

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

IN RE:

POWER HOME SOLAR, LLC,

Debtor,

CLAUDE MUMPOWER, et al.,

Plaintiffs

v.

POWER HOME SOLAR, LLC, et al.,

Defendants.

Chapter 7

Case No. 22-50228

Adv. Proc. No. 23-03005

Judge: J. Craig Whitley

**DEFENDANT WILMINGTON TRUST, NATIONAL ASSOCIATION AS TRUSTEE
FOR SLSLT UNDERLYING TRUST 2020-1'S
MOTION TO COMPEL ARBITRATION**

Defendant Wilmington Trust, N.A., as Trustee for SLSLT Underlying Trust 2020-1 (Wilmington Trust) moves to compel arbitration and stay Plaintiffs' First Amended Adversary Class Action Complaint. For the reasons stated in the Memorandum in Support of Motion to Compel Arbitration, this Court should stay this adversary proceeding and compel Plaintiffs Kim and Scott Larsen and Carl Steinhart to individually pursue their claims in arbitration.

Dated: July 31, 2023

By: /s/ Kristen P. Watson

BALLARD SPAHR LLP

Thomas F. Burke (*pro hac vice* application pending)
1735 Market St., 51st Floor
Philadelphia, PA 19103
Telephone: (215) 864-8463
burket@ballardspahr.com

BURR & FORMAN LLP

Kristen P. Watson
NC Bar No. 51410
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203
Telephone: (205) 251-3000
kwatson@burr.com

*Counsel for Defendant Wilmington Trust, N.A. as
Trustee for SLSLT Underlying Trust 2020-1*

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on July 31, 2023, the foregoing document was electronically filed with the Clerk of Court and served on all counsel of record using the Court's CM/ECF system.

/s/ Kristen P. Watson
Kristen P. Watson
Counsel for Defendant Wilmington
Trust, N.A. as Trustee for SLSLT
Underlying Trust 2020-1

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

IN RE:

POWER HOME SOLAR, LLC,

Debtor,

CLAUDE MUMPOWER, et al.,

Plaintiffs

v.

POWER HOME SOLAR, LLC, et al.,

Defendants.

Chapter 7

Case No. 22-50228

Adv. Proc. No. 23-03005

Judge: J. Craig Whitley

**DEFENDANT WILMINGTON TRUST, NATIONAL ASSOCIATION AS TRUSTEE
FOR SLSLT UNDERLYING TRUST 2020-1'S MEMORANDUM IN SUPPORT OF ITS
MOTION TO COMPEL ARBITRATION**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTUAL BACKGROUND.....	1
A. The Larsens and Steinhart purchased residential solar installations.....	1
B. The Larsens and Steinhart agreed to arbitrate any claims brought at the same time as claims against Sunlight and Cross River.....	2
C. The Larsens and Steinhart filed this lawsuit.	4
III. ARGUMENT	5
A. The Larsens’ and Steinhart’s claims are subject to binding arbitration pursuant to the Arbitration Provision.....	5
1. Under the FAA, the Larsens and Steinhart should be compelled to arbitrate their claims.	5
2. The Arbitration Provision is valid and enforceable.	7
3. The Larsens’ and Steinhart’s claims fall squarely within the Arbitration Agreement.	9
4. The claims at issue are non-core and must be submitted to arbitration.	10
5. The Action must be stayed pending arbitration.	12
IV. CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Albertson</i> , 535 B.R. 662 (Bankr. S.D.W.Va. 2015)	11
<i>Allen-White v. Bloomingdale’s, Inc.</i> , 225 F. Supp. 3d 254 (D.N.J. 2016)	8
<i>Allied-Bruce Terminix Cos., Inc. v. Dobson</i> , 513 U.S. 265 (1995)	5
<i>Am. Express Co. v. Italian Colors Rest.</i> , 570 U.S. 228 (2013)	6
<i>Am. Handkerchief Corp. v. Frannat Realty Co.</i> , 109 A.2d 793 (N.J. 1954)	8
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011)	5, 6
<i>AT&T Tech., Inc. v. Commc’ns Workers of Am.</i> , 475 U.S. 643 (1986)	9
<i>Barbee v. Johnson</i> , 660 S.E.2d 135 (N.C. Ct. App. 2008)	8
<i>Barber v. Charlotte Motor Speedway, LLC</i> , No. 1:13CV99, 2014 U.S. Dist. LEXIS 165214 (M.D.N.C. Nov. 26, 2014)	9
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006)	5
<i>Campbell v. Five Star Quality Care - N. Carolina, LLC</i> , No. 3:21-CV-95-FDW-DCK, 2021 U.S. Dist. LEXIS 223493 (W.D.N.C. Nov. 19, 2021)	6
<i>Carotek, Inc. v. Textron Fastening Sys.</i> , No. 3:05cv395, 2008 U.S. Dist. LEXIS 103458 (W.D.N.C. Oct. 9, 2008)	7
<i>In re Crysen/Montenay Energy Co.</i> , 226 F.3d 160 (2d Cir. 2000)	11
<i>Davis v. Young & Assocs., Inc.</i> , No. 1:20CV00061, 2021 U.S. Dist. LEXIS 175518 (W.D. Va. Sept. 15, 2021)	9

<i>Epic Sys. Corp. v. Lewis</i> , 138 S. Ct. 1612 (2018).....	5
<i>Executive Leasing Associates, Inc. v. Rowland</i> , 227 S.E.2d 642 (N.C. Ct. App. 1976).....	9
<i>Ferrante v. Westin St. John Hotel Co.</i> , 559 F. Supp. 3d 492 (E.D.N.C. 2020).....	7
<i>Fidler v. Accent Personnel, Inc.</i> , 11 Va. Cir. 278 (1988).....	8
<i>First Options of Chicago, Inc. v. Kaplan</i> , 514 U.S. 938 (1995).....	7
<i>Galloway v. Priority Imports Richmond, LLC</i> , 426 F. Supp. 3d 236 (E.D. Va. 2019)	10
<i>Gibbs v. Haynes Invests., LLC</i> , 967 F.3d 332 (4th Cir. 2020)	12
<i>Goldfarb v. Solimine</i> , 245 A.3d 570 (N.J. 2021).....	8
<i>Hejl v. Hood, Hargett & Assocs., Inc.</i> , 674 S.E.2d 425 (N.C. 2009).....	8
<i>Hodge v. Toyota Motor Credit Corp.</i> , No. 1:22-cv-00001-MR-WCM, 2022 U.S. Dist. LEXIS 108792 (W.D.N.C. June 17, 2022).....	10, 12
<i>Holloman v. Consumer Portfolio Servs.</i> , No. RDB-23-134, 2023 U.S. Dist. LEXIS 105075 (D. Md. June 15, 2023).....	3, 9, 12
<i>Jessee v. Smith</i> , 278 S.E.2d 793 (Va. 1981).....	8
<i>Kahuna Grp., LLC v. Bunker Cap., LLC</i> , No. 3:19-CV-552, 2020 U.S. Dist. LEXIS 129570 (W.D.N.C. July 21, 2020).....	12
<i>Klein v. Verizon Commc’ns, Inc.</i> , 674 F. App’x 304 (4th Cir. 2017)	7
<i>KPMG LLP v. Cocchi</i> , 565 U.S. 18 (2011).....	6
<i>In re Mason</i> , 600 B.R. 765 (Bankr. E.D.N.C. 2019).....	7

<i>McLean v. HSBC Fin. Corp.</i> , No. CV 15-8974, 2016 U.S. Dist. LEXIS 136817 (D.N.J. Oct. 3, 2016).....	9
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985).....	9
<i>Montagna v. Holiday Inns, Inc.</i> , 269 S.E.2d 838 (Va. 1990).....	8
<i>Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983).....	5, 9
<i>Moses v. CashCall, Inc.</i> , 781 F.3d 63 (4th Cir. 2015)	11
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987).....	5
<i>In re Piedmont Eng’rs of the Carolinas, P.C.</i> , No. 07-101315C-7G, 2008 Bankr. LEXIS 4552 (Bankr. M.D.N.C. July 28, 2008)	10
<i>In re Power Home Solar, LLC</i> , Case No. 22-50228 (Bankr. W.D.N.C.).....	4
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> , 388 U.S. 395 (1967).....	5
<i>United States ex rel. Red Hawk Contracting, Inc. v. MSK Constr., Inc.</i> , No. 1:16CV1183, 2018 U.S. Dist. LEXIS 80019 (M.D.N.C. May 8, 2018).....	7
<i>Rota-McLarty v. Santander Consumer USA, Inc.</i> , 700 F.3d 690 (4th Cir. 2012)	6
<i>Sawyer v. Market Am., Inc.</i> , 661 S.E.2d 750 (N.C. Ct. App. 2008).....	7
<i>Shearson/Am. Express, Inc. v. McMahon</i> , 482 U.S. 220 (1987).....	10
<i>Specialty Mills, Inc. v. Citizens State Bank</i> , 51 F.3d 770 (8th Cir. 1995)	11
<i>Stern v. Marshall</i> , 564 U.S. 462 (2011).....	11
<i>United Steelworkers of Am. v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574 (1960).....	9

Statutes

9 U.S.C. § 2.....	5
9 U.S.C. § 3.....	11
28 U.S.C. § 157.....	11
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 <i>et seq.</i>	4, 10, 11
Virginia Consumer Protection Act, Va. Code Ann. § 59.1-199 <i>et seq.</i>	4, 10, 11

I. INTRODUCTION

Of the 89 named plaintiffs in this action, three—Kim and Scott Larsen, and Carl Steinhart—allege that after entering into residential solar installation and financing contracts with other parties, their loans were later sold to Defendant Wilmington Trust, N.A., as Trustee for SLSLT Underlying Trust 2020-1 (Wilmington Trust). They now contend that Wilmington Trust, in its capacity as loan holder for those three individuals, is derivatively liable for the alleged statutory violations and torts of other parties committed during the execution of their solar financing agreements—a process Wilmington Trust had nothing to do with. Relevant here, the Larsens and Steinhart entered into valid agreements to arbitrate any claim “that arises from or relates in any way to” their financing contracts—i.e., all claims at issue in this case. Further, they agreed to arbitrate claims not only against their contractual counterparties—Defendants Sunlight Financial LLC (Sunlight) and Cross River Bank (Cross River)—but also against third parties, such as Wilmington Trust, that the Larsens and Steinhart sue “at the same time” as Sunlight and Cross River. As a result, this Court should stay this matter while the Larsens and Steinhart arbitrate their claims as agreed.

II. FACTUAL BACKGROUND

A. The Larsens and Steinhart purchased residential solar installations.

Defendant-Debtor Power Home Solar, LLC (Power Home) sold and installed residential solar power systems to individual customers, including the Larsens and Steinhart—all residents of Virginia. *See* ECF No. 34-1, Declaration of Carl Steinhart, at 60 ¶ 1 (identifying Steinhart as a Virginia resident); ECF No. 34 (First Amended Complaint or FAC) at 37 (identifying the Larsens as “Virginia Plaintiffs”). For the Larsens and Steinhart, that process included execution of a contract with Power Home to install solar panels at their residences, FAC ¶ 3, along with a loan

agreement with Cross River to finance the purchase of their systems, *id.* ¶ 73. The loan agreements were “arranged” by Sunlight. *Id.* ¶ 76.

The Larsens and Steinhart allege that Power Home’s salespersons made two types of misrepresentations to them during the sales and financing process. First, they allege that Power Home misrepresented their eligibility for a federal tax credit related to the effectiveness and efficiency of the system. *Id.* ¶¶ 41–52. Second, they allege that Power Home misrepresented the price of the system by stating it would receive all proceeds from the loan as the purchase price, when, in fact, the lender that originated the loan kept a portion of the proceeds as a “hidden” fee. *Id.* ¶¶ 39, 55.

According to the First Amended Complaint, Wilmington Trust is a securitization trust that has bought, and continues to hold, the credit contracts entered into between the Larsens, Steinhart, and Cross River. *Id.* ¶¶ 26, 79. The Larsens and Steinhart do not allege that Wilmington Trust was directly involved in the contracting process or that it made any of the alleged misrepresentations that form the basis for their claims. Nor do they allege that Wilmington Trust holds the credit contracts for any other named plaintiffs.

B. The Larsens and Steinhart agreed to arbitrate any claims brought at the same time as claims against Sunlight and Cross River.

The Larsens and Steinhart allege that they executed two contracts when purchasing their solar panel systems: an installation agreement with Power Home and a loan agreement with Cross River. *Id.* ¶¶ 30, 73. The two loan agreements at issue—one signed by Kim and Scott Larsen, and the other by Carl Steinhart (together, the Loan Agreements)—each contain an arbitration provision whereby the Larsens and Steinhart agreed to arbitrate any claims relating to, among other things, the loan or the purchase of the solar panel system (the Arbitration Provision). ECF 73-1, Declaration of Justin Carpenter in support of Sunlight’s Motion to Compel Arbitration (Carpenter

Decl.) ¶¶ 16–17, 29–38; ECF 73-14 (Larsen Loan Agreement); ECF 73-15 (Steinhart Loan Agreement).¹ Each Loan Agreement emphasizes the existence of the Arbitration Provision above the signature line in capitalized and bolded font:

BY SIGNING BELOW, YOU AGREE TO THE TERMS OF THIS NOTE, INCLUDING THE ADDITIONAL TERMS AND CONDITIONS BELOW AND IN THE ATTACHED ARBITRATION PROVISION.

Carpenter Decl. ¶ 29; Loan Agreements at 15. Below the signature line, each Loan Agreement also states that:

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.

Carpenter Decl. ¶ 30; Loan Agreements at 15.

Exhibit A of each Loan Agreement contains the Arbitration Provision, which states that “[u]nless prohibited by applicable law, you and we agree that either party may elect to require arbitration of any Claim under this Provision.” Carpenter Dec. at ¶ 33; Loan Agreements at 24–25. The provision defines “Claim” to mean:

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

¹ In evaluating motions to compel, courts routinely consider declarations and other evidence establishing the enforceability of an arbitration agreement, including when that evidence is set forth by only one of the moving parties. *See, e.g., Holloman v. Consumer Portfolio Servs.*, No. RDB-23-134, 2023 U.S. Dist. LEXIS 105075, at *15–20 (D. Md. June 15, 2023).

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.

Carpenter Dec. at ¶ 34; Loan Agreements at 24. The term “Related Parties” “include[s] third parties . . . that you bring a Claim against at the same time you bring a Claim against us or any other Related Party.” Loan Agreements at 24. The Arbitration Provision also includes a class-action waiver:

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 . . . (iii) PARTICIPATE IN A CLASS ACTION IN COURT OR IN ARBITRATION, EITHER AS A CLASS REPRESENTATIVE, CLASS MEMBER OR CLASS OPPONENT . . . (v) JOIN OR CONSOLIDATE CLAIM(S) INVOLVING YOU WITH CLAIMS INVOLVING ANY OTHER PERSON.

Carpenter Dec. at ¶ 37; Loan Agreements at 25.

C. The Larsens and Steinhart filed this lawsuit.

Power Home filed a Chapter 7 bankruptcy petition on October 7, 2022. *In re Power Home Solar, LLC*, Case No. 22-50228 (Bankr. W.D.N.C.), ECF No. 1. Plaintiffs filed a complaint in this Court on March 10, 2023, *id.*, and filed an Amended Complaint on May 3, 2023. They seek to represent a nationwide class of individuals “who signed a contract with Power Home for the installation of a photovoltaic solar power system at their residence in a transaction where at least one of the Defendant financial entities was involved in the sale process.” FAC ¶ 100. They allege claims against Wilmington Trust for violations of the Racketeering Influenced and Corrupt Organizations (RICO) Act, Virginia Consumer Protection Act (VCPA), and fraud. *See id.* ¶¶ 111–157. Wilmington Trust intends to address these claims by dispositive motion after the threshold issue of arbitrability is resolved.

III. ARGUMENT

A. **The Larsens’ and Steinhart’s claims are subject to binding arbitration pursuant to the Arbitration Provision.**

1. **Under the FAA, the Larsens and Steinhart should be compelled to arbitrate their claims.**

Section 2 of the FAA mandates that binding arbitration agreements in contracts “evidencing a transaction involving [interstate] commerce . . . 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; *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (“Section 2 [of the FAA] embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.”). Arbitration agreements governed by the FAA must be enforced as written. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (“The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written.”). Further, it is well settled that the FAA is extremely broad and applies to any transaction directly or indirectly affecting interstate commerce. *See, e.g., Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967).

The FAA promotes a “liberal federal policy favoring arbitration agreements,” and “questions 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); *see also Perry v. Thomas*, 482 U.S. 483, 490–91 (1987) (stating that arbitration agreements falling within the scope of the FAA “must be ‘rigorously enforce[d]’”) (citations omitted). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24–25; *see also Perry*, 482 U.S. at 490.

The Supreme Court has consistently confirmed that the FAA “requires courts to enforce the bargain of the parties to arbitrate” and “leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (per curiam) (citations omitted; emphasis in original); *see also Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (stating that “courts must ‘rigorously enforce’ arbitration agreements according to their terms”) (citations omitted); *Concepcion*, 563 U.S. at 344 (confirming that the “‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’”).

A party seeking to compel arbitration “bears the burden of proving that a valid arbitration agreement exists” and such a “burden . . . is not high.” *Campbell v. Five Star Quality Care - N. Carolina, LLC*, No. 3:21-CV-95-FDW-DCK, 2021 U.S. Dist. LEXIS 223493, at *4 (W.D.N.C. Nov. 19, 2021). The party opposing arbitration “bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Id.* (citation omitted). That burden requires the opposing party to “unequivocally deny that there was an arbitration agreement and produce evidence to substantiate the denial.” *Id.* (citation omitted).

The FAA applies here because the Loan Agreements at issue affect interstate commerce. *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697 (4th Cir. 2012) (the FAA “operates to enforce an arbitration provision included in “a contract evidencing a transaction involving [interstate] commerce.”). In the Fourth Circuit, “the FAA does not impose a burden upon the party invoking the FAA to put forth specific evidence proving the interstate nature of the transaction.” *Id.* Nonetheless, the Loan Agreements fall within the FAA’s ambit because “reliance upon funds from a foreign source in a transaction is sufficient to implicate the FAA.” *Id.*; *see also*

United States ex rel. Red Hawk Contracting, Inc. v. MSK Constr., Inc., No. 1:16CV1183, 2018 U.S. Dist. LEXIS 80019, at *10 (M.D.N.C. May 8, 2018) (“The multistate nature of [a] business is itself evidence of a transaction involving interstate commerce.”) (internal quotations omitted). Cross River is located in New Jersey. The Larsens and Steinhart are residents of Virginia. The Loan Agreements thus affect interstate commerce, and the FAA applies.

2. The Arbitration Provision is valid and enforceable.

Under Section 2 of the FAA, state law applies to the formation of arbitration contracts and defenses to their enforcement, viewed through the prism of the FAA. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under North Carolina choice-of-law principles,² choice-of-law provisions are enforced “as long as the parties ‘had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental public policy of [North Carolina] or otherwise applicable law.’” *Ferrante v. Westin St. John Hotel Co.*, 559 F. Supp. 3d 492, 506 (E.D.N.C. 2020) (quoting *Sawyer v. Market Am., Inc.*, 661 S.E.2d 750, 752 (N.C. Ct. App. 2008)). Moreover, when multiple states’ law could apply, resolution of the choice-of-law question is unnecessary. *Carotek, Inc. v. Textron Fastening Sys.*, No. 3:05cv395, 2008 U.S. Dist. LEXIS 103458, at *9 n.2 (W.D.N.C. Oct. 9, 2008).

Here, the Loan Agreements identify two states with a relationship to the transaction: (1) Virginia (where the Larsens and Steinhart reside); and (2) New Jersey (where Cross River was located). See Carpenter Decl. ¶¶ 13–17, 22, 28. But the Court need not resolve which state’s law applies because under Virginia, New Jersey, or North Carolina law (to the extent the Larsens or

² See, e.g., *Klein v. Verizon Commc’ns, Inc.*, 674 F. App’x 304, 308 (4th Cir. 2017) (explaining that the forum state’s choice-of-law rules govern which state law applies to arbitration clauses); see also *In re Mason*, 600 B.R. 765, 772 (Bankr. E.D.N.C. 2019) (“[B]ankruptcy courts . . . apply their forum states’ choice of law principles.”).

Steinhart argue for application of North Carolina law), the arbitration provision is enforceable.

First, under Virginia, New Jersey, and North Carolina law, the elements of an enforceable contract are offer, acceptance, and consideration. *Goldfarb v. Solimine*, 245 A.3d 570, 577 (N.J. 2021); *Montagna v. Holiday Inns, Inc.*, 269 S.E.2d 838, 844 (Va. 1990); *Barbee v. Johnson*, 660 S.E.2d 135, 140 (N.C. Ct. App. 2008). The Loan Agreements are detailed offers, which include an offer to agree to arbitration. See Carpenter Dec. at ¶ 33; Loan Agreements at 23–24.

Second, under each state’s laws, the signed Loan Agreements reflect acceptance. *Allen-White v. Bloomingdale’s, Inc.*, 225 F. Supp. 3d 254, 259–60 (D.N.J. 2016); *Fidler v. Accent Personnel, Inc.*, 11 Va. Cir. 278 (1988); *Executive Leasing Associates, Inc. v. Rowland*, 227 S.E.2d 642, 644 (N.C. Ct. App. 1976).

Third, consideration exists in the form of Cross River’s agreement to lend funds permitting the Larsens and Steinhart to purchase the solar systems at-issue in exchange for agreeing to arbitration, among other provisions. Such consideration is sufficient. See, e.g., *Hejl v. Hood, Hargett & Assocs., Inc.*, 674 S.E.2d 425, 428–29 (N.C. 2009) (“The slightest consideration is sufficient to support the most onerous obligation” (citation and quotation marks omitted)); see also *Jessee v. Smith*, 278 S.E.2d 793, 795 (Va. 1981) (same); *Am. Handkerchief Corp. v. Frannat Realty Co.*, 109 A.2d 793, 796 (N.J. 1954) (same). Thus, under either New Jersey’s, Virginia’s, or North Carolina’s law, the Arbitration Provision is enforceable.

Finally, although Wilmington Trust is not a signatory to the Loan Agreements, it is a “Related Party” under the Loan Agreements because the Larsens and Steinhart are asserting “a Claim against [Wilmington Trust] at the same time [they are] bring[ing] a Claim against [Cross River] or any other Related Party.” Loan Agreements at 24. Under any applicable state’s law, a non-signatory like Wilmington Trust can compel arbitration as third-party beneficiaries. See, e.g.,

McLean v. HSBC Fin. Corp., No. CV 15-8974, 2016 U.S. Dist. LEXIS 136817, at *6–7 (D.N.J. Oct. 3, 2016); *Davis v. Young & Assocs., Inc.*, No. 1:20CV00061, 2021 U.S. Dist. LEXIS 175518, at *14–15 (W.D. Va. Sept. 15, 2021); *Barber v. Charlotte Motor Speedway, LLC*, No. 1:13CV99, 2014 U.S. Dist. LEXIS 165214, at *9 (M.D.N.C. Nov. 26, 2014); *see also, e.g., Holloman*, 2023 U.S. Dist. LEXIS 105075, at *21 (granting third-party motion to compel arbitration).

3. The Larsens’ and Steinhart’s claims fall squarely within the Arbitration Agreement.

Where the parties have entered into a binding arbitration agreement, a strong presumption exists that any dispute between the parties is arbitrable. *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24–25. Therefore, 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.” *AT&T Tech., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Where the clause is broad, as is the Arbitration Agreement here, there is a heightened presumption of arbitrability such that, in “the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.” *AT&T Tech.*, 475 U.S. at 650 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)).

Here, under the Arbitration Provision, the parties agreed that the term “Claim” “is to be given the broadest reasonable meaning,” and would extend to “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.” Loan

Agreements at 24. The term also “includes disputes that seek relief of any type, including damages and/or injunctive, declaratory or other equitable relief.” *Id.*

The FAC is premised on allegations of misrepresentations regarding the applicability of a tax credit, which fall squarely within the scope of the arbitration provision. FAC ¶¶ 1, 28–97. Even the FAC’s assertion of fraudulent inducement into the Loan Agreements must be arbitrated subject to the Arbitration Provision. *See, e.g., Hodge v. Toyota Motor Credit Corp.*, No. 1:22-cv-00001-MR-WCM, 2022 U.S. Dist. LEXIS 108792, at *15–16 (W.D.N.C. June 17, 2022) (recognizing that where a claim of fraudulent inducement relates to the agreement itself, and not specifically the arbitration provision, that claim “cannot serve as a basis to deny” a motion to compel arbitration).

Plaintiffs’ RICO and VCPA claims asserted against Wilmington Trust are also subject to arbitration. *See, e.g., Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 223 (1987) (RICO claims may be subject to arbitration); *Galloway v. Priority Imports Richmond, LLC*, 426 F. Supp. 3d 236, 244–45 (E.D. Va. 2019) (granting motion to compel arbitration of VCPA claims). The FAC’s allegations reflect that both the RICO and VCPA claims arise out of the Loan Agreements, *see* FAC ¶¶ 124 (asserting RICO claim based on “misrepresenting through the phone, email, and internet two material facts about the [tax] credit”), 135 (asserting VCPA claim based on “misrepresentations set forth in the facts above about the effectiveness and efficiency of the system being sold,” among other contractual matters), and are therefore within the scope of the agreement to arbitrate.

4. The claims at issue are non-core and must be submitted to arbitration.

“With respect to non-core matters, most courts have concluded that a bankruptcy court does not have discretion to deny enforcement of an arbitration clause.” *In re Piedmont Eng’rs of the Carolinas, P.C.*, No. 07-101315C-7G, 2008 Bankr. LEXIS 4552, at *5 (Bankr. M.D.N.C. July

28, 2008) (collecting authority); *see also In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 166 (2d Cir. 2000) (“[B]ankruptcy courts generally must stay non-core proceedings in favor of arbitration.”).

The Bankruptcy Code governs whether a proceeding is core or non-core. *See* 28 U.S.C. § 157. The Code provides a non-exclusive list of matters which are core proceedings. *Id.* Generally, a non-core proceeding is a right that might exist outside the bankruptcy court while a core proceeding arises only in bankruptcy and involves a right created by the bankruptcy laws. *See Specialty Mills, Inc. v. Citizens State Bank*, 51 F.3d 770, 773–74 (8th Cir. 1995); *see also, e.g.*, 28 U.S.C. § 157(b)(2)(O) (generally recognizing that core matters are those “affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship”).

Moreover, core claims should only be treated as core claims if they are both statutorily and constitutionally core. A claim is “statutorily core” if it is a type of claim referenced in 28 U.S.C. § 157. *Stern v. Marshall*, 564 U.S. 462, 499 (2011). A claim is “constitutionally core” if it “stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.” *Id.* Courts must treat a claim “as if it were statutorily non-core” if not *both* statutorily and constitutionally core. *Moses v. CashCall, Inc.*, 781 F.3d 63, 70 (4th Cir. 2015) (citations omitted).

Here, the applicable claims asserted against Wilmington Trust—RICO, VCPA, and fraud—are all statutorily non-core because none relates to a “core proceeding” listed in 28 U.S.C. § 157. Such violations of state and federal statutes and efforts to obtain damages in tort are non-core claims. *Moses*, 781 F.3d at 85. Moreover, the alleged claims arose *prior to* Power Home’s filing of the bankruptcy case, strongly indicating that the claims are non-core. *See In re Albertson*, 535 B.R. 662, 667–68 (Bankr. S.D.W.Va. 2015) (finding claims to be non-core where the “claims

existed before the filing of the bankruptcy case, they are based entirely on state law, and the parties' rights or obligations are not significantly affected by the outcome of the bankruptcy proceedings" (citation omitted)).

5. The Action must be stayed pending arbitration.

Under the FAA, the instant action should be stayed pending arbitration. *See* 9 U.S.C. § 3 (requiring the action be stayed "until such arbitration has been held" in accordance with the arbitration agreement); *see also, e.g., Hodge*, 2022 U.S. Dist. LEXIS 108792, at *20 (staying action pending arbitration after granting motion to compel); *Kahuna Grp., LLC v. Bunker Cap., LLC*, No. 3:19-CV-552, 2020 U.S. Dist. LEXIS 129570, at *7–8 (W.D.N.C. July 21, 2020) (same); *Holloman*, 2023 U.S. Dist. LEXIS 105075, at *28 ("Because the Court concludes that the Arbitration Agreement is valid and enforceable, the Court also must stay the matter." (citing *Gibbs v. Haynes Invests., LLC*, 967 F.3d 332, 337 (4th Cir. 2020))).

IV. CONCLUSION

For the aforementioned reasons, the Court should grant the Motion to Compel Arbitration of Plaintiffs Kim and Scott Larsen and Carl Steinhart's claims against Wilmington Trust in accordance with the express terms of the valid and enforceable Arbitration Agreements. In addition, this Court should stay this action pending completion of arbitration proceedings.

Dated: July 31, 2023

By: /s/ Kristen P. Watson

BALLARD SPAHR LLP

Thomas F. Burke (*pro hac vice* application pending)
1735 Market St., 51st Floor
Philadelphia, PA 19103
Telephone: (215) 864-8463
burket@ballardspahr.com

BURR & FORMAN LLP

Kristen P. Watson
NC Bar No. 51410
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203
Telephone: (205) 251-3000
kwatson@burr.com

*Counsel for Defendant Wilmington Trust, N.A. as
Trustee for SLSLT Underlying Trust 2020-1*

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on July 31, 2023, the foregoing document was electronically filed with the Clerk of Court and served on all counsel of record using the Court's CM/ECF system.

/s/ Kristen P. Watson
Kristen P. Watson
Counsel for Defendant Wilmington
Trust, N.A. as Trustee for SLSLT
Underlying Trust 2020-1