UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: NYREE BELTON, Debtor,	Case No. 12-23037 (RDD) Chapter 7
NYREE BELTON, Debtor and Plaintiff on behalf of herself and all others similarly situated, v. GE CAPITAL CONSUMER LENDING, INC., A/K/A GE MONEY BANK Defendant.	Adv. No. 14-08223 (RDD)

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION

Upon the motion (the "Motion"), on due notice, of defendant GE Capital Consumer Lending Inc. for an order compelling arbitration and staying this proceeding pursuant to 9 U.S.C. §§ 2-4; and upon plaintiff's objection to the Motion and all other pleadings filed in connection therewith; and upon the record of the hearings held by the Court on the Motion on September 11, 2014 and October 6, 2014; and, after due deliberation and for the reasons stated in the Court's corrected and modified bench ruling, dated November 10, 2014, a copy of which is attached hereto, the Court having found and concluded that the plaintiff has sustained her burden in opposition and that the Motion should not be granted, it is hereby

ORDERED that the Motion is denied.

Dated: White Plains, New York
November 10, 2014

/s/ Robert D. Drain
United States Bankruptcy Judge

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In re: NYREE BELTON, Debtor.	Chapter 7 Case No. 12-23037 (RDD)
NYREE BELTON, Plaintiff, v. GE CAPITAL CONSUMER LENDING, INC. A/K/A GE MONEY BANK, Defendant.	Adv. P. No. 14-08223 (RDD)

CORRECTED AND MODIFIED BENCH RULING ON MOTION TO COMPEL ARBITRATION

APPEARANCES:

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Hon. Robert D. Drain, United States Bankruptcy Judge

In this adversary proceeding, the plaintiff, Ms. Belton seeks under 11 U.S.C. §§ 105(a) and 524, as well as by invoking the Court's inherent power to enforce and find parties in contempt for breach of its orders, to enforce the discharge of debt under section 727(a) of the Bankruptcy Code that she received at the end of her bankruptcy case. In addition to requesting relief on behalf of Ms. Belton, the adversary proceeding also seeks, pursuant to Fed. R. Bankr. P. 7023, to enforce the discharge on behalf of a class of all similarly situated debtors. (The Court previously addressed an issue raised by the complaint's request for class action relief in a closely analogous proceeding, Haynes v. Chase Bank USA (In re Haynes), 2014 Bankr. LEXIS 3111 (Bankr. S.D.N.Y. July 22, 2014)).

The asserted factual basis for relief is that the defendant, GE Capital Consumer Lending, Inc. ("GE Capital"), while aware of Ms. Belton's discharge, did not correct one or more credit reports to show that her debt originally owed to GE Capital was, in fact, discharged in bankruptcy, instead permitting it to continue to be represented as outstanding. The complaint asserts that this was not a simple mistake by GE Capital but, rather, an attempt to enforce the debt notwithstanding its discharge.

The complaint asserts that when a credit report lists debt as not having been discharged in bankruptcy, the debtor's fresh start, and more particularly her ability to obtain credit in the future, including, for example, to buy a home, an automobile or engage in other substantial credit transactions, is materially impaired. As stated by the editors of the leading bankruptcy treatise,

> The failure to update a credit report to show that a debt has been discharged is also a violation of the discharge injunction if shown to be an attempt to collect the debt. Because debtors often feel compelled to pay debts listed in credit reports when entering into large transactions, such as a home purchase, it should not be difficult to show that the creditor, by leaving discharged debts on a credit report, despite failed attempts to have the creditor update the report, is attempting to collect the debt.

4 Collier on Bankruptcy, ¶ 524.02[2][b] (16th ed. 2014), at page 524-23; see also In re Haynes, 2014 Bankr. LEXIS 3111, *5, and the cases cited therein.

The complaint asserts that GE Capital has a concerted, widespread and profitable practice of not reporting debt to it as discharged in bankruptcy in order to pressure consumer debtors to clean up their credit reports by paying debt that, as a matter of law embodied in the discharge order, they do not have to pay.

The complaint’s merits (which GE Capital disputes), are not presently at issue. Instead, what is before me is GE Capital’s motion to stay this proceeding pursuant to section 3 of the Federal Arbitration Act, 9 U.S.C. §§ 1-15 (the “FAA”), and to compel arbitration of the dispute pursuant to sections 2 and 4 of the FAA.

The parties are party to an agreement, contained in Ms. Belton’s credit card contract, which provides in relevant part, "Any legal dispute or claim of any kind, including statutory and common law claims and claims for equitable relief that relate in any way to your account, card, or your relationship with us will be resolved by binding arbitration if either you or we elect to arbitrate." The credit card agreement also contains a waiver of any class action remedy. Finally, it provides

> We [GE Capital] will pay all filing, administrative hearing and other fees the administrator or arbitrator charges up to $2,500. If the cost is higher, you can ask us to pay more and we will consider your request in good faith. Under all circumstances we will pay all amounts we are required to pay under applicable law.

Although the particular factual context of this motion raises issues that have not been directly addressed by the Second Circuit, or courts within the Circuit or by the Supreme Court, the general standard by which the Court should determine a motion to compel arbitration under the FAA is reasonably well-established.

The FAA "reflects a legislative recognition of the desirability of arbitration as an alternative to the complications of litigation. The Act, reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid the costliness and delays of litigation, and to place arbitration agreements upon the same footing as other contracts." Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 844 (2d Cir. 1987) (internal quotations and citations omitted). The FAA, and in particular section 2 thereof, which provides that a provision in a contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract," is "a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). "This text reflects the overarching principle that arbitration is a matter of contract. And consistent with that text, courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted." American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2309 (2013) (internal quotations and citations omitted). "That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" Id. (quoting CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668-69 (2012)).

That being said, and consistent with the last clause of the foregoing quotation, courts, including the Supreme Court, have continued to recognize limitations on the enforceability of arbitration agreements under section 2 of the FAA and the related obligation, which is mandatory if the FAA applies, to stay proceedings pending before them in favor of arbitration pursuant to section 3 of the FAA.

Given the statutory directives in those two sections, a court asked to stay proceedings and compel arbitration in a case claimed to be covered by the FAA has essentially four tasks. First, it must determine whether the parties in fact agreed to arbitrate the dispute at issue. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

Second, it must determine the scope of the parties' agreement to arbitrate and whether the agreement is revocable, "with a healthy regard for the federal policy favoring arbitration [such that] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." Id. See also AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011)("Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006)(arbitrator, not court, should consider claim that entire contract, as opposed to arbitration provision itself, is void for illegality); Prima Paint Corp. v. Flood &

Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967)(federal case should be stayed under section 3 of FAA in favor arbitration unless arbitration provision, in contrast to contract in which it appears, is revocable).

Third, “[l]ike any statutory directive the [FAA’s] mandate may be overridden by a contrary congressional command;” therefore, if federal statutory claims are asserted in the pending action, the Court must consider whether Congress intended those claims to be non-arbitrable. Shearson/American Express v. McMahon, 482 U.S. 220, 226-27 (1987). The burden is on the party opposing arbitration to establish such contrary congressional intent, which may be shown by the allegedly conflicting statute’s text or legislative history to establish either an express or inherent conflict between arbitration and the statute’s underlying purposes. Id.

Neither McMahon nor subsequent decisions equate this inquiry with determining whether Congress has impliedly repealed the FAA in the allegedly conflicting statute, which would require a finding that the two statutes are in “irreconcilable conflict, or where the latter act covers the whole subject of the earlier one and is clearly intended as a substitute.” Calcieri v. Salazar, 555 U.S. 379, 395 (2009). A lesser showing of Congress' express or inherent intent "to limit or prohibit waiver of a judicial forum for a particular claim . . . deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes" is required. Shearson/American Express v. McMahon, 482 U.S. at 227 (internal quotations and citations omitted). See also CompuCredit Corp. v. Greenwood, 132 S. Ct. at 675 (Sotomayor, J., concurring opinion); United States Lines, Inc. v. American S.S. Owners Mut. Protection & Indem. Ass'n (In re United States Lines, Inc.), 197 F.3d 631, 640 (2d Cir. 1999), cert. denied, 529 U.S. 1038 (2000) (arbitration clause should be enforced "unless [doing so] would seriously jeopardize the objectives of the [Bankruptcy] Code").

Related to both this point and the second inquiry to be undertaken, the Court may also refuse to enforce an arbitration agreement if it would prevent the "effective vindication of a statutory right." American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2310 (2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 298 (2d Cir. 2013). However, in enforcing arbitration between corporations that had waived the right to class action relief, Italian

Colors Restaurant also clarified that "the fact that it is not worth the expense involved in *proving* a statutory remedy [by arbitration] does not constitute the elimination of the *right to pursue* that remedy." 133 S. Ct. at 2311 (emphasis in the original). Thus, the "effective vindication" doctrine may now be limited to invalidating "a provision in an arbitration agreement forbidding the assertion of certain statutory rights . . . [and] would perhaps cover filing and administrative fees attached to arbitration that are so high as to make *access to the forum* impractical." Id. at 2310-11 (emphasis added); see also Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs would preclude a litigant . . . from effectively vindicating her federal statutory rights.").

Finally, if the Court concludes that some but not all of the claims are arbitrable, it must determine whether to stay the balance of the proceedings pending arbitration. See generally Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 75-76 (2d Cir. 1998); Bethlehem Steel Corp. v. Moran Towing Corp. (In re Bethlehem Steel Corp.), 390 B.R. 784, 789 (Bankr. S.D.N.Y. 2008). In this proceeding, however, the plaintiff does not seek relief with the exception of enforcing her discharge under the

Bankruptcy Code. The complaint does not invoke, for example, alleged breaches of the Fair Credit Reporting Act or other federal statutes or regulations. The Court therefore need not consider the fourth step of the foregoing analysis.

There is also no dispute regarding the terms of the arbitration provision in the credit card agreement at issue, which are broad, subjecting to arbitration "any. . .claim of any kind, including statutory . . . claims and claims for equitable relief, that relate in any way to [Ms. Belton's] account . . . or . . . relationship with [GE Captial]."

The parties disagree, however, over the scope of the arbitration provision -- or, rather, whether the parties could have intended it to cover a claim to enforce Ms. Belton's bankruptcy discharge. They also, perhaps more aptly, dispute whether Congress intended a claim for the enforcement of a bankruptcy discharge to be non-arbitrable.

When a party seeks, as here, to compel arbitration in a bankruptcy context, both of these issues -- the scope of the arbitration agreement and whether Congress intended it to be superseded by the operation of the Bankruptcy Code and the bankruptcy court's jurisdiction -- are for a number of reasons often intertwined. This is because, as has long been recognized, bankruptcy proceedings raise several inherent conflicts with the policies and purposes of the FAA. That recognition, in the Second Circuit at least, goes back at least to Bohack Corp. v. Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, 431 F. Supp. 646 (E.D.N.Y 1977), aff'd, 567 F.2d 237 (2d Cir. 1977), cert. denied, 439 U.S. 825 (1978), although it has been reiterated in many other decisions, as well, including MBNA America Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006), and In re United States Lines, Inc., 197 F.3d at 640.

Perhaps the most obvious conflict between the FAA and the Bankruptcy Code is that bankruptcy cases are predominantly collective, multi-party proceedings rather than two-party disputes. The debtor is often a mere stakeholder; thus, a prepetition agreement between the debtor and a creditor that includes an arbitration provision may not be said to cover disputes in a bankruptcy case that involve multiple new parties who did not agree, pre-bankruptcy to arbitration and who have a statutory right to intervene under section 1109(b) of the Code. This is compounded in disputes in which the United States Trustee, who is given standing under section 307 of the Bankruptcy Code to "raise and . . . appear and be heard on any issue in any case or proceeding under [the Code],” decides to become involved. In such contexts, courts conclude that the two-party arbitration agreement does not extend to the dispute. See generally In re Hostess Brands, Inc., 2013 Bankr. LEXIS 79 at *7-10 (Bankr. S.D.N.Y. Jan. 7, 2013), citing among such cases Kraken Investments Ltd. v. Jacobs (In re Salander-O'Reilly Galleries, LLC), in which District Judge Seibel stated, "[T]here is no justification for binding creditors to an arbitration clause with respect to claims that are not derivative of one who is a party to it." 475 B.R. 9, 24 (S.D.N.Y 2012)(citing Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1155 (3d Cir. 1989)); see also Note, “Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act,” 117 Harv. L. Rev. 2296, 2302 (2004) (citing EEOC v. Waffle House, Inc., 534 U.S. 279, 293-94 (2002) (“It goes without saying that a contract [to arbitrate] cannot bind a non-party.”)).

However, the multi-party nature of bankruptcy cases and proceedings is not the only clear conflict between the FAA and the Bankruptcy Code. It is, rather, indicative of a larger conflict inherent in the underlying structure of the Bankruptcy Code, in which Congress chose to stay and ultimately abrogate individual contract rights to enable the claims against the debtor and the debtor's assets to be assembled and determined in one forum under the supervision of one judge consistent with the Code's dictates, in contrast to piecemeal determinations by other bodies, including different arbitration panels. This clear policy, implicit throughout the Bankruptcy Code and the related provisions of the Judicial Code that create the bankruptcy courts, differs from the mere conferral of jurisdiction on a court to decide a federal claim, which, as recognized in <u>CompuCredit v. Greenwood</u>, 132 S. Ct. at 670-71, is insufficient to override the FAA. In 28 U.S.C. §§ 1334(b) and 157(a)-(b), Congress granted specialized, though deep, jurisdiction to the bankruptcy courts over issues central to the bankruptcy process in the interests of efficiency, expertise and fairness. <u>Continental Ins. Co. v. Thorpe Insulation Co.</u> (<u>In re Thorpe Insulation Co.</u>), 671 F.3d 1011, 1022-23 (9th Cir. 2012), <u>cert.</u> <u>denied.</u>, 133 S. Ct. 119 (2012); <u>MBNA America Bank, N.A. v. Hill</u>, 436 F.3d at 108; <u>Phillips v. Congelton, L.L.C.</u> (<u>In re White Mining Co., L.L.C.</u>), 403 F.3d 164, 169-79 (4th Cir. 2005); <u>Ins. Co. of N. Am. v. NGC Settlement Trustee & Asbestos Claims Mgmt. Corp.</u> (<u>In re Nat'l Gympsum Co.</u>), 118 F.3d 1056, 1069 (5th Cir. 1997).

In light of that policy, courts have long held that when disputes pending before the bankruptcy court are at the core of the adjustment of debtor/creditor relations, whether as a matter of law or because of their importance to the conduct of the bankruptcy case, they should not be subject to arbitration. Id. Thus, recognizing the purely bankruptcy nature of the priority of a union's claims in bankruptcy, the Second Circuit in Bohack affirmed and adopted the District Court's opinion that such issues were not subject to arbitration, although the amount of the union's claims were properly arbitrable. 431 F. Supp. at 653-55, aff'd, 567 F.2d at 237. And, recognizing the separate though related policy of efficiently managing bankruptcy cases in the bankruptcy court, the Second Circuit held in In re United States Lines that where declaratory judgment proceedings were integral to the bankruptcy court's ability to preserve and equitably distribute a post-reorganization trust's assets, arbitration was not required. 197 F.3d at 631. See also Geron v. Cohen 2013 U.S. Dist. 188737, *6-13 (S.D.N.Y. Mar. 21, 2013)(stay under section 3 of FAA properly denied where litigation over prepetition claim was "at the center of various causes of action in at least 37 filed adversary proceedings and many tolled actions in addition to Defendant’s underlying proceeding”). As stated by the Fifth Circuit in holding that the bankruptcy court properly exercised its discretion not to stay under section 3 of the FAA an adversary proceeding to enforce a debtor’s discharge,

> We think that, at least, where the cause of action at issue is not derivative of the pre-petition legal or equitable rights possessed by a debtor but rather is derived entirely from the federal rights conferred by the Bankruptcy Code, a bankruptcy court retains significant discretion to assess whether arbitration would be consistent with the purpose of the Code, including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.

In re Nat’l Gypsum, 118 F.3d at 1069.

In contrast, it is clear that the Bankruptcy Code and the FAA do not conflict when the dispute at issue does not implicate core aspects of the adjustment of debtor/creditor relations but, instead, was and remains rooted in the pre-bankruptcy past. Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.), 226 F.3d 160, 165-66 (2d Cir. 2000), cert. denied, 532 U.S. 920 (2001); Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1161 (3d Cir. 1989)

At times it is not entirely clear whether courts have denied a request for a stay under section 3 of the FAA because they have concluded that arbitration would conflict with the Bankruptcy Code or, instead, based on their determination that the Bankruptcy Code so infuses the issue that the parties could not be said to have agreed to arbitrate it. One could argue, for example, that the purely bankruptcy issue of the extent and enforcement of a debtor's discharge, which frees the debtor from the personal imposition of a debt, could not have been intended by the parties to be covered by an arbitration provision in an agreement that gives rise to that very debt. Indeed, two courts have held that the issuance of the discharge removes an action to enforce the discharge from the ambit of an arbitration provision in the agreement that gave rise to the discharged debt. See Harrier v. Verizon Wireless Communications, 903 F. Supp. 2d 1281, 1283-84 (S.D. Fla. 2012), and Jernstad v. Greentree Servicing, LLC, 2012 U.S. Dist. LEXIS 108988, *5-6 (N.D. Ill. Aug. 2, 2012).

I conclude, however, like the court in Mann v. Equifax Information Services, LLC, 2012 U.S. Dist. LEXIS 103210, *11-12 (E.D. Mich. May 24, 2013), that the better approach would be to analyze the issue through the lens of whether Congress intended in the Bankruptcy Code and related sections of the Judicial Code to render an action to enforce the discharge non-arbitrable.

I do that in part because I am persuaded that the discharge itself does not, in the words of Section 2 of the FAA, render the contract "revocable". The bankruptcy discharge frees the debtor from personal liability for pre-bankruptcy debts but does not eliminate all contractual obligations. For example, liens and leasehold interests ride through bankruptcy cases and may be enforced, in rem, if the debtor who has received the discharge does not continue to pay the underlying debt. See generally Johnson v. Home State Bank, 501 U.S. 78, 84-5 (1991); In re Dabrowski, 257 B.R. 394, 415 (Bankr. S.D.N.Y 2011).

It has also long been clear that rejection under section 365 of the Bankruptcy Code of a contract that includes an arbitration provision does not abrogate an obligation to arbitrate under such provision. See Truck Drivers Local Union No. 807, International Brotherhood of Teamsters v. Bohack Corp., 541 F.2d 312, 321 n.15 (2d Cir. 1976); see also Top Rank, Inc. V. Ortiz (In re Ortiz), 400 B.R. 755, 762-63 (C.D. Cal. 2009).

Moreover, given the broad language of the arbitration provision here, it cannot be said that the parties clearly did not contemplate arbitration of all disputes related to the debt, including whether GE Capital has violated the discharge of that debt. See Shearson/American Express v. McMahon, 482 U.S. at 220, in which the Supreme Court held that Securities and Exchange Act and RICO claims, though arguably at best remotely contemplated when the parties agreed to arbitrate, were nevertheless covered by their arbitration agreement.

Given the strong policy in favor of arbitration, therefore, and Congress's use of the word "revocation" in Section 2 of the FAA, I believe that the fact that Ms. Belton's discharge is at issue as opposed to other claims does not remove the parties' agreement to arbitrate from the ambit of their present dispute.

That still leaves, however, the question whether Congress implicitly provided that this type of dispute not be subject to arbitration based on the policy conflicts of "near polar extremes" that often arise between the FAA and the Bankruptcy Code, described above. MBNA America Bank, N.A. v. Hill, 436 F.3d at 108.

To analyze that issue, the Second Circuit in MBNA America Bank adopted the following approach, which continues to govern today. First, "[b]ankruptcy courts generally do not have discretion to compel arbitration of 'non-core' bankruptcy matters [that is, matters not constituting core proceedings under 28 U.S.C. § 157(b)], or matters that are simply 'related to' bankruptcy cases. As to these matters, the presumption in favor of arbitration usually trumps the lesser interest of bankruptcy courts in adjudicating non-core proceedings." Id. (internal citations omitted). On the other hand, "[b]ankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters which implicate more pressing bankruptcy concerns. However, even as to core proceedings, the bankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that inherently conflict with the [FAA] or that arbitration of the claim would necessarily jeopardize the objectives of the Bankruptcy Code. This determination requires a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy. The objectives of the Bankruptcy Code relevant to this inquiry include the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." Id. (internal quotations and citations omitted). See also Koper v. Trinity Christian Ctr. of Santa Ana, Inc. (In re Koper), 2014 Bankr. LEXIS 4168, *26-7 (Bankr. E.D.N.Y. Sept. 30, 2014) (asserted conflict must impinge upon a "substantially core" function of the bankruptcy process); In re Hostess Brands, Inc., 2013 Bankr. LEXIS 79, *7-14 (Bankr. S.D.N.Y. Jan. 7, 2013) (same).

MBNA America Bank, N.A. v. Hill also provides considerable guidance, in strong dicta, on how to apply the foregoing analysis to the specific dispute before this Court, as do several decisions that directly address whether a bankruptcy court should decline to stay proceedings to enforce a debtor's discharge in light of a motion under section 3 of the FAA.

GE Capital contends that because the discharge issue is not a multi-party dispute, the Bankruptcy Code's centralization policy does not apply in favor of maintaining the bankruptcy court's jurisdiction. That is true as far as it goes, but, as noted by the decisions cited above and discussed below, the conflict between the FAA and the Bankruptcy Code extends beyond protecting parties in interest who were not party to the underlying arbitration agreement; the Court may also properly refuse to stay a proceeding that is fundamental to the adjustment of the debtor/creditor relationship if to do otherwise would seriously impinge on a function that it has been established to carry out. MBNA America Bank, 436 F.3d at 108; In re Nat'l Gypsum, 118 F.3d at 1071 ("We are convinced that arbitration of a core bankruptcy adversary proceeding brought to determine whether [defendant's] collection efforts were barred by the section 524(a) discharge injunction . . . as a nondebtor-derivative action to enforce asserted rights created by the Bankruptcy Code that are completely divorced from [the debtor's] prepetition rights under the [defendant's agreement], would be inconsistent with the Bankruptcy Code.").

As noted by Nat'l Gypsum, 118 F.3d at 1070-71, the discharge is very clearly a fundamental, if not the fundamental, right obtained by a debtor in bankruptcy, whether the debtor is an individual or a corporation or other entity. See also Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007); Schneiderman v. Bogdanovich (In re Bogdanovich), 292 F.3d 104, 107 (2nd Cir. 2007).

Let me amplify on that point, because the language in the foregoing cases, albeit stating what those courts believe is an obvious proposition, nevertheless seems somewhat deracinated. This Court sees hundreds of individual debtors in bankruptcy every month, most of them in Chapter 7 liquidations and in the Chapter 13 context where they are seeking to save their house or other valuable property subject to liens through an income payment plan lasting from three to five years, although I also see them in Chapter 11 cases (in fact, I confirmed one today). These cases are not easy for the debtors. Generally speaking, although there is nothing shameful in filing for bankruptcy relief -- it is a federally recognized right supported by ample policy reasons -- the vast majority of debtors view bankruptcy as a last resort and seriously regret having to invoke it.

When they file for bankruptcy relief, they subject themselves, moreover, to scrutiny of their financial condition at the most minute level. Congress has carefully enacted provisions of the Bankruptcy Code and Bankruptcy Rules to preclude those who do not fall into the category of the "honest but unfortunate debtor" from receiving a discharge of particular debts or an overall discharge, so that any creditor, in addition to being able to take essentially unfettered discovery of the debtor's financial condition under Bankruptcy Rule 2004, can also, if there is a basis, pursue the denial of his or her discharge or the dischargeability of a particular debt under sections 727(a) and 523(a) of the Bankruptcy Code, respectively.

Why then do debtors seek this relief, which subjects them to such scrutiny and the liquidation and distribution to their creditors, in a Chapter 7 case, of their non-exempt property, and, in Chapter 11 and Chapter 13 cases, of as much of their ongoing income as is required by those chapters of the Code? Why do they file a case in which, as is the practice in this district, at least, Chapter 7 trustees will require them to turn over their engagement ring if that ring exceeds the value of the exemption, which is relatively small? Why? Because they need the discharge. The discharge is why they subject themselves to everything else. If a party subsequently violates the discharge, the debtor’s reason for seeking relief and enduring all of the constraints imposed by Congress in the Bankruptcy Code go for nothing. Indeed, if the violation persists the case itself can be said to have been for nothing, which, of course, means that the effectiveness of bankruptcy as a fair, collective remedy for creditors and a fresh start for debtors is eviscerated.[1]

In other words, there is nothing more fundamental to bankruptcy relief than the discharge and its related fresh start. That policy underlies the Bankruptcy Code and Congress's determination, rooted in Article 1, Section 8 of the Constitution, that debtors should be able to discharge their debts and creditors should have the benefit of uniform bankruptcy laws premised on that ultimate quid pro quo. It is perhaps for this reason that every case, whether in its holding or in dicta, that has considered whether, standing alone, a proceeding to enforce the discharge is subject to arbitration under the FAA has concluded, to the contrary, that it is not properly arbitrable and that it should, instead, be determined by the bankruptcy court.

In addition to the three district court cases that I have already cited on the issue, Harrier v. Verizon Wireless, 903 F. Supp. 2d at 1283-84; Jernstad v. Greentree Servicing, LLC, 2012 U.S. Dist. LEXIS 108900 at *5-6; and Mann v. Equifax Info. Servs, 2013 U.S. Dist. LEXIS 103210 at *12-13, in which the court stated that if the debtor had been pursuing an action

[1] One could argue that the reporting of a discharged debt as still outstanding when the credit report also shows that the debtor has been in bankruptcy is even a worse result, indicating to those who are considering providing credit in the future that the debtor has fallen into the category of the dishonest debtor who did not receive a discharge.

to enforce the discharge as opposed to an action primarily for relief under the Fair Credit Reporting Act, it too would have compelled the proceeding to go forward in federal court, the Fifth Circuit in Nat’l Gypsum, 118 F.3d 1056, held that a proceeding to determine the scope of and enforce a Chapter 11 debtor's discharge should be litigated in the bankruptcy court rather than in arbitration. See also Hooks v. Acceptance Loan Co., 2011 U.S. Dist. LEXIS 76544, *14 (M.D. Ala. July 14, 2011)(stay under section 3 of FAA denied where action to enforce discharge was core and would interfere with the bankruptcy court’s authority to enforce its orders); Grant v. Cole(In re Grant), 281 B.R. 721, 726 (Bankr. S.D. Ala. 2000) (same). Cf. In re Koper, 2014 Bankr. LEXIS 4168, *36-38 (denying FAA section 3 stay of non-dischargeability proceeding under section 523(a) of the Bankruptcy Code).

Moreover, the Second Circuit in MBNA America Bank, 436 F.3d at 104, articulated in very strong dicta that when the debtor's fresh start is at issue, an enforcement proceeding in the bankruptcy court should not be stayed in favor of arbitration. In that case, a debtor plaintiff sought the imposition of sanctions under section 362(h) of the Bankruptcy Code for a creditor's alleged breach of the automatic stay under section 362(a) of the Code. The Circuit went out of its way to point out that since the proceeding had been commenced the debtor had received her discharge and therefore her fresh start. Id. at 110. In essence then, the debtor was looking only for money from the defendant. Moreover, these damages did not include the money that the defendant had allegedly withheld in breach of the automatic stay, because that sum had been repaid, but, rather, were the cost of seeking relief plus punitive sanctions for the plaintiff and a class of similarly-situated debtors. Id.

As the Circuit stated, "First, and most importantly, arbitration of Hill's § 362(h) claim would not jeopardize the important purposes that the automatic stay serves: providing debtors with a fresh start . . . ." Id. at 109. The decision goes on to list other purposes of the automatic stay: "protecting the assets of the estate and allowing the bankruptcy court to centralize disputes concerning the estate," id.; however, its first and fundamental purpose was to provide debtors with a fresh start. As the Circuit further stated,

> Hill's bankruptcy case is now closed and she has been discharged. Resolution of Hill's claim against MBNA therefore cannot affect an ongoing reorganization, and arbitration would not conflict with the objectives of the automatic stay. MBNA has reimbursed Hill for the $159.01 payment it extracted

> from her bank account, and Hill no longer requires the protection of the stay to ensure her fresh start.

Id. at 110.

From that language, it is clear that if the issue before me had been presented to the Second Circuit in the MBNA America Bank case, the Court would have denied the motion to compel arbitration, as did the Fifth Circuit in In re Nat'l Gypsum Co., 118 F.3d at 1068-70.

Thus, although both the MBNA and Nat'l Gypsum cases hold that the mere fact that an issue before the Court is "core" under 28 U.S.C. § 157(b) will not compel the denial of a motion under section 3 of the FAA, requiring, instead, a case-by-case analysis of whether the issue is so fundamental to the Bankruptcy Code and its policies that it inherently conflicts with the FAA, they recognize that nothing is more fundamental to the adjustment of debtor/creditor relations than the discharge, an event that is not derived from the parties' pre-bankruptcy conduct but, rather, is the bankruptcy case's culminating event.

Given that Congress established the bankruptcy courts for this fundamental purpose, under the logic of the foregoing cases Ms. Belton should have to prove nothing more in order to defeat GE Capital’s motion to compel arbitration. Nevertheless, other, lesser concerns support her objection to arbitration, as well. As noted by the Fifth Circuit in Nat’l Gypsum, “In the bankruptcy context, . . . efficient resolution of claims and conservation of the bankruptcy estate assets are integral purposes of the Bankruptcy Code. Accordingly, insofar as efficiency concerns might present a genuine conflict between the Federal Arbitration Act and the Code -- for example where substantial arbitration costs or severe delays would prejudice the rights of creditors or the ability of a debtor to reorganize -- they may well represent legitimate considerations” against arbitration. 118 F.3d at 1069 n.21. Here, three such concerns exist.

As discussed above, although American Express Company v. Italian Colors Restaurant, 133 S. Ct. at 2304, limited the “effective vindication” doctrine, the Court nevertheless stated that it “would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." Id. at 2310-11, quoting Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. at 90, for the proposition that “It may well be that the existence of large arbitration costs would preclude a litigant . . . from effectively vindicating her federal statutory rights.”

The agreement at issue here provides for GE Capital’s payment of the costs and fees of the arbitrator[s] up to $2,500, as well as recognizes the potential for greater liability, which, although there is no express attorneys’ fees provision, could conceivably include attorneys' fees occasioned by GE Capital’s breach of the discharge. In Italian Colors, the Court expressed its disagreement with applying the “effective vindication” doctrine in a way that would “require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the [parties].” 133 S. Ct. at 2311-12 (internal citation and quotations omitted). Is it not logical, however, as well as far from objectionable “tallying”, to assume that Congress meant debtors who have recently emerged from bankruptcy -- having had their assets liquidated with the exception of statutorily exempt property -- to gain free access to a court to enforce their discharge, rather than running the risk that they would have to pay for even a portion of the cost of an arbitration decision? I believe the answer to this question is clear, as is the risk that the arbitrator[s]’ costs in the present dispute will exceed $2,500.

The timely and effective enforcement of the discharge also may be critically important for a debtor’s fresh start, the difference between a debtor’s resuming normal economic life and destitution. Accordingly, I asked the parties to brief whether rapid, equitable relief is available under the arbitration provision at issue here.

GE Capital correctly pointed out, first, that a year-and-a-half passed between the issuance of Ms. Belton's discharge and the commencement of this proceeding, arguing from this fact that there cannot be any urgency here. The complaint asserts, however, that Ms. Belton brought this action only after she learned that her credit report still reflected her debt as outstanding, and, in keeping with the fact that the discharge is an injunction, no debtor should have to wait any longer than is necessary to ensure that his or her discharge will be enforced. For example, if the complaint is correct, every day that a credit report is inaccurate is another day that the debtor believes she must pay her debt or be turned down for new credit. This raises two concerns -- the ability of an arbitration panel to grant timely relief and the ability of an arbitration panel to grant effective relief. Having considered the parties' arguments, I conclude that neither of these concerns is fully satisfied.

Thus, while it is reasonably clear that, under the arbitration rules applicable to the parties' agreement, one party may seek expedited relief through an emergency arbitrator requested to be appointed pending the appointment of the arbitration panel, there is bound to be delay and uncertainty regarding that procedure. Also, while it is generally accepted that arbitrators, particularly those acting under an arbitration provision like the one at issue here which recognizes the right to equitable relief, have the ability to award such relief, see, e.g., Next Step Medical Co., Inc. v. Johnson & Johnson Int'l, 619 F.3d 67, 70 (1st Cir. 2010); Sperry Int'l Trade, Inc. v. Gov't of Israel, 689 F.2d 301, 303 (2d Cir. 1982); Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City, 606 F. Supp. 692, 693-94 (S.D.N.Y. 1985), and, although the issue is not entirely free from doubt, most would agree that the district courts, and presumably the bankruptcy courts, have the power to issue an injunction to preserve the status quo, at least, pending completion of an arbitration, see, e.g., Next Step Medical, 619 F.3d at 70; see also Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1377-80 (6th Cir. 1995)(citing cases), the procedure for obtaining injunctive relief again is uncertain and cumbersome, with enforcement power resting in the district court, not the arbitrator or arbitration panel that issued the decision. It is more likely that Congress intended the prompt and well established enforcement of the discharge to be left to a single bankruptcy judge who issued it. Whether the matter is resolved on the merits or, as is common in bankruptcy cases, settled, complete and consistent relief is more likely to occur if it is determined by -- and with the possible remedial supervision of -- a bankruptcy court than on an arbitration-by-arbitration basis of separate alleged violations of the discharge. Indeed, this Court routinely handles such matters.

Finally, obtaining an effective remedy in arbitration (regardless whether the plaintiff or the defendant prevails) is today an open issue because of constitutional separation-of-powers concerns raised by at least three Courts of Appeal, although the Supreme Court may eventually render this concern moot.[2]

As the Supreme Court has often observed, "The FAA reflects the overarching principle that arbitration is a matter of contract." American Express Co. v. Italian Colors Rest., 133 S. Ct. at 2306. Thus, in section 2 of the FAA Congress required the determination by arbitrators, who do not have life tenure and whose salary is not protected by the Constitution -- indeed, who do not even have to be lawyers, let alone have to be judges -- of disputes that the parties consented to arbitrate; and, under section 3 of the FAA, Congress directed that federal courts stay proceedings pending before them if they are covered by such agreements. In addition, under section 10 of the FAA the courts' review of arbitrators' decisions is extremely limited, as recognized by countless federal courts, to instances where (a) the award was procured by corruption, fraud, or undue means, (b) where there was evident partiality or corruption in the arbitrators, or either of them, (c) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of

[2] The separation of powers issue was raised but not ruled on in In re Nat'l Gypsum Co., 118 F.3d at 1071 n.26.

a party have been prejudiced, or (d) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a).

This Court is acutely aware that following Stern v. Marshall, 131 S. Ct. 2594 (2011), three Courts of Appeal have held, based on separation-of-powers principles, that bankruptcy courts, whose decisions, of course, are subject to much more review than is provided in section 10 of the FAA -- and are, in fact, courts -- cannot render a final decision on matters submitted to them on consent if those matters do not implicate fundamental aspects of the adjustment of debtor/creditor relations. See Frazin v. Haynes & Boone, L.L.P. (In re Frazin), 732 F.3d 313, 320 n.3 (5th Cir. 2013); Wellness Int'l Network Ltd. v. Sharif, 727 F.3d 751, 768-72 (7th Cir. 2013), cert. granted in part on the issue of consent, 134 S. Ct 2901 (2014); and Waldman v. Stone, 698 F.3d 910, 917-18 (6th Cir. 2012), cert. denied, 133 S. Ct. 1604 (2013). Each of those decisions, deriving from a broad reading of Stern's statement that "Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that

Article," 131 S. Ct. at 2620, held that the fact that bankruptcy judges do not have life tenure and that their salaries are subject to congressional approval creates a sufficient non-waivable structural separation-of-powers concern that bankruptcy courts cannot decide matters on consent by final order.

To hold that, notwithstanding this reading of the Constitution, federal courts must, except for the reasons stated in section 10 of the FAA, do the bidding of arbitrators chosen on a piecemeal basis, without any tenure or salary protection (indeed, whose salary may be paid by only one of the parties) because Congress said so, boggles the mind. I believe that the faulty logic actually lies in the foregoing decisions, and hope that, as was said of the Aethelred the Unready, having begun in cruelty (or more aptly, amour-propre), and moved on to wretchedness, they will be overturned in disgrace. Until that happens, however, one cannot be assured that any ruling by an arbitration panel can be given the deference required by section 10 of the FAA, and instead must be subject to _de novo_ review. On the other hand, it should be clear from _Stern_ that this Court has the power to determine by final order fundamental issues historically pertaining to the adjustment of debtor/creditor relations, 131 S. Ct. at 2620; see also id. at 2621 (Scalia, J., concurring opinion); and as noted, nothing is more fundamental to the adjustment of debtor/creditor relations than the enforcement of a debtor's discharge.

Therefore, for all of the foregoing reasons, I conclude that GE Capital's motion should be denied. Counsel for the debtor should submit a proposed order to chambers consistent with this ruling.

Dated: White Plains, New York
November 10, 2014

/s/Robert D. Drain
United States Bankruptcy Judge