were trained to misrepresent "the full potentially available tax credit as a rebate that the customer would necessarily receive all at one time, as a cash payment rather than a reduction in tax owed." (*Id.* ¶ 48.) The agents were trained to "discuss the monthly payment that would be required to pay the loan as if the full amount of the tax credit would be available to the consumer the following year." (*Id.* ¶ 50.)

"Power Home established contracts with the financial-entity defendants for those entities to work with Power Home to sell and finance residential solar power systems that produced electricity." (*Id.* ¶ 29.) Power Home had "hidden fee agreements with the financial entity defendants" (*id.* ¶ 37), which, in this instance, refers to Tech CU through its acknowledged partnership with Sunlight and Power

Home. The sales process "ensured that the agents who sold the system and arranged the financing did not disclose the hidden fee." (*Id.* ¶ 38.)

Plaintiffs' Amended Complaint explains how Power Home increased the cost of the system far higher than if the consumer were to pay cash. (*Id.* ¶ 53.) It details how this was to cover the hidden fee. (*Id.* ¶ 55.) Specifically, "the purported cash price of the system was determined in part by the credit granting protocols of the financial-entity defendants and their secret agreement with Power Home (through Waller) regarding the hidden fee that the financial-entity defendants retained from the principal amount of the loan to the consumer purportedly for the cost of the solar installation contract." (*Id.* ¶ 56.) "None of the Plaintiffs were told that the price of the system had been increased because of the hidden fee being retained by the financial-entity defendant that was working with Power Home." (*Id.* ¶ 60.)

"No Plaintiffs were aware of the hidden fee in their contract because the Defendants took affirmative steps to conceal its existence from them." (*Id.* ¶ 81.) Those steps are set forth in Paragraphs 82 through 85 of the Amended Complaint.

All the claims against the Debtor and Tech CU in the Amended Complaint have at their core the unlawful nature of the hidden fee. Plaintiffs recognize that they may recover their actual damages only once on these inter-related claims. As for the direct liability of Tech CU, "recovery of damages for that direct liability, which cover the same damages as a claim against Power Home, may also reduce the amount

of the Plaintiffs' claims against Power Home, potentially leaving more resources available for the bankruptcy estate, which may improve the potential recovery available to Power Home's non-consumer creditors." (*Id.* ¶ 8.)

Furthermore, Tech CU contractually agreed to be liable for all claims and defenses that these Plaintiffs have against Power Home, up to the amount owed under the loan. (See e.g. ECF 86-1.) This clause is also common to the other Plaintiffs "such that any claim the consumer has against Power Home is also a claim that can be raised against the finance entity Defendants, which themselves are creditors of Power Home in its (above captioned) bankruptcy case." (Am. Compl. ¶ 3.)

Plaintiffs have also alleged that Tech CU, as one of the financial entity defendants, can assert claims against Power Home through indemnity agreements or other legal theories. (*Id.* ¶ 4.). Sunlight has filed a proof of claim against the Debtor, Claim 5736, in the amount of $32,556,024.47. Its attachment explains that this claim includes "indemnification obligations (including any Losses, as defined in the Financing Agreement" dated November 9, 2018, as amended. Furthermore, under Sunlight's agreement with Tech CU, Sunlight has indemnity obligations and repurchase obligations regarding credit contracts it arranged for Tech CU. (See Exhibit 1, Sec. 8.7, pg. 13-14, Residential Solar Energy Loan Program Agreement between Sunlight and Tech CU).

Plaintiffs assert that Defendants' unlawful conduct allows them, and all other victims, to choose to cancel their contracts and have their system removed and have their property replaced to its previous condition. (Am. Compl. ¶ 94.) All these victims should also be able to choose to keep a functioning system and recover their actual damages based on the value of the electricity being produced. (*Id.* ¶ 95.)

II.
DELEGATING THE QUESTION OF ARBITRABILITY OF THESE PLAINTIFFS' CLAIMS AGAINST TECH CU IS CONTRARY TO THE ARBITRATION PROVISION IN QUESTION AND INCOMPATIBLE WITH THE PURPOSES OF THE BANKRUPTCY CODE

Although Tech CU asserts that it can enforce a delegation clause in its contracts, it misreads its own contracts. As quoted near the bottom of page 6 of its Memorandum (ECF 86, Pg. 6 of 22), its arbitration agreement specifically excludes from the definition of "Claim" all "disputes about the validity, enforceability, coverage or scope of this Provision" and "all such disputes are for a court and not an arbitrator to decide." This is an anti-delegation clause which mandates that the specific question of whether or not the arbitration clause should be enforced is to be decided by this Court.

Although no further analysis is necessary other than to read the actual words of this provision, even if the delegation clause in the Tech CU arbitration agreement were different, it cannot override this Court's power to decide whether administration of the Debtor's bankruptcy case consistent with the Bankruptcy

Code's provisions and purposes is incompatible with separate arbitrations of each and every Plaintiff's claims against Tech CU and the other non-debtor defendants, such that application of the Federal Arbitration Act to the claims in this case is precluded. "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate. . . ." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (quotation omitted).

Power Home's bankruptcy constitutes a legal and practical impediment to enforcement of Tech CU's arbitration agreements with Plaintiffs, which makes any delegation of the question of arbitrability of the Plaintiffs' claims in this litigation – as against Tech CU – inappropriate. By filing its Chapter 7 bankruptcy petition, Power Home invoked the claims administration procedures of the Bankruptcy Code and Rules, which represents a specific challenge to the separate arbitration of Plaintiffs' claims against Tech CU. "A party may contest the enforceability of the delegation clause with the same arguments it employs to contest the enforceability of the overall arbitration agreement." *Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021). These Plaintiffs assert that for the same reason that their claims against Tech CU should not be sent to arbitration, the delegation clause cannot possibly be read to send to arbitration this initial question on whether arbitration of those claims conflicts with the bankruptcy power and duties of this Court.

Delegation of the decision to arbitrate Plaintiffs' claims to an arbitrator (who is paid and thus incentivized to arbitrate) would leave a major question regarding available resources to fund the debtor's estate in the hands of a private arbitrator with no constitutionally delegated bankruptcy jurisdiction. This outcome urged by Tech CU is simply incompatible with the Supreme Court's holdings in *Celotex*.

III.

TO ACCOMPLISH THE PURPOSE OF THE BANKRUPTCY CODE, THE ARBITRATION CLAUSE SHOULD NOT BE ENFORCED REGARDING PLAINTIFFS' CORE BANKRUPTCY CLAIMS AGAINST BOTH THE DEBTOR AND TECH CU.

Plaintiffs are not contesting the basic validity of the arbitration clause in their Tech CU contracts. Instead, Plaintiffs oppose Defendant's motion because arbitration of Plaintiffs' claims against Tech CU would present an irreconcilable conflict between the Federal Arbitration Act ("FAA") and the provisions and purposes of the Bankruptcy Code, which therefore precludes enforcement of the FAA on the facts of this case. Because arbitration of Plaintiffs' claims against Defendant in this case is incompatible with the efficient administration of bankruptcy, the bankruptcy court should deny Defendant's motion to compel arbitration.

In the context of the claims adjudication process in the Power Home bankruptcy, the FAA cannot be reconciled with the provisions of the later-enacted Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) with

respect to Tech CU's rights to enforce the arbitration clause in Plaintiffs' financing agreements for their solar power systems. *See Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456–457 (1945) (repeal by implication occurs when earlier and later Federal statutes are irreconcilable); *Morton v. Mancari*, 417 U.S. 535, 550(1974) (same).

Although courts ordinarily strongly disfavor the implied repeal of one federal statute by another, *see Randolph v. IMBS, Inc.,* 368 F.3d 726, 730 (7th Cir. 2004) ("repeal by implication is a rare bird indeed"), bankruptcy is a unique area of law that has been specifically carved out by Congress, *see In re Bauer*, No. AP 20-80012-DD, 2020 WL 3637902, at *3 (Bankr. D.S.C. June 8, 2020) (discussing *Allen v. Cooper*, 140 S. Ct. 994 (2020) (comparing copyright law with bankruptcy law because both are mentioned in Article I of the United States Constitution, recognizing the "singular nature" of a bankruptcy court's jurisdiction and acknowledging "bankruptcy exceptionalism")).

Other than these Plaintiffs' TILA claim, which they assert solely against Tech CU, this adversary proceeding asserts inseparable core bankruptcy claims against both Tech CU and the Debtor, which will necessarily be resolved in the claims allowance process established under the Banrkuptcy Code and Federal Rules of Bankruptcy Procedure. Plaintiffs acknowledge that their separate TILA claims against Tech CU are not core bankruptcy claims for purposes of 28 U.S.C. § 157,

because Plaintiffs' TILA count seeks relief solely from Tech CU, and does not seek relief from the Debtor. Nevertheless, the central issue at the heart of Plaintiffs' TILA claim against Tech CU—whether the Debtor and Tech CU included an unlawful secret finance charge in Tech CU's loan to Plaintiffs for the Power Home solar power system—will be decided in connection with the resolution of Plaintiffs' non-TILA core bankruptcy claims against the Debtor and the other Defendants in this case. Additionally, the resolution of the proof of claim will also necessarily determine the amount of Plaintiffs' actual damages from the hidden fee, and that the Tech CU loan is part of a consumer transaction. Because Tech CU will not be able to deny that it is a "creditor" subject to TILA's requirements (as that term is defined in TILA), the only other issue that would need to be adjudicated with respect to Plaintiffs' TILA claim against Tech CU would be the statutory damages remedy, which is a purely mathematical computation under 15 U.S.C. § 1640(a).

The question of whether a bankruptcy court may enter a final judgment in a case depends on whether the cause of action stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. *Stern v. Marshall,* 564 U.S. 462 (2011). Because Plaintiffs' inextricably intertwined non-TILA claims against the Debtor and Tech CU will necessarily be resolved in the claims allowance process, Plaintiffs' claims against the Debtor and Tech CU are constitutionally core such that this Court may enter final judgment on them. As for the non-

constitutionally core TILA claim, Tech CU did not initially object to the Court exercising jurisdiction in the first instance over this matter and should not be allowed to change that position. Therefore, this Court can decide all the matters raised by Tech CU.

Conducting contemporaneous separate arbitrations of Plaintiffs' claims against Tech CU and the other non-debtor finance entities while this Court adjudicates those same core claims against the Debtor and other Defendants would produce an unworkable administrative nightmare that further confirms the irreconcilable conflict between the FAA and the Bankruptcy Code with respect to the facts of this case. The Fourth Circuit recognizes that inherent conflicts exist between the FAA and the Bankruptcy Code, and the facts of this case likewise present an irreconcilable conflict between these overlapping federal laws. In *Moses v. CashCall, Inc.*, 781 F.3d 63 (4th Cir. 2015), the Fourth Circuit affirmed the district court's holding that the appellant was not required to arbitrate a "constitutionally core" claim, which was necessarily resolved in connection with the claims allowance process. *Id.* (denying creditor's motion to dismiss or compel arbitration of adversary proceeding by Chapter 13 debtor seeking declaratory judgment that creditor's consumer loan was "void *ab initio*" under North Carolina law and seeking damages under the North Carolina Debt Collection Act, finding that the adversary proceeding was a core bankruptcy proceeding because it involved the allowance or disallowance

of claims, but finding that Mrs. Moses' second cause of action was non-core and it could therefore not enter a final judgment. *Id.* at 68–69).

Just as requiring arbitration of the Plaintiff's constitutionally core declaratory judgment claim in *CashCall* posed an inherent conflict with the Bankruptcy Code, so too would requiring separate arbitrations of each Plaintiff's non-core TILA claim against Tech CU. The same facts and legal issues will necessarily be resolved in the Court's determination of Plaintiffs' claims against Power Home, as will be resolved with respect to their interrelated claims against Tech CU.

Tech CU's attempt to compel arbitration of Plaintiffs claims against it in this case is an attempt to protect its own interests without regard to the detrimental effect that doing so would cause to the efficiency and fairness of the administration of the Power Home bankruptcy. While Tech CU's motivation is understandable, the effect of its proposal on the administration of this case is untenable.

Compelling separate arbitrations of every Plaintiff's claims against Tech CU would result in separate determinations by each arbitrator in each arbitration of precisely the same issues that this Court will already be deciding with respect to each of the Plaintiffs' identical claims against the debtor. Compelling arbitration in this case thus guarantees inconsistent results, both from one arbitral award to the next, and as between the amount of each of these arbitral awards versus the Court's own determination of the amount of consumers' identical claims against the Debtor.

Moreover, compelling arbitration places an unnecessary economic burden on Plaintiffs and the debtor's other consumer creditors, as they would be obligated to pay Bankruptcy Court fees to lift the automatic stay to pursue arbitrations of their claims against the non-debtor Defendants, as well as fees for initiating the arbitration proceeding, even though this Court will already be determining Plaintiffs' identical claims against the Debtor in the ordinary course of administering this Chapter 7 case.

The FAA and the Bankruptcy Code both are grounded in important policy considerations concerning efficiency and fairness. *See In re McPherson*, 630 B.R. 160, 166–67 (Bankr. D. Md. 2021). However, unlike the FAA, the Bankruptcy Code is not party- or contract-specific, which is what Tech CU's motion fails to address. Bankruptcy administration determines and balances the rights of many parties that hold a variety of legal rights and interests involving the debtor. It is this collective balancing that is critical to the Bankruptcy Court's ability to administer the bankruptcy process efficiently and expeditiously:

> Bankruptcy cases are different in purpose and scope from most other debtor-creditor matters and two-party disputes in general. Bankruptcy law is collectivist in nature, impacting a debtor and potentially many of her creditors. Its purpose protects the debtor's fresh start while equitably adjusting and enforcing creditor payment rights. […] Uniform application of the law […] should not depend upon whether the issue is before a judicial officer or an arbitrator and should not vary depending upon whether a creditor has contracted for arbitration or not. To the extent that the bankruptcy clause in the United States Constitution was intended to ensure uniformity in application of the law to sovereign states, likewise it requires uniformity of the law […] to all debtors and creditors.

In re Bauer, 2020 WL 3637902, at *8.

"Although the objectives of the FAA and the Code may not always conflict, they frequently do diverge, presenting the bankruptcy court with competing considerations." *In re McPherson*, 630 B.R. 160, 167 (Bankr. D. Md. 2021) (citing *In re White Mountain Mining Co., L.L.C.*, 403 F.3d 164, 169 (4th Cir. 2005) ("Arbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights 'contingent upon an arbitrator's ruling' rather than the ruling of the bankruptcy judge assigned to hear the debtor's case.")). This is why "'Congress intended to grant comprehensive jurisdiction to bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.'" *Moses v. CashCall, Inc.*, 781 F.3d 63, 71 (4th Cir. 2015) (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995)).

Determining the "allowance or disallowance of claims against the estate," 28 U.S.C. § 157(b)(2)(B), is both constitutionally and statutorily core, *see CashCall*, 781 F.3d at 70. Thus, ruling on the amount of a claim is central to the operation of the Bankruptcy Court. To effectively carry out its statutory duty, the Bankruptcy Court must necessarily be able to decide the validity of claims before it. In light of the purposes underlying the Bankruptcy Code of "centraliz[ing] disputes over the debtor's assets and obligations in one forum," *id.* at 72, the Bankruptcy Court should

not relinquish its control over determining whether to allow or disallow a claim; doing so necessarily interferes with its basic function to determine such claims. Thus, as set forth in *Cashcall,* the determination of the validity of a claim is not something any bankruptcy court must send to arbitration. *Id*.

Thus, determining the amount of these Plaintiffs' Proofs of Claim is a necessary, "core" part of the statutory bankruptcy process that Congress has created the Bankruptcy Court to oversee; it is not something an arbitrator decides. Given the interlocking indemnity agreements with Sunlight, determining its claim against the Debtor will also necessarily involve these loans by Tech CU. Finally, Jayson Waller, another co-defendant, has also filed a Proof of Claim in the Power Home bankruptcy, which is claim no. 5607 on the Court's claims register for the Power Home bankruptcy. Waller's claim asserts an unliquidated claim of indemnity rights against Power Home to the extent that any person asserts any claims against him in his role as an officer, manager, or employee of Power Home. Waller's claim must necessarily be decided by this court, and its determination is also directly controlled by and intertwined with the resolution of Plaintiffs' claims against Tech CU for its role in effectuating Defendants' fraudulent scheme.

Significantly, this Court's determination of the amount of these Plaintiffs' Proofs of Claim against the Debtor will be a function of whether they are required to pay all, some, or none of the Tech CU loans. That determination necessarily has

three parts: Tech CU's direct liability for (i) the misconduct of the Power Home agent it used to negotiate the loan and for (ii) its participation in the hidden fee scheme, as well as (iii) Tech CU's derivative liability for Power Home's misconduct under the terms of the Plaintiffs' loans. Regardless of whether Tech CU's liability to Plaintiffs is direct or derivative, Plaintiffs' claims against Tech CU are based on the exact same conduct in a transaction by a sales agent who worked for both Power Home and Tech CU. Tech CU is also a necessary party to determine the amount of liability to be assessed against Power Home under these Plaintiffs' Proof of Claim because, to the extent these Plaintiffs are relieved from paying any part of the Tech CU loan, their claim against Power Home is correspondingly reduced. If that determination is not made within the bankruptcy case, the liability claim against Power Home would be overstated to the detriment of other creditors.

Tech CU relies on Judge Beyer's inapposite pre-*CashCall* decision in *In re Barker*, a case involving a single Chapter 13 debtor's adversary proceeding against a single creditor, in which the creditor invoked an arbitration clause in its agreement with the debtor to compel arbitration of the claims the debtor asserted in the adversary proceeding. *See Barker v. Fox Den Acres, Inc. (In re Barker)*, 510 B.R. 771 (Bankr. W.D.N.C. 2014). *Barker* can be reconciled with the Fourth Circuit's later *CashCall* opinion on the basis that the Chapter 13 debtor's claims against his creditors in *Barker* were not "necessarily resolved" in connection with the

administration of the debtor's Chapter 13 bankruptcy, which is a very different process from this Chapter 7 case. *Id.* at 777. Here, the inclusion of Tech CU as a Defendant in the litigation potentially has a direct impact on the Chapter 7 estate, as Tech CU is (presumably) solvent and, as Plaintiffs have alleged, jointly liable with the Debtor for the fraudulent scheme described in Plaintiffs' Amended Complaint. As a consequence, Plaintiffs' recovery from Tech CU, if any, would reduce their claim against the estate dollar-for-dollar (excluding any recovery on their separate TILA claim against Tech CU), which would consequently leave more estate resources available for Power Home's other creditors.

Accordingly, because separate arbitration of Plaintiffs' claims against Tech CU is incompatible with the provisions and purposes of the Bankruptcy Code, the Court should find that enforcement of the FAA in this case is precluded by the provisions and purposes of the later enacted Bankruptcy Code.

IV.

EVEN IF NOT CONSTITUTIONALLY CORE, SEPARATE ARBITRATION OF PLAINTIFFS' CLAIMS AGAINST TECH CU WOULD SUBSTANTIALLY INTERFERE WITH THE FUNCTIONS OF THE BANKRUPTCY COURT.

When determining whether compelling arbitration would result in substantial interference with the Bankruptcy Code, the arbitral process is not to be given preference. Under the Federal Arbitration Act, "federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan v.*

Sundance, Inc., - U.S -, 142 S. Ct. 1708, 1713 (2022). "The Federal Arbitration Act eliminates hostility to private dispute resolution; it does not create a preference for that process." *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 666 (7th Cir. 2009). Sending any of Plaintiffs' claims against Tech CU to a separate arbitration would substantially interfere with the Bankruptcy Court's efficient administration of this case.

As the Fourth Circuit determined in *In re Bestwall*, litigating the exact same claims in forums other than the bankruptcy court inevitably affects the bankruptcy estate. See *In re Bestwall LLC*, -- F. 4th. --, 2023 WL 4066848, at *6 (4th Cir. 2023) (affirming 2022 WL 67469 (W.D.N.C. Jan. 06, 2022), which affirmed 606 B.R. 243 (Bankr. W.D.N.C. 2019)).[1] For a similar reason, in *Allied Title Lending v. Taylor*, both the Bankruptcy Court and the District Court found that the plaintiff's state law claim should not be sent to arbitration. The Bankruptcy Court specifically found that the usury claim concerned whether money was owed, and that it "would necessarily be resolved by the Court in the claims allowance process when considering Allied's proofs of claim." *In re Taylor*, 594 B.R. 643, 654 (E.D. Va. Bankr. 2018). Similarly,

[1] In *Bestwall*, the Fourth Circuit held "[as] the bankruptcy court correctly determined, the asbestos-related claims against Bestwall are identical to the claims against New GP pending now or likely to be pending in the future in the various state courts." *Id.* One reason for such jurisdiction is because "the bankruptcy procedures promote the equitable, streamlined, and timely resolution of claims in one central place compared to the state tort system, which can and has caused delays in getting payment for legitimate claimants." *Id.* at *9.

the District Court found that "because resolution of Counts II and III would determine the very validity of Allied's Claims against Taylor's bankruptcy estate, referral of those Counts to arbitration would defeat the "animating purpose" of the Bankruptcy Code . . . By referring Counts II and III to arbitration, or by keeping one and referring the other, the Bankruptcy Court would risk inconsistent results — results that directly impact the reorganization of Taylor's bankruptcy estate." *Allied Title Lending, LLC v. Taylor*, 420 F. Supp. 3d 436, 450 (E.D. Va. 2019).

Just like in the *Taylor* case, when this Court determines the causes of action against the Debtor as part of determining Plaintiffs' claims, it will necessarily determine the issues against Tech CU. As in *Bestwall*, having the same claims against Tech CU decided in another forum risks "issue preclusion, inconsistent liability, and evidentiary issues." *See* 2023 WL 4066848, *6. Also as in *Bestwall*, any recovery by Plaintiffs against Tech CU resulting from these satellite arbitrations "could reduce the claimants' recovery on those claims in the bankruptcy proceeding, thereby reducing the amount of money that would be paid out of the bankruptcy estate and leaving more funds in the estate for other claimants." *Id.*

Finally, if each Plaintiff's claims against Tech CU are sent to separate arbitrations, the Debtor (via the Chapter 7 trustee) will need to respond to discovery in each individual arbitration, as well as in the adversary proceeding. Likewise, even if arbitration of Plaintiffs' claims against Tech CU were required, Tech CU would

still be required to participate in this adversary proceeding with respect to third-party discovery, and thus Tech CU's litigation burden would only be multiplied by compelling separate arbitrations of each Plaintiff's claims against it. Given the unity of the issues and witnesses involved in both arbitrating the liability of Tech CU while also litigating the liability of Power Home in the adversary proceeding, arbitration will substantially interfere with an efficient resolution of the Debtor's bankruptcy.

"The bankruptcy courts are expressly invested by statute with original jurisdiction to conduct proceedings under the Bankruptcy Act." *Katchen v. Landy*, 382 U.S. 323, 326–27 (1966). "The bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession." *Id.* at 327 (quotations omitted). The bankruptcy court's jurisdiction includes the resolution of claims against and by the estate. *See Cent. Virginia Community College v. Katz*, 546 U.S. 356, 369 (2006). "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate. . . ." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (quotation omitted). "All matters" means just that, and in this case, that includes the Plaintiffs' inseparable claims against Tech CU, the resolution of which will impact Plaintiffs' claims against the estate and impact other creditors' recoveries from the estate. This case

thus demonstrates precisely why this "comprehensive jurisdiction" of the Bankruptcy Court is so critical.

When deciding whether a claim goes to arbitration, the pertinent question is not whether this is a core claim but how to maintain the Bankruptcy Code's efficient process for reorganizing debts.

> The core/non-core distinction, however, is not mechanically dispositive in deciding whether a bankruptcy judge may refuse to send a claim to arbitration. Instead, what matters fundamentally is whether compelling arbitration for a claim would inherently undermine the Bankruptcy Code's animating purpose of facilitating the efficient reorganization of an estate through the "[c]entralization of disputes concerning a debtor's legal obligations . . . ."

Cashcall, 781 F.3d at 83–84 (Gregory, J., concurring regarding the non-core, debt collection practices claim) (citations removed).

Whether the claim is core or not, "substantial interference" with the bankruptcy process is the test for when courts may exercise discretion to decline to enforce arbitration agreements. *Id.* at 84, 92. Regarding the declaratory judgment claim in *Cashcall*, the majority (Judges Niemeyer and Gregory) agreed that arbitration was properly denied because determination of that claim by an arbitrator would pose an inherent conflict with the Bankruptcy Code because of the substantial interference with the reorganization. *Id.* at 72–73, 82. For the non-constitutionally core claim, the same substantial interference test was used. *Id.* at 84-85, 92-93 (in the concurring opinions by Judge Gregory and Judge Davis); *see also id.* at 75-77

(Judge Niemeyer in dissent explaining his reasons for why the non-core claim should not be sent to arbitration).

Therefore, Tech CU incorrectly claims the test is only whether these are core proceedings or not. The constitutionally core issue does not determine the result or the test but, under *Cashcall* only this Court's initial jurisdiction to enter a final judgment. Because *Cashcall* states that an arbitration decision even though interlocutory in nature is required to meet the *Stern* test which applies to final judgments, *id.* at 72, Plaintiffs understand that, under ordinary principles of precedence, this Court is to follow *Cashcall* for any claim that is not constitutionally core. This holding in *Cashcall* is contrary to the ordinary principle that in non-constitutionally core cases this Court retains jurisdiction to enter interlocutory orders without the need to issue proposed findings of fact and conclusions of law. "[I]t is now very well established that bankruptcy courts consistent with *Stern v. Marshall* may handle all pretrial proceedings short of a final ruling—including entry of interlocutory orders dismissing fewer than all of the claims in an adversary complaint, granting partial summary judgment, or making discovery and evidentiary rulings—without the need to issue proposed findings of fact and conclusions of law and invocation of Fed. R. Bankr. P. 9033." *Windstream Holdings, Inc. v. Charter Comms., Inc. (In re Windstream Holdings, Inc.)*, Case No. 19-22312 (RDD), 2020 Bankr. Lexis 468, 2020 WL 833809 *2 (Bankr. S.D.N.Y. Feb. 19, 2020); *see also*

First-Citizens Bank & Trust Co. v. Parker Med. Holding, (In re Parker Med. Holding Co.), Case No. 22-50369 (JWC), 2023 Bankr Lexis 850, 2023 WL 2749715 *15, (Bankr. N.D.Ga. March 13, 2023). The holding in *Cashcall*, which appears without analysis or explanation for why an interlocutory decision is subject to treatment under *Stern* as if it is a final order, is pertinent here because Tech CU has tried to walk back its specific request that this Court issue a final ruling on its Motion. Even if this Court allows Tech CU to withdraw the jurisdiction it requested, this Court has jurisdiction to decide the arbitration motion as an interlocutory decision without issuing proposed findings of fact and conclusions of law even as to a claim that is not constitutionally core. To the extent the Court disagrees and follows *Cashcall*, the test is still the same, and the proposed findings of fact and conclusions of law should be that any non-constitutionally core claim should not be sent to arbitration.

Consequently, even if any of the claims against Tech CU are non-constitutionally core, and even under *Cashcall*, this Court should determine that arbitration of such claims would substantially interfere with its statutory bankruptcy functions.

V.

THE ISSUE OF WHETHER A CLASS SHOULD BE CERTIFIED IS NOT RIPE.

Tech CU asks this Court to rule that these Plaintiffs have waived their right to proceed with a class action even if arbitration is not compelled. The terms of the arbitration clause are clear that the class action waiver is to apply in arbitration. If this Court compels arbitration, it is up to the arbitrator to enforce that provision. If this Court does not enforce the arbitration clause, the waiver embedded in the arbitration agreement does not apply. So, if this Court does not compel arbitration, then it will be the Court's decision regarding whether the class action remedy may be used after analyzing the factors of Rule 23.

As fully explained above, whether core or not, the test for any claim is whether referring that matter to arbitration would substantially interfere with the bankruptcy process. Accordingly, if the Court eventually agrees with Plaintiffs and exercises its discretion to not enforce the arbitration agreements, then the Court may subsequently consider applying Rule 7023 to this case.

To the extent that Tech CU argues that class action waivers are somehow independent of the arbitration clause in which they are embedded, it may not assert that such class action waivers are given the same deferential treatment as arbitration agreements. Once outside the umbrella of the arbitration agreement, Tech CU would need to prove that these were knowing and voluntary waivers obtained in

enforceable contracts. Like other rights regarding court procedures, the right to participate in a class action may be waived by agreement. *See Flintkote Co. v. W.W. Wilkinson, Inc*., 220 Va. 564, 570, 260 S.E.2d 229, 230, 232 (1979). Any waivers of important court procedures requires intentional relinquishment of a known right. *See Hunter v. Commonwealth*, 13 Va. App. 187, 191, 409 S.E.2d 483, 485 (1991)(in the context of a criminal proceeding but equally applicable to any waiver of the right to participate in a class action). Thus, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). This principle has been recognized in numerous cases around the United States. *See Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3rd Cir. 1988) ("Constitutional rights, like rights and privileges of lesser importance, may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver."); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 756 (6th Cir. 1985); *Western Nat'l Mutual Ins. Fund v. Lennes (In re Workers Compensation Refund)*, 46 F.3d 813, 819 (8th Cir. 1995); *see also Finch v. Vaughn*, 67 F.3d 909, 914 (11th Cir. 1995). Under ordinary common law contract law, any contract clause that waives a right will only be enforced "[i]f the party being charged with

relinquishment of a right had knowledge of the right and intended to waive it . . . ." *Gordonsville Energy L.P. v. Virginia Electric and Power Comp*. 257 Va. 344, 356, 512 S.E.2d 811, (1999) (*citing Roenke v. Virginia Farm Bureau Mut. Ins.* Co., 209 Va. 128, 135, 161 S.E.2d 704, 709 (1968)). Like any other contractual waiver, to be an effective waiver, a party "should be apprised of all the facts: of those which create the forfeiture, and those which will necessarily influence its judgment in consenting to waive it." *Combs v. Equitable Life Ins. Co.*, 120 F.2d 432, 438 (4th Cir. 1941) (holding no waiver granted where party had not been fully informed about pertinent facts); *see also MacDonald v. First Interstate*, 100 B.R. 714 (D. Del. 1989) (even in commercial settings a waiver will scrutinized).

In its Motion to Dismiss, Tech CU does not even try to meet these ordinary waiver standards and is instead relying on the arbitration clause, and its presumption of enforceability. This issue can only be taken up in an evidentiary process where Tech CU has an opportunity to assert and prove this defense to the issue of class action treatment.

Furthermore, Plaintiffs have alleged that these contracts were fraudulently induced. Under Virginia law, fraud in the inducement of a contract is grounds for a tort claim. *See Abi–Najm v. Concord Condominium, LLC*, 280 Va. 350, 362-63, 699 S.E.2d 483, 489-90 (2010). North Carolina similarly prohibits fraudulently induced contracts. *See Media Network, Inc. v. Long Haymes Carr, Inc*., 197 N.C.App. 433,

453, 678 S.E.2d 671, 684 (2009). Because fraud in the inducement "vitiates the contract", clauses within such a contract cannot be enforced to the detriment of the victim. *See Laundry Machinery Co*., 225 N.C. 285, 288–89, 34 S.E.2d 190, 192–93 (1945). Therefore, outside of an arbitration motion, such fraudulently induced clauses like the one Tech CU asserts cannot be enforced on a Motion to Dismiss that accepts all the alleged facts as true.

The class action issue can only be taken up after the Court (at a minimum) decides whether the Bankruptcy Code precludes enforcement of the arbitration agreements in which the class waivers are embedded. Further, it is normal for class discovery to take place to allow plaintiffs to obtain sufficient information to support a motion under Rule 7023. See, e.g., *Priddy v. Health Care Serv. Corp.*, 870 F.3d 657, 660 (7th Cir. 2017) ("The plaintiff bears the burden of proving by a preponderance of the evidence all necessary prerequisites to the class action. This normally means that some discovery related to the class certification issue must take place. Ever since the Supreme Court underscored this point in *Wal-Mart* and related cases, as a practical matter the time when a potential class action is ripe for a certification decision has been pushed back, and the burden on the party seeking to proceed with a class has increased."). Until that time, the appropriateness of class action in this bankruptcy case is not a matter ripe for argument or decision. Plaintiffs

are entitled to the discovery necessary for them to prove to this Court that the class action factors are met.

Because the basic presumption of arbitrability that is created by the FAA is not the proper analysis for whether any party has waived its right to proceed under Rule 23 in federal court, the class action issue is premature. If it is indeed taken up and ruled upon by this Court outside of a motion to compel arbitration, then Tech CU has filed its Motion to Dismiss under Rule 12(b)(6). In that event and if this matter stays in this Court, then it next must file an Answer rather than another Rule 12(b)(6) motion.

CONCLUSION

Therefore, this Court should deny Tech CU's motion to compel to arbitration of the Plaintiffs' claims against it. In the alternative, for any claim found not to be constitutionally core and if the Court finds it has no authority to decide in the first instance such an interlocutory question, it should recommend to the District Court that the Motion similarly be denied.

Respectfully submitted,

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