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

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| IN RE:<br><br>POWER HOME SOLAR, LLC<br><br>Debtor. | Case No. 22-50228<br><br>Chapter 7 |
| CLAUDE MUMPWOER, et. al.<br><br>For themselves and on behalf of others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>POWER HOME SOLAR, LLC, et. al.<br><br>Defendants. | Adversary Proceeding<br>No. 23-03005<br><br>**ADDITION FINANCIAL CREDIT UNION'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT OR, ALTERNATIVELY, TO STAY THE LITIGATION AND COMPEL ARBITRATION** |

NOW COMES Defendant, Addition Financial Credit Union ("Addition"), and respectfully submits this Brief in support of its Motion to Dismiss the Amended Complaint or, Alternatively, to Stay the litigation as to Addition and compel arbitration pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

## NATURE OF THE MATTER BEFORE THE COURT

Two of the plaintiffs, Lesley Jackson and Daniel Jackson (collectively the "Jacksons"), were members of Addition and signed an agreement with Addition to obtain financing related to the purchase and installation of solar panels on their home. The

documents signed by the Jacksons require that any dispute with Addition is subject to arbitration as the exclusive forum.

## FACTUAL AND PROCEDURAL BACKGROUND

On March 10, 2023 over 80 plaintiffs, including the Jacksons, filed a lawsuit against at least 11 defendants, including Addition. (Doc. 1). On May 3, 2023, the plaintiffs filed an amended complaint. (Doc. 34). The plaintiffs' amended complaint is broad and generally lacks specificity as to each plaintiff and each defendant. (Doc. 34). However, broadly, speaking, the plaintiffs, presumably including the Jacksons, allege they were induced to "purchase over-promised and under-performing solar panels for their homes at secretly inflated prices." (Doc. 34 at ¶ 1). All the plaintiffs allege companies like Addition are liable due to its relationship financing the contracts the plaintiffs entered with Power Home Solar, LLC ("Power Home"). (Doc. 34). Regardless, the plaintiffs make clear they each signed separate contracts with Power Home for the installation of the solar panel system and credit contracts with the financial-entity defendants that financed the consumer's purchase of the solar panel system from Power Home. (Doc. 34 at ¶ 15 & 75). The Jacksons are the only plaintiffs who signed any agreements with Addition. (Doc. 1 at ¶ 75).

On August 3, 2022, the Jacksons completed and electronically signed a Membership Application. *See* Membership Application, attached hereto as Exhibit "A." In the box above the Jacksons' signatures and under the title "Authorization," the Membership Application provides that the Jacksons "agree to the Terms and Conditions

of the Important Account Information for Our Members." *See id.* The Important Account Information for Our Members provides as follows:

> **ARBITRATION AND WAIVER OF CLASS ACTION.**
>
> You and we agree that both parties shall attempt to informally settle any and all disputes arising out of, affecting, or relating to your accounts, or the products or services we have provided, will provide or has offered to provide to you, and/or any aspect of your relationship with us (hereinafter referred to as the "Claims"). If that cannot be done, then you agree that any and all Claims that are threatened, made, filed or initiated after the Effective Date (defined below) of this Arbitration and Waiver of Class Action provision ("Arbitration Agreement"), even if the Claims arise out of, affect or relate to conduct that occurred prior to the Effective Date, shall, at the election of either you or us, be resolved by binding arbitration administered by the American Arbitration Association ("AAA") in accordance with its applicable rules and procedures for consumer disputes ("Rules"), whether such Claims are in contract, tort, statute, or otherwise…Either you or we may elect to resolve a particular Claim through arbitration, even if one of us has already initiated litigation in court related to the Claim, by: (a) making written demand for arbitration upon the other party, (b) initiating arbitration against the other party, or (c) filing a motion to compel arbitration in court. AS A RESULT, IF EITHER YOU OR WE ELECT TO RESOLVE A PARTICULAR CLAIM THROUGH ARBITRATION, YOU WILL GIVE UP YOUR RIGHT TO GO TO COURT TO ASSERT OR DEFEND YOUR RIGHTS UNDER THIS ACCOUNT AGREEMENT (EXCEPT FOR CLAIMS BROUGHT INDIVIDUALLY WITHIN SMALL CLAIMS OR COUNTY COURT JURISDICTION, SO LONG AS THE CLAIM REMAINS IN SMALL CLAIMS OR COUNTY COURT). This Arbitration Agreement shall be interpreted and enforced in accordance with the Federal Arbitration Act set forth in Title 9 of the U.S. Code to the fullest extent possible, notwithstanding any state law to the contrary, regardless of the origin or nature of the Claims at issue….
>
> ...

**Effective Date** – This Arbitration Agreement is effective upon the 31st day after we provide it to you ("Effective Date"), unless you opt-out in accordance with the requirements of the RIGHT TO OPT-OUT provision below. If you receive your statements by mail, then the Arbitration Agreement was provided to you when it was mailed. If you receive your statements electronically, then it was provided to you when you were sent notice electronically.

**…**

- **Enforceability.** Any determination as to whether this Arbitration Agreement is valid or enforceable in part or in its entirety will be made solely by the arbitrator, including without limitation any issues relating to whether a Claim is subject to arbitration; provided, however, the enforceability of the Class Action Waiver set forth below shall be determined by the Court.

- **Class Action Waiver.** ANY ARBITRATION OF A CLAIM WILL BE ON AN INDIVIDUAL BASIS. YOU UNDERSTAND AND AGREE THAT, BY AGREEING TO HAVE AN ACCOUNT AT ADDITION FINANCIAL CREDIT UNION, YOU ARE WAIVING THE RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER IN A CLASS ACTION LAWSUIT.

  …

- **Right to Opt-Out.** You have the right to opt-out of this Arbitration Agreement and it will not affect any other terms and conditions of your Account Agreement or your relationship with the Credit Union. To opt out, you must notify the credit union in writing of your intent to do so within 30 days after the Effective Date. Your opt-out will not be effective and you will be deemed to have consented and agreed to the Arbitration Agreement unless your notice of intent to opt out is received by the credit union in writing at Addition Financial Credit Union, Attn. Legal Department, 1000 Primera Blvd., Lake Mary, FL 32746 or legal@additionfi.com within such 30 day time period. Your notice of intent to opt out can be a letter that is signed by you

> or an email sent by you that states "I elect to opt out of the Arbitration Agreement" or any words to that effect.

*See id.* at pp. 15-16 (emphasis in original).

There is no allegation or evidence that the Jacksons have followed the procedure to opt-out of the Arbitration Agreement in the Membership Application as of the date of this filing. (Doc. 34).

Also, on August 3, 2022, the Jacksons electronically signed a Solar Energy System Long-Term Loan Agreement and Promissory Note Nonnegotiable Consumer Note (the "Loan Agreement"), attached hereto as Exhibit "B." In one of the boxes above the Jacksons' signatures is the following statement,

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

*See id.* at p. 4 (emphasis in original).

Below the Jacksons' signature was the following statement,

> **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.**

*See id*. at p. 4 (emphasis in original)

Under "Additional Terms and Conditions," the Loan Agreement provides,

> **ENTIRE AGREEMENT**: This Note constitutes the entire agreement of the parties relating to the Loan. This Note replaces any earlier contract of a similar nature. No oral modification is valid.

*See id.* at p. 9 (emphasis in original)

The Loan Agreement also provides the "Arbitration Provision (Exhibit A)." *See id.* at p. 16. It provides,

> **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.**
>
> (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:
>
> (i) Our "Related Parties" include all our parent companies, subsidiaries and affiliates, as well as the Contractor and Sunlight Financial, LLC (which has provided services to Lender and Contractor in connection with this Note) and their parent companies, subsidiaries and affiliates, and our and their employees, directors, officers, shareholder, governors, managers, and members. Our "Related Parties also include third parties, such as subcontractors, that you bring a Claim against at the same time you bring a Claim against us or any other Related Party. References to you include any Entity Owner that owns the Residence.
>
> (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, tors, 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 dispute about the validity or enforceability, coverage or scope of this Provision or any part thereof (including, without limitations, 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….

(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. "Claim Notice" means written notice of a Claim from a Complaining Party to a Defending Party.

(c) Arbitration Election; Administrator; Arbitration Rules

(i) …If a lawsuit is filed, the Defendant 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….

(ii) Any arbitration Proceeding shall be conducted pursuant to this Provision and the applicable rules of the arbitration administrator (the "Administrator") in effect at the time the arbitration is commenced. The Administrator will be the American Arbitration Association (""AAA")…JAMS…or any other company selected by mutual agreement of the

parties if both AAA and JAMS cannot or will not serve and the parties are unable to select an Administrator by mutual consent, the Administrator will be selected by a court. 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. The arbitrator will be selected under the Administrator's rules, except that the arbitrator must be a lawyer with at least ten years of experience or a retired judge unless the parties agree otherwise. The party initiating an arbitration gets to the select the Administrator.

…

(f) No Class Actions Or Similar Proceedings: Special Features Of Arbitration. YOU AND WE AGREE THAT ARBITRATION OF ANY CLAIM WILL BE CONDUCTED ON AN INDIVIDUAL BASIS AND YOU UNDERSTAND AND AGREE THAT BY OBTAINING A LOAN FROM US, YOU ARE WAIVING YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER IN A CLASS ACTION LAWSUIT. **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 THAT IN COURT, OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WANT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.**

…

> (i) Governing Law. Your credit purchase of the System involves interstate commerce and this Provision shall be governed by 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 all remedies available in an individual lawsuit under applicable substantive law, including, without limitations, 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 or conclusions on which the award is based.
>
> …

*See id*. at pp. 16-18 (emphasis in original)

The plaintiffs, including the Jacksons, allege Addition is liable for violations of the Racketeer Influenced and Corrupt Organizations Act, the North Carolina Unfair and Deceptive Trade Practices Act, fraud and the Truth in Lending Act. (Doc. 34 at ¶¶ 111-129 & 140-169.

## STATEMENT OF QUESTIONS PRESENTED

1. Should the Jacksons' claims against Addition be dismissed?

2. Alternatively, should the Jacksons' claims against Addition be stayed and arbitration compelled?

## LEGAL ARGUMENT

### A. Federal Law Favors Arbitration.

The Federal Arbitration Act provides that written agreements to arbitrate "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. There is a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). "[D]ue regard must be given to the federal policy favoring arbitration…ambiguities as to the scope of the arbitration clause itself [should be] resolved in favor of arbitration." *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 476 (1989).

**B. The Court May Dismiss Or Stay And Compel Arbitration.**

"[D]ismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-710 (4th Cir. 2001) *citing Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992). Further, the FAA "authorizes a party to an arbitration agreement to demand a stay of proceedings in order to pursue arbitration." *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 204 (4th Cir. 2004).

Here, all the issues presented by the Jacksons as to Addition are arbitrable as they all arise out of allegations related to the solar panels installed at their home and their relationship with Addition. Accordingly, dismissal is a proper remedy. Alternatively, the Court may stay the litigation as to Addition and compel arbitration of the Jacksons' claims against Addition.

**C. The Arbitration Provisions In The Membership Application And The Loan Agreement Must Be Enforced.**

"[W]hen there is a written agreement to arbitrate, that agreement must be enforced unless there is a legal impediment to its enforcement that is not preempted by the FAA." *Barker v. Fox Den Acres, Inc. (In re Barker)*, 510 B.R. 771, 777 (Bankr. W.D.N.C. 2014) *citing AT&T Mobility LLC, v. Concepcion*, 563 U.S. 333 (2011). Further, when disputes about whether the agreement must be arbitrated, are delegated to the arbitrator, which is known as a delegation clause, such are enforceable unless there is a specific challenge that is separate and distinct from a challenge to the agreement to arbitrate overall. *See id*. *citing Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70-71 (2010) and *Buckeye Check Chasing, Inc. v. Cardegna* 546 U.S. 440, 445 (2006). Put simply, "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." *See id*.

Here, there are two written agreements to arbitrate in the form of the Membership Application and the Loan Agreement. Both are signed by the Jacksons. Both delegate the question of arbitrability to the arbitrator. *See* Membership Application ("[a]ny determination as to whether this Arbitration Agreement is valid or enforceable in part or in its entirety will be made solely by the arbitrator, including without limitation any issues relating to whether a Claim is subject to arbitration"); Loan Agreement ("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"). Accordingly, this Court must dismiss the Jacksons' claims against Addition. Alternatively, the Court must stay the action as to Addition and compel arbitration of the Jacksons' claims against Addition.

**D. Enforcement Of The Arbitration Provisions Is Consistent With The Bankruptcy Code.**

As this matter is in Bankruptcy Court, an additional layer of analysis may be necessary. *See id.* "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. quoting Phillips v. Congelton, LLC (In re White Mountain Mining Co., LLC),* 403 F.3d 164, 168 (4th Cir. 2005). To evaluate whether there is an inherent conflict between arbitration and the underlying purposes of the Bankruptcy Code, courts ask if the cause of action is core or not core. *See id.*

**1. The Jacksons' claims against Addition are not core and arbitration is required.**

"If the cause of action is not core, it generally must be submitted to arbitration." *Id. citing The Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (In re Elec. Mach. Enters., inc.),* 479 F.3d 791, 796 (11th Cir. 2007); *Edwards v. Vanderbilt Mortgage & Fin., Inc. (In re Edwards),* 2013 Bankr. LEXIS 4379 (Bankr. E.D.N.C. 2013); *TP, Inc. v. Bank of Am., N.A. (In re TP, Inc.),* 479 B.R. 373, 382 (Bankr. E.D.N.C. 2012).

An adversary proceeding is not core when it is not among the 16 enumerated categories of proceedings and does not turn on bankruptcy law or affect the uniform administration of bankruptcy law. *See* 28 U.S.C. § 157(b); *Rogers v. Preferred Carolinas Realty, Inc. (In re Rodgers),* 2014 U.S. Dist. LEXIS 87087 at *55 (E.D.N.C. 2014) ("the adversary proceeding is non-core….[it] does not turn on bankruptcy law; therefore, it will not affect the uniform administration of bankruptcy law."); *Angell v. Allstate Prop. &*

*Cas. Ins. Co. (In re Caceres)*, 2023 Bankr. LEXIS 697 at * 172 (M.D.N.C. 2023) (Court held because adversary proceeding claims were based on state law claims and not on any right expressly created by the Bankruptcy Code or part of the claims allowance process, the claims were non-core).

Here, the Jacksons' claims against Addition are not core. The Jacksons' claims are not among the 16 enumerated categories of proceedings specified in 28 U.S.C. § 157(b). Moreover, the Jacksons' claims against Addition do not directly involve the bankruptcy estate, the debtor, bankruptcy law, or the claims allowance process. They are simply state and federal claims by two individuals against a non-bankrupt entity. The only reason they are asserted in the Bankruptcy Court is that one of the co-defendants filed Chapter 7 bankruptcy. (Doc. 1 at ¶ 9). Accordingly, this Court must dismiss the Jacksons' claims against Addition. Alternatively, the Court must stay the action as to Addition and compel arbitration of the Jacksons' claims against Addition.

**2. Even if the Jacksons' claims against Addition were core, they are not constitutionally core, and arbitration is required.**

If the action is not core the issue is more complex. Courts in North Carolina appear to have determined that the Bankruptcy Court may retain jurisdiction of claims that are determined to be "constitutionally core" as specified in *Stern v. Marshall*. *See id.* at 778 citing *Stern v. Marshall*, 564 U.S. 462 (2011). "A cause of action 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.* If a cause of action is "constitutionally core" the Bankruptcy Court may deny a request to compel

arbitration as long as the facts and circumstances of the case reveal an inherent conflict between arbitration and the Bankruptcy Code. *See id*.

Here, the Jacksons' claims against Addition, even if somehow considered core, are not constitutionally core. The Jacksons' claims against Addition do not arise from the bankruptcy itself. As noted, they are simply federal and state law claims asserted in an adversary proceeding against a non-bankrupt entity. Additionally, the Jacksons' claims are unrelated to the claims allowance process. Whether the Jacksons are entitled to recovery from Addition does not impact whether claims against the debtor are allowed.

Accordingly, this Court must dismiss the Jacksons' claims against Addition. Alternatively, the Court must stay the action as to Addition and compel arbitration of the Jacksons' claims against Addition.

**3. Even if the Jacksons' claims against Addition were constitutionally core, there is no conflict between arbitration and the purposes of the Bankruptcy Code and arbitration is required.**

Even if a matter is constitutionally core, the 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 in exercising jurisdiction. *See id*. Thus, even if the Jacksons' claims against Addition could be considered constitutionally core, there is no conflict between arbitration and the underlying purposes of the Bankruptcy Code as there is no prejudice to the bankruptcy case if the claims of the Jacksons against Addition are arbitrated. As noted, the validity or recoverability of the Jacksons from Addition is unrelated to the bankruptcy of Power

Home. Thus, the fact that the Jacksons are required to arbitrate their claims against Addition will not prejudice the bankruptcy case of Power Home.

Accordingly, this Court must dismiss the Jacksons' claims against Addition. Alternatively, the Court must stay the action as to Addition and compel arbitration of the Jacksons' claims against Addition.

**E. No Plaintiff Other Than The Jacksons Have Stated Any Claims Against Addition.**

Finally, the Complaint makes clear that the only plaintiffs who had any dealings with Addition and are currently asserting any claims against Addition are the Jacksons. (Doc. 34 at ¶¶ 75). Accordingly, as all the other plaintiffs have failed to state a claim against Addition their claims as related to Addition must be dismissed under Rule 12(b)(6) of the Federal Rules of Procedure.

## CONCLUSION

For the above stated reasons, Addition respectfully request that the Court dismiss any and all claims asserted against it. Alternatively, Addition respectfully requests that the Court stay the action as to Addition and compel arbitration of the Jacksons' claims against Addition.

This the 30th day of May, 2023.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was served by electronic notification on those parties registered with the United States Bankruptcy Court, Western District of North Carolina ECF system to received notices for this case on the date above.

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**DECLARATION OF LESLEY JACKSON**

I declare under penalty of perjury that the following statements are true:

1. My name is Lesley Jackson. I am over the age of 18 and have personal knowledge of the following facts.
2. My husband is a Master Gunnery Sergeant in the United States Marine Corps and currently stationed in Quantico, Virginia.
3. I reside at our permanent home in Jacksonville, North Carolina.
4. In July 2022, we agreed to purchase a solar system from Power Home Solar, LLC, doing business under the name Pink Energy.
5. The system was for personal use at our residence.
6. I met with the Pink Energy salesperson at our house on July 26, 2022.
7. The same sales agent sold the system and explained the financing to me.
8. The sales agent promised that the system would make more electric power than we needed.
9. The sales agent promised that our electric company would buy the excess power from us and we would be receiving checks from them each month.
10. The sales agent explained that the battery system would allow us to store power during the day so that it could be used at night.
11. The sales agent promised us a very low interest rate.
12. The sales agent never mentioned that the full loan amount would not be paid to Pink Energy, and no fees for the financing were discussed other than the low interest rate.
13. The sales agent explained that with a rebate check from the federal government when we did our taxes in 2023, we would receive over $14,000.00 that could be

applied to the loan, and that if this was done within eighteen months our monthly payments would not go up.

14. I asked the sales agent to explain more about this because I knew that each year we normally owed some money to the federal government in taxes.

15. I specifically asked whether the rebate would simply be offset against our taxes such that we would not actually receive the check.

16. The sales agent assured me that the money would come to us a rebate check regardless of how much we owed in taxes.

17. I have since learned that these representations about the rebate were false.

18. We have received no benefit of any tax credit yet because the system is not yet operational.

19. The system was not fully installed before Pink Energy declared bankruptcy and stopped working on it.

20. Additionally, we were promised directly from Pink Energy a military rebate of $1,000.00, and that it would make the first 12 monthly payments.

21. This totaled a $ 3,652.12 rebate from Pink Energy.

22. We never received that rebate.

23. After my husband told me the lender started auto-withdrawing money from our bank account, I called Sunlight Financial.

24. Sunlight Financial explained to me that Pink Energy had marked our installation as completed and that in reliance on that Sunlight had authorize money to be paid to Pink Energy.

25. After Pink Energy stopped working on the installation, two different companies have come out on multiple times to try to make the system operational.

26. The system is still not operational.

27. We have been paying our full electric bill and paying on the solar power system that has not yet produced any electricity for us.

Signed this 26th day of June, 2023

Lesley Jackson

**DECLARATION OF DANIEL JACKSON**

I declare under penalty of perjury that the following statements are true:

1. My name is Daniel Jackson. I am over the age of 18 and have personal knowledge of the following facts.
2. I am a Master Gunnery Sergeant in the United States Marine Corps and currently stationed in Quantico, Virginia.
3. My spouse and I have a permanent home in Jacksonville, North Carolina.
4. In July 2022, we agreed to purchase a solar system from Power Home Solar, LLC, doing business under the name Pink Energy.
5. The system was for personal use at our residence.
6. Because I was at Quantico, the sales and financing were arranged by my spouse.
7. The system was not fully installed before Powe Home Solar, LLC, declared bankruptcy and stopped working on it.
8. The system is still not operational nor has it received final permits.
9. Although installation had not occurred, last fall the lender started auto-withdrawing money from our bank account as if installation had been completed.
10. I called Sunlight Financial and, after much frustration and lost time, obtained a six-month grace period of no payments.
11. That time period has expired and the money is again being taken out each month from our bank.
12. My next duty station will be the United States Pentagon as senior enlisted advisor to the Sergeant Major of the Marine Corps.
13. For my job I must maintain a top secret security clearance.

14. To maintain that top secret security clearance, I must not have unpaid debts reported against my credit.

15. Therefore, although the solar panel system has never yet been operational, I must continue to allow the lender to take the money out each month so that it does not report an unpaid debt against my credit.

Signed this 26th day of June, 2023

Daniel Jackson

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

**IN RE:**

**Ch. 7**

**POWER HOME SOLAR, LLC,**

**Debtor** **Case No. 22-50228**

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**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.**

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**PLAINTIFFS' OPPOSITION MEMORANDUM TO DEFENDANT ADDITION FINANCIAL CREDIT UNION'S MOTION TO COMPEL ARBITRATION**

Plaintiffs, on behalf of themselves and all others similarly situated, oppose the Motion to Dismiss or in the Alternative Compel Arbitration (ECF No. 57) filed by Defendant Addition Financial Credit Union ("Addition"). 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 claims to not be constitutionally core and that it lacks authority to decide this Motion

as a matter of first impression as to any such claims, this Court should recommend that the District Court deny the Motion as to those claims for the same reason.

## INTRODUCTION

This case concerns a fraudulent scheme orchestrated by Defendants that induced consumers to purchase underperforming solar power systems at secretly inflated prices. North Carolina residents Leslie and Daniel Jackson were two of those consumers. Their loan from Addition was arranged by Power Home Solar, LLC ("Power Home") and Sunlight Financial, LLC for the purchase of a solar power system. As alleged in the Amended Complaint, Addition's loan to the Jacksons included a hidden fee not disclosed on the loan document.

This class action seeks to remedy that wrong and others. Plaintiffs allege that Power Home, Waller, and Addition violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO), the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), and that they committed common law fraud. Plaintiffs also assert a Truth in Lending Act (TILA) claim against Addition (and other non-debtor defendants). 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 their other claims against the Debtor, as all claims are based on the same fraudulent loan transactions.

Addition's motion to dismiss or stay (*i.e.*, compel arbitration) seeks to needlessly multiply this litigation by severing Plaintiffs' inextricably intertwined claims against it from this unified class action adversary proceeding and sending them to a separate arbitration. The Court should deny Addition's motion, as compelling a separate arbitration of Plaintiffs' claims against Addition in this case is incompatible with the efficiency and collective resolution policies that are fundamental to bankruptcy administration.

## I.

## FACTUAL BACKGROUND

The Jacksons have filed individual proofs of claim against the Debtor based on the 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 Addition. (*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.

The Jacksons signed a credit contract with Addition (*Id.* ¶ 75) that was arranged for them by a Power Home sales representative. That credit contract states the amount financed—$55,200.00—as due Power Home and further explains that Sunlight Financial, LLC, "provided services" to Addition and Power Home regarding the loan. (Ex. B to Addition's Memorandum in Support of Motion at 1, 17, ECF No. 58-2.)

The Amended Complaint alleges that the face amount of each loan—in the Jacksons' case, $55,200.00—"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" which, in this instance, refers to Addition. (*Id.* ¶ 37). 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.

As set forth in the attached Declarations, the Jacksons were subject to these deceptive practices. Mrs. Jackson met with the Pink Energy salesperson at their house on July 26, 2022. The same sales agent sold the system and explained the financing. That agent promised that the system would make more electric power than they needed and that they would be receiving checks from their power company each month to buy that excess. The sales agent promised a very low interest rate and never mentioned that the full loan amount would not be paid to the installer. The

sales agent misrepresented that they would receive a large rebate check from the federal government regardless of how much they owed in taxes. To date, they have received no benefit of any tax credit yet because the system was never made operational. If and when they do receive a tax credit, it will not be a rebate check but simply an offset against the taxes they owe.

After Pink Energy declared bankruptcy, it stopped working on the Jacksons' installation. Although repair attempts have not succeeded in making the system operational, Addition continues to auto-withdraw money from the Jacksons' bank account. Because Mr. Jackson's position with the United States Marine Corps requires a top-secret security clearance, they feel compelled to allow the withdrawal to protect his credit rating. Thus, they have received no benefit, but each month make a payment to the lender.

All the claims against the Debtor and Addition in the Amended Complaint have at their core the unlawful nature of the hidden fee. Plaintiffs recognize that they may recover only actual damages one time on these inter-related claims. As for the direct liability of Addition, "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, as set forth on page 16 of Addition's loan contract, Addition contractually agreed to be liable for all claims and defenses that the Jacksons have against Power Home, up to the amount owed under the loan. (Ex. B to Addition Memorandum in Support of Motion at 16.). This clause is 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." (*Id.* ¶ 3.) Plaintiffs have alleged that Addition, as one of the financial entity defendants, can assert claims against Power Home through indemnity agreements or other legal theories. (*Id.* ¶ 4.)

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. (*Id.* ¶ 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.

## TO ACCOMPLISH THE PURPOSE OF THE BANKRUPTCY CODE THE ARBITRATION CLAUSE SHOULD NOT BE ENFORCED REGARDING PLAINTIFFS' CONSTITUTIONALLY CORE CLAIMS AGAINST BOTH THE DEBTOR AND ADDITION.

In the context of the claims adjudication process in the Power Home bankruptcy, the Federal Arbitration Act (FAA) cannot be reconciled with the

provisions of the later-enacted Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) with respect to Addition's arbitration agreements with the Jacksons. *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 Plaintiffs' TILA claim, which they assert solely against Addition, this adversary proceeding asserts inseparable constitutionally core claims against both Addition and the debtor, which must necessarily be resolved in the claims allowance process. Plaintiffs acknowledge that their TILA claim is not constitutionally core in the same sense as their other claims against Defendants because Plaintiffs' TILA count seeks relief solely from Addition. But the central

issue at the heart of Plaintiffs' TILA claim—whether the Debtor, Sunlight, and Addition included an unlawful secret finance charge in Addition's loan to Plaintiffs for their solar power system—will nevertheless be decided in connection with the resolution of Plaintiffs' other claims against the Debtor. Additionally, the resolution of the proof of claim will also necessarily determine the amount of actual damages from the hidden fee and that the Addition loan is a consumer transaction. Addition will not be able to deny that it is a creditor subject to TILA's requirements. The only other issue under the TILA claim 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 Addition will necessarily be resolved in the claims allowance process, Plaintiffs' claims against the Debtor and Addition are constitutionally core such that this Court may enter final judgment on them. [1]

[1] As such, under *Stern*, the Court may still enter final judgment on Plaintiffs' TILA claim against Addition. Alternatively, at a minimum, consistent with the Supreme Court's holding in *Exec. Benefits Ins. Agency v. Arkison,* 537 U.S. 25, 35 (2014), even if Addition continues to withhold its consent to entry of final judgments against it on that claim, at the stage of a final order, this Court may still submit proposed findings of fact and conclusions of law to the District Court, which may then enter an appropriate final judgment on Plaintiffs' TILA count against Addition.

Entry of final judgment by the Bankruptcy Court on Plaintiffs' constitutionally core claims against the Debtor without also resolving Plaintiffs' claims against Addition would present an irreconcilable conflict between the FAA and the Bankruptcy Code. The Fourth Circuit recognizes that inherent conflicts exist between the FAA and the Bankruptcy Code. 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 a separate arbitration of Plaintiffs' claims against Addition, given that the same facts and legal issues will necessarily be resolved in the Court's

determination of Plaintiffs' claims against Power Home, Sunlight, and Waller with respect to consumer borrowers with loans financed by Addition.

Addition'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 Addition's motivation is understandable, the effect of its proposal on the administration of this case is untenable.

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 Addition'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*.

Determining the amount of the Jacksons' Proof of Claim is a necessary part of the statutory bankruptcy process that Congress has created the Bankruptcy Court to oversee; it is not something an arbitrator decides. Further, the contract proffered by Addition states it was arranged through Sunlight Financial, LLC, and that entity has filed its own Proof of Claim against the Debtor. (*See* Claim number 5736 in the amount of $32,556,024.47). Sunlight explains the basis of the claim as including "indemnification obligations" and "contingent obligations." (See Attachment 1, Pg. 1, Claim number 5736). Therefore, determining the Jacksons' claim is necessarily entwined with Sunlight Financial LLC's liability and, consequently, part of its claim against the Debtor. Jayson Waller, another co-defendant, has also filed a Proof of Claim, designated by the Court as Claim Number 5607, which 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.

Significantly, this Court's determination of the amount of the Jacksons' Proof of Claim against the Debtor will be a function of whether the Jacksons are required to pay all, some, or none of the Addition loan. That determination necessarily has two parts: Addition's direct liability for the misconduct of the Power Home agent it used to negotiate the loan and for its participation in the hidden fee scheme, and Addition's derivative liability under the terms of the loan for Power Home's misconduct. Regardless of the direct or derivative liability, the claims are based on the exact same conduct in a transaction by a sales agent who worked for both Power Home and Addition. Addition is also a necessary party to determine the amount of liability to be assessed against Power Home under the Jacksons' Proof of Claim because, to the extent the Jacksons are relieved from paying any part of the Addition 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.

Similarly, the claim amount of Sunlight Financial, LLC, and Waller will also be determined in part by the outcome of the Jacksons' claims against Addition. Discovery will show the indemnity agreements that link Waller and all these entities, and unless Addition is abandoning any and all indemnification and contractual reimbursement rights that relate to its loan to the Jacksons, including those that flow through Sunlight Financial, LLC, the liability assessed against it will be part of the

determination of these other proofs of claim. Accordingly, because separate arbitration of Plaintiffs' claims against Addition 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.

## III.

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

When determining whether substantial interference with the Bankruptcy Code exists, 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 the Jacksons' claims against Addition 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)).[2] 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, 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 the Jacksons' claim, it will necessarily

[2] 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.

determine the issues against Addition. As in *Bestwall*, having the case against Addition decided in another forum risks "issue preclusion, inconsistent liability, and evidentiary issues." *See* 2023 WL 4066848, *6. Also as in *Bestwall*, any recovery by the Jacksons against Addition "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 the case against Addition is sent to arbitration, the Debtor will need to respond to discovery in that forum as well as in the adversary proceeding. This duplication of effort will further interfere with the bankruptcy process. Given that unity of the issues and witnesses involved in both arbitrating the liability of Addition 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 Addition, 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 just 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 . . . ."

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

"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, the constitutionally core issue does not determine the result or the test but, under *Cashcall* only this Court's 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* appears without analysis or explanation for why an interlocutory decision is subject to treatment under *Stern* as if it is a final order. On this point, *Cashcall* is wrong and the 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 Addition 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.

## IV.

## DELEGATING THE QUESTION OF ARBITRABILITY OF PLAINTIFFS' CLAIMS AGAINST ADDITION IS INCOMPATIBLE WITH THE PROVISIONS AND PURPOSES OF THE BANKRUPTCY CODE

Power Home's bankruptcy constitutes a legal impediment to enforcement of Addition's arbitration agreements with the Jacksons that makes delegation of the question of arbitrability of the Plaintiffs' claims in this litigation – as against Addition – 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 Addition.

In its motion to dismiss or stay this case in favor of arbitration, Addition relies heavily on Judge Beyer's inapposite pre-*CashCall* decision in *In re Barker*, a case involving a Chapter 13 debtor's adversary proceeding against a 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.NC. 2014). However, *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 Addition as a Defendant in the litigation potentially has a direct impact on the Chapter 7 estate, as Addition 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 Addition, if any, would reduce their claim against the estate dollar-for-dollar (excluding any recovery on their separate TILA claim against Addition), which would consequently leave more estate resources available for Power Home's other creditors.

By contrast, 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 Addition is simply incompatible with the Supreme Court's holdings in *Katz* and *Celotex*, cited *supra* at p. 19.

## CONCLUSION

Therefore, this Court should deny Addition's motion to dismiss or stay 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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