No. 14-1195

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OTERIA Q. MOSES,
Plaintiff-Appellee,

v.

CASHCALL, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina

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BRIEF OF APPELLEE

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June 26, 2014

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 14-1195 Caption: Oteria Q. Moses v. CashCall, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Oteria Q. Moses
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☑ YES ☐NO
If yes, identify any trustee and the members of any creditors' committee:
Trustee: Richard M. Stearns

Signature: /s/ Leah M. Nicholls Date: 6/26/2014

Counsel for: Oteria Q. Moses

CERTIFICATE OF SERVICE

****

I certify that on 6/26/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Leah M. Nicholls
(signature)

6/26/2014
(date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE ADMINISTRATIVE ORDER

STATUTES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

INTRODUCTION

At the end of her financial rope, Oteria Moses took out a loan with Western Sky Financial. Advertised for $1500, the loan featured an off-the-top $500 origination fee and an effective annual percentage rate of over 233%. JA 73-74. Less than three months after she received $1000, she owed nearly $2000. The law in North Carolina, where Ms. Moses lives, caps origination fees at $25 and interest rates at 30% for certain licensed lenders and 16% for others. N.C. Gen. Stat. §§ 24-1.1, 53-176(a), (b). Western Sky later transferred the loan to appellant CashCall, and after Ms. Moses filed a voluntarily Chapter 13 bankruptcy proceeding CashCall entered the fray. It filed a proof of claim in Ms. Moses' bankruptcy proceeding asking the bankruptcy court to award it almost $2000 dollars out of Ms. Moses' estate. Ms. Moses challenged CashCall's claim by filing an adversary proceeding and asking the bankruptcy court to rule that CashCall's proof of claim was invalid because its loan was illegal and therefore should not be drawn against the estate.

What happened next is something that bankruptcy courts and trustees are beginning to see with increasing frequency: CashCall vigorously tried to divest the bankruptcy court of jurisdiction to resolve the adversary proceeding. It filed a motion to withdraw its proof of claim and then, nine minutes after that, it filed a motion to compel arbitration of the entire adversary proceeding. In this motion, it

told the bankruptcy court that all the claims surrounding its effort to recover out of the estate must be sent to arbitration while Ms. Moses' adversary proceeding should be stayed indefinitely.

CashCall has tried this strategy before. In fact, in an effort to shield its illegal lending scheme from any American court and any American law, CashCall has developed a blueprint for shuttling all challenges to its loans—including challenges brought in bankruptcy proceedings—to a legal black hole called tribal arbitration. *Heldt v. Payday Fin., LLC*, 2014 WL 1330924, at *21 (D.S.D. Mar. 31, 2014). According to CashCall's arbitration agreement in this case, all disputes must be resolved by arbitration "conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules." JA 76. Among many other problems, there is no such thing as arbitration conducted by the Cheyenne River Sioux Tribe, there are no tribal representatives authorized to conduct arbitration, and there are no tribal consumer dispute rules. *See Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1308-09 (S.D. Fla. 2013).

In this case, CashCall's gambit failed. The bankruptcy court refused to let CashCall withdraw its proof of claim, finding that it would cause significant prejudice and delay to Ms. Moses and her bankruptcy proceedings. JA 92. It also declined to send either of the two claims in the adversary proceeding to tribal

arbitration—CashCall's newly desired forum—because the claims in the case were central to Ms. Moses' reorganization process.

That decision should be affirmed. Keeping bankruptcy claims in bankruptcy makes a huge difference for an individual debtor, like Ms, Moses, who is trying to rehabilitate her financial life through a voluntary Chapter 13 bankruptcy proceeding. For her reorganization plan to work, all of Ms. Moses' debts must be prioritized and resolved in one place. If not, creditors who manage to circumvent the bankruptcy system may be able to fully recover their debts at the expense of other creditors, and those charged with overseeing the reorganization process—bankruptcy courts and trustees—will lose their ability to efficiently manage the administration of thousands of bankruptcy cases annually.

Ultimately, this case boils down to a simple question: Should a bankruptcy court have the discretion to decide if sending an adversary proceeding to an alternative forum like arbitration would undermine the goals of the bankruptcy case? Under this Court's and the U.S. Supreme Court's precedent, as well as federal bankruptcy law, the answer has consistently been "yes." Creditors may not opt out of the bankruptcy regime when it no longer suits them by sending bankruptcy proceedings that are central to a debtor's reorganization to an arbitral forum that may not even exist. CashCall offers no persuasive reason why the bankruptcy court's exercise of discretion in this case should not be affirmed.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

1. The Bankruptcy Code.

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007). To this end, the Bankruptcy Code "centralize[s] disputes about a debtor's assets and legal obligations in the bankruptcy courts." *In re White Mountain Mining Co.*, 403 F.3d 164, 169 (4th Cir. 2005). Bankruptcy offers a streamlined and efficient "procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

Key to an honest debtor's chance at beginning anew is the centralization process. *See In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 117 (2d Cir. 1992). By design, the Bankruptcy Code creates something of a safe harbor, where "the debtor's affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another." *Fidelity Mortg. Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir. 1976); *see also A.H. Robins Co. v.*

Piccinin, 788 F.2d 994, 1011 (4th Cir. 1986) (explaining that core purpose of bankruptcy "was, as Congressman Kastenmeier declared, to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.'" (quoting 130 Cong. Rec. H7492, June 29, 1984)). For the debtor in particular, the centralization process offers protection from creditor actions against her while her estate is being processed in an orderly reorganization so she can pay off her legitimate debts in accordance with the Code. *See White Mountain*, 403 F.3d at 169-170.

But centralizing disputes is not for the debtor's benefit alone. The centralization process also protects the integrity of the bankruptcy estate—a core advantage for creditors—and therefore serves, rather than undermines, the policy of protecting creditors. *Id.* at 170. As this Court has explained, invoking the bankruptcy court's centralized jurisdiction and procedures "allow[s] for a systematic, equitable liquidation proceeding by avoiding a 'chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts.'" *Safety–Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 864 (4th Cir. 2001); *see also In re United States Lines, Inc.*, 197 F.3d 631, 640 (2d Cir. 1999) (centralization allows the bankruptcy court to "efficiently" resolve "all disputes concerning property of the debtor's estate," unimpeded "by uncoordinated proceedings in other arenas"). It keeps administrative costs low

which, in turn, "preserve[s] as much of the estate as possible for the creditors." *In re Citation Corp.*, 493 F.3d 1313, 1318 (11th Cir. 2007).

Of particular relevance here, several specific features of bankruptcy carry the centralization goal forward. *First*, when a debtor files for bankruptcy, an automatic stay is triggered under 11 U.S.C. § 362. The "general policy" behind the stay "is to grant complete, immediate, albeit temporary relief to the debtor from creditors, and also to prevent dissipation of the debtor's assets before orderly distribution to creditors can be effected." *Penn Terra Ltd. v. Dep't of Envtl. Res.*, 733 F.2d 267, 271 (3d Cir. 1984). "As the legislative history of the automatic stay provision reveals, the scope of section 362(a)(1) is broad, staying all proceedings, including arbitration." *FAA v. Gull Air, Inc.*, 890 F.2d 1255, 1262 (1st Cir. 1989). The stay thus prohibits creditors from bypassing the bankruptcy court to collect on claims against the debtor—critical to "preclude one creditor from pursuing a remedy to the disadvantage of other creditors," *A.H. Robins*, 788 F.2d at 998, "via a creditor race to the courthouse," *In re Constr. Supervision Servs., Inc.*, __ F.3d __, 2014 WL 2120094, at *2 (4th Cir. May 22, 2014). Included within the "ambit," *id.*, of the automatic stay provision are claims, like CashCall's, that attempt to collect or recover a claim against the debtor that arose before the bankruptcy. *See, e.g.*, 11 U.S.C. § 362(a)(6).

Second, because "[t]he very purpose of bankruptcy is to modify the rights of debtors and creditors," 1 Collier on Bankruptcy ¶ 3.02[2] (15th ed. rev. 2005), 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." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). This broad grant of subject matter jurisdiction over a debtor's property is codified in 28 U.S.C. §§ 1334 and 157—the Bankruptcy Code's two "critical sections," that establish what a bankruptcy court "can and cannot do." *A.H. Robins*, 788 F.2d at 998 n.7 (quoting Chatz & Schumm, *1984 Bankruptcy Code Amendments–Fresh from the Anvil*, 89 Com. L.J. 317, 319-20 (1984)).

Under these provisions, a bankruptcy court has "broad, well-established powers . . . to preserve the integrity of the reorganization process." *In re U.S. Lines*, 197 F.3d at 640; *see In re Chateaugay Corp.*, 109 B.R. 613, 621 (S.D.N.Y. 1990) (discussing §§ 1334 and 157). The scope of this power is set forth in § 157, which hinges a bankruptcy court's authority on whether the bankruptcy proceeding is "core" or "non-core." *See White Mountain*, 403 F.3d at 169. For core proceedings under § 157—which typically involve central disputes over the validity of creditors' claims and the size of the debtor's estate—Congress determined that bankruptcy courts should have nearly complete control over their resolution. *See id.*

Against this backdrop, the Supreme Court's twin decisions in *Stern v. Marshall*, __ U.S. __, 131 S. Ct. 2594 (2011), and *EBIA v. Arkison*, __ S. Ct. __, 2014 WL 2560461 (June 9, 2014), ushered in a new framework for classifying certain types of claims arising in the bankruptcy context. In *Stern*, the Supreme Court held that bankruptcy courts lacked the constitutional authority to enter final judgment on certain claims that § 157 defines as core. 131 S. Ct. at 2620 (discussing state-law counterclaims not fully resolved by ruling on a creditor's claim). For these claims—dubbed *Stern* claims—the Supreme Court made clear that only Article III judges had the constitutional authority to finally resolve them. *Id.*

Left open after *Stern*, however, was whether a bankruptcy court could *ever* hear a *Stern* claim. In *EBIA*, the Supreme Court held that bankruptcy courts remain free to hear *Stern* claims within their jurisdiction and to propose findings of fact and conclusions of law—not unlike magistrate judges. *EBIA*, 2014 WL 2560461, at *3. *Stern* and *EBIA*, thus, did not fundamentally alter the role of bankruptcy courts in administering bankruptcy proceedings. As the Court explained in *Stern*, "[w]e do not think the removal of counterclaims such as [the debtor's] from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute" because bankruptcy courts would still hear the claims in the first instance. 131 S. Ct. at 2620.

2. Chapter 13 Bankruptcy Proceedings.

A Chapter 13 bankruptcy provides a "method[] for an individual to cure his indebtedness." *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 343 (4th Cir. 2013). The need for a Chapter 13 proceeding frequently arises with little or no warning because "[p]otential Chapter 13 debtors typically find a lawyer's office when they are one step from financial Armageddon." *Hamilton v. Lanning*, 560 U.S. 505, 521 (2010) (quoting K. Lundin & W. Brown, Chapter 13 Bankruptcy § 3.1 [2] (4th ed. rev. 2009)). For instance, there is "a foreclosure sale of the debtor's home the next day" or "the debtor's only car was mysteriously repossessed in the dark of last night" or, even, "a garnishment has reduced the debtor's take-home pay below the ordinary requirements of food and rent." *Id.* In these cases, "[i]nstantaneous relief is expected, if not necessary." *Id.*

Chapter 13 proceedings are "primarily focused on a plan of reorganization rather than liquidation." *In re Davis*, 716 F.3d 331, 332 (4th Cir. 2013). Thus, unlike a Chapter 7 bankruptcy proceeding, which requires liquidation of an individual's assets, Chapter 13 offers a less "radical solution" for individuals facing bankruptcy. *Wilson*, 717 F.2d at 343 (comparing Chapter 7 with Chapter 13 proceedings). Typically appropriate for "individuals with regular income," *Hamilton*, 560 U.S. at 505, under Chapter 13, the debtor "remains in possession of the property of the estate and cures his indebtedness, under the supervision of the

trustee, by way of regular payments to creditors from his earnings through a court approved payment plan," *Wilson*, 717 F.3d at 343-44. *See also* 11 U.S.C. §§ 109(e) 1306(b), 1322.

In this way, Chapter 13 offers individuals a path forward that mirrors how Chapter 11 proceedings work for businesses. As this Court has explained, "the fundamental purpose of chapter 11 is rehabilitation of the debtor." *White Mountain*, 403 F.3d at 170 (internal quotations omitted). The goal under Chapter 13 is no different. It allows the debtor an opportunity to reorganize her affairs and rehabilitate her finances. *See In re Moffett*, 356 F.3d 518, 520 (4th Cir. 2004) (explaining that Chapter 13 affords debtors rights and protections designed to optimize "their chances for successful rehabilitation"). Initially, the debtor takes stock of her debts, proposes a plan to pay them off "under which a portion of the debtor's future income will be paid to the bankruptcy trustee," and, if "it complies with the applicable requirements," the bankruptcy court confirms the plan, thereby binding the parties. *In re Quigley*, 673 F.3d 269, 271 (4th Cir. 2012); *see* 11 U.S.C. § 1325.

Importantly, confirmation of a Chapter 13 reorganization plan is usually only the beginning—not the end—of a debtor's reorganization process. *See Caroll v. Logan*, 735 F.3d 147, 151 (4th Cir. 2013). Once approved, a bankruptcy trustee continues to oversee the execution of a Chapter 13 debtor's plan and "advise" and

"assist" the debtor in her performance. 11 U.S.C. § 1302(b)(4); *see also Hamilton*, 560 U.S. at 508. And a Chapter 13 debtor's estate is under the jurisdiction of the bankruptcy court "until the Chapter 13 case is closed, dismissed, or converted." *Carroll*, 735 F.3d at 151. During this time, the repayment plan remains "subject to modification" due to a change in circumstances, for instance if the debtor's ability to pay decreases or increases. *In re Murphy*, 474 F.3d 143, 148 (4th Cir. 2007); *see also In re Flores*, 735 F.3d 855, 861 (9th Cir. 2013) (by ensuring the "availability of plan modification" over the life of the plan, Chapter 13 thus "operate[s] as a mechanism for repayment *over time* by wage earners, in accordance with their actual ability to pay"); *In re Petrie Retail, Inc.*, 304 F.3d 223, 230 (2d Cir. 2002) ("A bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders, particularly when disputes arise over a bankruptcy plan of reorganization.").

For unsecured creditors, this means that the filing of a proof of claim—a filing that "invokes the special rules of bankruptcy," *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987)—and any adversary proceeding that follows may be resolved after the debtor's proposed plan is confirmed. *See, e.g.*, *In re Lewis*, 339 B.R. 814, 817 (Bankr. S.D. Ga. 2006) (even after plan confirmation, "[u]nsecured creditors have a better chance and more cost-efficient opportunity to be paid in a chapter 13 plan under court supervision than contemplated under available state debt-collection

law"); *see also In re Arnold*, 869 F.2d 240, 243 (4th Cir.1989) (noting that "[w]hen a [Chapter 13] debtor's financial fortunes improve, the creditors should share some of the wealth"). No matter when the adversary proceeding is resolved, its resolution may directly affect the estate, because it may impact a debtor's "resources to pay her debts." *Ford Motor Credit Co. v. Roberson*, 2010 WL 4286077, at *3 (D. Md. Oct. 29, 2010). Thus, resolving an adversary proceeding even post-confirmation plays a crucial role in a debtor's rehabilitation process.

3. The FAA.

Congress enacted the Federal Arbitration Act in 1925 to put arbitration agreement on an "equal footing" with other contracts—not on a different or better footing. *See, e.g.*, *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)). Congress wanted to ensure that arbitration agreements would be as enforceable as other contracts by establishing a federal policy of favoring arbitration, *id.*, but Congress also made clear that, "[l]ike any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command," *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). In this sense, arbitration agreements are like "forum selection clause[s]," *Waffle House*, 534 U.S. at 295—they allow parties to choose an arbitral rather than a judicial forum, but they do not

change the parties' substantive rights and they must yield when faced with an overriding and contrary congressional command. *See McMahon*, 482 U.S. at 226.

In *McMahon*, the Supreme Court established a framework under which courts analyze how the FAA and a particular federal statute interact. *See id.* Congressional intent to override the FAA's policy favoring arbitration is ascertained from (1) the text of the statute; (2) its legislative history; or (3) whether an inherent conflict between arbitration and the underlying purposes of the statute exist. *Id.*

Applying the *McMahon* factors to the Bankruptcy Code, this Court—like other circuits—has found no direct evidence in the text of the Bankruptcy Code or in the legislative history that Congress intended to create an exception to "preclude arbitration in the bankruptcy setting." *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1020 (9th Cir. 2012); *White Mountain*, 406 F.3d at 169; *In re Mintze*, 434 F.3d 222, 231 (3d Cir. 2006). Rather, the question here—"whether there is an inherent conflict between arbitration and the underlying purposes of the bankruptcy laws"—implicates *McMahon*'s third prong. *White Mountain*, 403 F.3d at 169. On that question, as explained in detail below, this Court has been quite clear: There is an inherent conflict. *Id.*

B. Factual and Procedural Background.

1. Oteria Moses' Bankruptcy. Facing imminent financial ruin and foreclosure on her home, on August 1, 2012, Oteria Moses filed a voluntary petition in the United States Bankruptcy Court for the Eastern District of North Carolina seeking protection under Chapter 13 of the Bankruptcy Code. JA 1. As Chapter 13 proceedings provide, along with her petition Ms. Moses filed a repayment plan that proposed a way for Ms. Moses to pay her debts while at the same time protecting some of her assets, namely her house from foreclosure. *See* JA 2.

2. Western Sky's Loan. Like many consumers on the knife's-edge of financial solvency, before Ms. Moses filed for bankruptcy she tried to stem the tide by turning to a dubious but remarkably popular source. In May 2012 she obtained an unsecured consumer loan from Western Sky Financial, LLC. Although Western Sky did not characterize its loans as payday loans because it generally offered larger personal loans over longer terms (with correspondingly larger fees), its triple-digit interest rates, exorbitant fees, questionable legality, and last-dollar business model resemble those of payday lenders. *Cf. Community State Bank v. Knox*, 523 Fed. App'x 925 (4th Cir. 2013). Both involve a loan at an annual interest rate far higher than standard bank interest rates. In many states, including North Carolina, because of "the dangers to consumers and potential for predatory

lending practices" connected with these lending operations, *id.* at 926 n.1, "far higher" actually means "illegal." *See* Heather L. Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. Rev. 326 (2012).

Ms. Moses' loan typifies the predatory lending practices that states have sought to curb. *See In re CashCall, Inc.*, 2013 WL 3465250 (N.H. Banking Dep't June 4, 2013). Western Sky's lending structure promoted a $1500 loan but, when Ms. Moses took out the loan, the company immediately took $500 off the top as an "origination fee." JA 33, 74. Then, it established a payment plan that resulted in a total annual interest rate of about 233%. JA 73. North Carolina's usury law prohibits lenders from imposing interest rates over 16%, or 30% for certain lenders licensed under the North Carolina Consumer Finance Act. *See* N.C. Gen. Stat. §§ 24-1.1; 53-176(a)(1). (At the time of Ms. Moses' loan, North Carolina usury laws prohibited lenders from imposing interest rates over 36% for certain licensed lenders. *See* N.C. Sess. Law 2013-162, S489, §§ 3, 4.) Ultimately, in exchange for an effective loan of $1000, Ms. Moses would owe $4893.14. JA 73. Not surprisingly, this effort to find financial stability failed. By the time of her bankruptcy (less than three months after obtaining the $1000), Ms. Moses was told she owed $1,929.02. JA 38. Before Ms. Moses had made a single payment on the loan, Western Sky referred the loan to CashCall.

3. CashCall's Proof of Claim and the Adversary Proceeding. True to its name, one week after Ms. Moses filed for bankruptcy CashCall came calling. On August 8, CashCall filed a proof of claim seeking to recover the $1,929.02 out of Ms. Moses' estate. JA 28. For CashCall, using bankruptcy's proof of claim procedure to recover unsecured debts for its payday lender clients was nothing out of the ordinary. Over several years, CashCall has filed proofs of claim in more than a hundred individual Chapter 13 bankruptcy proceedings in the Eastern District of North Carolina alone. JA 66.

In response, Ms. Moses filed an adversary proceeding challenging CashCall's proof of claim. In her complaint, Ms. Moses objected to CashCall's proof of claim because it was unenforceable against the debtor under 11 U.S.C. § 502(a). She further sought a declaratory judgment that the alleged debt was void under the North Carolina Consumer Finance Act (CFA), N.C. Gen. Stat. §§ 53-164 to -191 (2012), and damages based on CashCall's engaging in acts that qualified as Prohibited Acts by Debt Collectors under N.C. Gen. Stat. §§ 75-50 to -56 (2012) when it sought to collect the debt.

With regard to Ms. Moses' first claim, under North Carolina law, loans are void if they violate the CFA. N.C. Gen. Stat. § 53-166(d). Ms. Moses contended that the loan violates the CFA both because Western Sky was not licensed to offer small-dollar loans in North Carolina as required by the statute, *see* N.C. Gen. Stat.

§ 53-166(a), and because the interest rates charged far exceed the statutory limit for her size loan, N.C. Gen. Stat. §§ 24-1.1, 53-176(a)(1). JA 36.

Ms. Moses' second claim relied on the first. She sought damages under the North Carolina Debt Collection Practices Act arguing that CashCall violated that statute by attempting—through harassing phone calls and other demands—to collect on an illegal debt. JA 38. In this way, the second claim would rise or fall on the success of the allegation that the underlying loan was illegal.

When Ms. Moses challenged CashCall's effort to lodge its claim against the estate, CashCall did two things to avoid having its claim resolved by a bankruptcy court. *First*, it tried to withdraw its proof of claim from the bankruptcy court arguing that it "no longer wishe[d] to pursue its Proof of Claim" and suggesting it would "voluntarily abandon[] its claim for the outstanding balance of the loan to the Debtor." *See* JA 55-58. *Second*—nine minutes after filing its motion to withdraw its claim—CashCall filed a motion to compel arbitration of the entire adversary proceeding based on an arbitration agreement contained in the original Western Sky Loan Agreement. JA 51-54; *see* JA 75-77 (the arbitration agreement).[1]

[1] CashCall misstates the record when it says that it has "already abandoned its claim on the loan." CashCall Br. 50 (citing JA 55). It *tried* to abandon its claim, filing a motion to withdraw it (at JA 55) and arguing that, in so doing, the bankruptcy court no longer had jurisdiction over the claim. But the bankruptcy court denied this motion—*see* JA 90—as did the district court—*see* JA 118—and

4. The Tribal Arbitration Agreement. CashCall's arbitration agreement (which is really Western Sky's), and the arbitration system it contemplates, has been called a "procedural nightmare," and lacking in any ability to ensure the "orderly administration of justice." *Heldt*, 2014 WL 1330924, at *21. The agreement contains multiple conflicting, ambiguous, or downright impossible sections, including a requirement that any dispute be resolved under a set of rules—the Cheyenne River Sioux Tribal Nation "consumer dispute rules"—that "do not exist." *Inetianbor*, 962 F. Supp. 2d at 1309. Of particular note:

- The agreement expressly disclaims application of all state and federal law, presumably including both the Bankruptcy Code and the FAA itself. JA 75 ("no United States state or federal law applies to this Agreement").

- It requires the arbitrator to "apply the laws of the Cheyenne River Sioux Tribal Nation." JA 77.

- It mandates that any dispute shall be "conducted by the Cheyenne River Sioux Tribe Nation by an authorized representative in accordance with its consumer dispute rules." JA 76.

- It also allows, however, that an arbitration may be conducted by either the AAA or JAMS, but only so long as "the chosen arbitration organization's rules and procedures . . . do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate." JA 76.

CashCall did not appeal this ruling. So, contra CashCall, the original "claim on the loan" remains pending, as does Ms. Moses' core claim challenging the enforceability of that claim.

- It asserts that the "Arbitration Provision continues in full force and effect, even if your obligations have been paid or discharged through bankruptcy." JA 77.

- It describes its arbitration process as "simpler and more limited than court proceedings." JA 75.

As discussed in more detail below, multiple federal courts have evaluated similar versions of CashCall's arbitration agreement and have doubted that it provides any meaningful dispute resolution forum. The Tribe itself has stated that it does not authorize anyone to conduct arbitrations, and the Tribe has no consumer dispute rules. *See Inetianbor*, 962 F. Supp. 2d at 1309 (finding that no Tribe member is "available to arbitrate the parties' claims" and that "CashCall conceded that . . . [the Tribe] does not have any consumer dispute rules").

5. The Bankruptcy Court Proceedings. Neither of CashCall's efforts to run from bankruptcy proved successful. First, the bankruptcy court rejected CashCall's effort to withdraw its claim. JA 90. The bankruptcy court explained that, to allow CashCall to withdraw its claim now, after Ms. Moses "brought an adversary proceeding objecting to the claim," would prejudice Ms. Moses by "necessarily delay[ing] any potential recovery to which [Ms. Moses] would be entitled." JA 92. CashCall chose not to appeal this decision to this Court, and so its proof of claim remains part of the case.

Next, the bankruptcy court refused to permit CashCall to break up the claims against the estate, exercising its discretion to keep the adversary proceeding in

bankruptcy and denying CashCall's motion to compel arbitration. JA 81-90. As the court explained, despite the general policy favoring the enforcement of arbitration agreements, when it comes to bankruptcy, this Court's decision in *White Mountain* established a different framework. JA 84. Teasing this framework out, the bankruptcy court began with this Court's clear statement that "[a]rbitration 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." JA 84 (quoting *White Mountain*, 403 F.3d at 169). Under *White Mountain*, therefore, bankruptcy courts are empowered to exercise substantial discretion in deciding whether to enforce a motion to compel arbitration of claims within a bankruptcy proceeding based on whether arbitration would conflict with the objectives of the Bankruptcy Code in a particular case.

In determining whether arbitration would conflict with the objectives of the Bankruptcy Code in this proceeding, the bankruptcy court followed this Court's guidance and first asked whether the claims involved in the adversary proceeding were core or non-core under § 157(b)(2). JA 84. The bankruptcy court held that all of the claims are statutorily core because they are "counterclaims asserted by the debtor to the claim filed by the creditor," a category of claim defined by the Bankruptcy Code as core. JA 85. The bankruptcy court then dug deeper, asking

whether the claims were central to the reorganization process. The first claim was because it directly challenged a creditor's claim on her estate. JA 86. Thus, a determination "that the underlying loan agreement is void . . . would undoubtedly alter the claim amount." JA 87. As for the second, although the bankruptcy court found that it was a *Stern* claim, it nevertheless was "necessarily intertwined in the claims allowance process" because "if successful, the bankruptcy estate will recover any non-exempt funds." JA 86, 87. Based on that finding, the bankruptcy court exercised its discretion to deny the motion to compel arbitration and to keep the entire adversary proceeding in one forum.

6. The District Court's Decision. CashCall appealed to the district court, which affirmed the bankruptcy court's exercise of discretion to deny the motion to compel arbitration. JA 124-29. Like the bankruptcy court, the district court explained that, although outside of bankruptcy there is a "healthy regard for the federal policy favoring arbitration," the "tension that exists between the policy favoring enforceability of agreement to arbitrate and the paramount interests of the bankruptcy courts in resolving bankruptcy matters is well recognized." JA 126. And, like the bankruptcy court, the district court observed that this Court has spoken clearly about the framework for resolving this tension. JA 126-27 (citing *White Mountain* and explaining that it allows bankruptcy courts to "resolv[e] core

claims before them, even where those claims would in another setting be inarguably subject to referral to arbitration").

The district court rejected CashCall's argument that, because one of Ms. Moses' claims in the adversary proceeding was a *Stern* claim, the whole proceeding should be referred to arbitration. JA 127. Putting aside that this claim was, like the others, statutorily core and therefore clearly within the ambit of *White Mountain*, the district court agreed that Ms. Moses' second claim was "inextricably intertwined" with her first claim that CashCall's loan was void—a claim that CashCall agreed was core. JA 127. In reaching this conclusion, the district court explained that the second claim alleges only that CashCall's debt collection practices were illegal "*because* they were made in an attempt to collect an illegal loan." JA 127 (emphasis in original). Thus, the second claim "ar[ose] out of [the] first claim," and so a "finding by the bankruptcy court that the loan was not void" would "cause Moses' second claim to necessarily fail." JA 127. For this reason, the district court agreed that sending any of the claims to arbitration "would frustrate, rather than facilitate, the efficiency favored by arbitration and could potentially lead to inconsistent results" while keeping the claims in bankruptcy would "greatly serve[]" the objectives of the Bankruptcy Code by "allowing the bankruptcy court to consider both claims together." JA 128.

The district court also contrasted this case with others CashCall advanced as persuasive. In those cases—like *In re TP, Inc.*, 479 B.R. 373 (Bankr. E.D.N.C. 2012)—the courts were not "presented with non-core claims which would, as here, rise or fall on the adjudication of a single, remaining core claim." JA 127. Instead, the non-core claims were either (1) separate and distinct from the core claims, *e.g.*, *TP, Inc.*, or (2) the only remaining claims still in the bankruptcy proceeding, *e.g.*, *In re Edwards*, 2013 WL 5718565 (Bankr. E.D.N.C. Oct. 21, 2013). Either way, the interests of the bankruptcy court were minimal, and so sending those claims to arbitration made sense. JA 128.

Having tried unsuccessfully before two separate courts to get out of bankruptcy after initially wanting in, CashCall now appeals to this Court. JA 131.

SUMMARY OF ARGUMENT

In *White Mountain*, this Court confronted the question of when a bankruptcy court has the discretion to deny a motion to compel arbitration, and its answer controls the outcome here. Under *White Mountain*, where sending bankruptcy claims to arbitration would conflict with "the purpose of the bankruptcy laws," namely "centraliz[ing] all disputes concerning a debtor's legal obligations so that reorganization can proceed efficiently," "protect[ing] reorganizing debtors and their creditors from piecemeal litigation," and preventing an arbitrator from "decid[ing] a core issue," then a bankruptcy court has the discretion to deny a

motion to compel arbitration and decide the claims in bankruptcy. *White Mountain*, 403 F.3d at 169, 170. That is exactly what the bankruptcy court did in this case.

Here, two claims comprise Ms. Moses' adversary proceeding. One is indisputably core and "undoubtedly" affects the estate—the bankruptcy court determined that it "involves the 'allowance or disallowance of claims against the estate,'" JA 86 (quoting § 157(b)(2)(B)). That claim has no business in arbitration and, consistent with *every* court that has addressed motions to compel arbitration of core claims, there is no serious argument that the bankruptcy court erred in denying CashCall's effort to send it to arbitration.

The other claim, although statutorily core, is a *Stern* claim. For this type of claim, courts have reached differing conclusions about the general propriety of arbitration. But, as we explain below, whatever the general rule, the *Stern* claim in this case is inextricably intertwined with a core proceeding, meaning both that its resolution *will* affect the debtor's estate and reorganization plan, and that having an arbitrator decide it would "make debtor-creditor rights contingent upon an arbitrator's ruling." *White Mountain*, 403 F.3d at 169. Coupled with the fact that sending this claim to arbitration would bifurcate the adversary proceeding, spark uncoordinated and piecemeal litigation over a debtor's effort to reorganize, delay (potentially indefinitely) the resolution of the adversary proceeding, and risk inconsistent judgments and the attendant possibility of thorny collateral estoppel

issues, the bankruptcy court was well within its discretion to deny CashCall's effort to shift this claim to tribal arbitration.

Contrary to CashCall's mostly boilerplate arguments about the importance of arbitration, what happened in this case poses no threat to the FAA's mandate that agreements to arbitrate are typically enforceable. Bankruptcy law's goal of centralized proceedings is inherently in tension with the FAA's preference for arbitration. As this Court (like every other) has explained, when that tension erupts in a particular case—where a creditor's request to send a bankruptcy claim to arbitration would undermine the goals of bankruptcy—a bankruptcy court may keep the claim in bankruptcy even in the face of a valid agreement to arbitrate. This is nothing new—courts recognize that the piecemeal arbitration of disputes arising in bankruptcy would threaten the bankruptcy system and lay waste to Congress's intention to have a centralized, efficient bankruptcy regime. Nor is this approach hostile to arbitration agreements; it reflects, instead, an understanding that bankruptcy requires comprehensive and centralized resolution of claims.

Finally, this case makes it easy to see why centralized bankruptcy proceedings are so important for comprehensive reorganization and claim-dispute resolution. If CashCall gets its wish, Ms. Moses' claims could be sent to a forum that is no forum at all. CashCall's tribal arbitration system has been described as a "procedural nightmare," *Heldt*, 2014 WL 1330924, at *21—it requires arbitration

under rules that do not exist, in front of arbitrators that also likely do not exist, and it explicitly disclaims that any American law, federal or state, applies. Ms. Moses' claims might never be resolved, and she may never be able to emerge from bankruptcy with a complete reorganization plan. Kafka would be proud.

The bankruptcy court in this case thoroughly evaluated whether an inherent conflict would exist for the claims in this case, and its conclusions are sound. This Court should affirm the bankruptcy court's exercise of discretion to keep the adversary proceeding in bankruptcy.

STANDARD OF REVIEW

Though this Court reviews legal conclusions of the bankruptcy and district courts de novo, *In re Taneja*, 743 F.3d 423, 429 (4th Cir. 2014), it is within the bankruptcy court's discretion to determine whether arbitration would interfere with bankruptcy proceedings and reorganization, and that determination is reviewed for clear error, *see White Mountain*, 403 F.3d at 170; *see also In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002) (when debtor's rights are conferred by the Bankruptcy Code, bankruptcy court has "significant discretion" to refuse to compel arbitration).[2]

[2] CashCall contends that whether to compel arbitration is always a question of law, not a question of discretion. CashCall Br. 27 (citing *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1162 (3d Cir. 1989)). But that is inconsistent with *White Mountain*. Though the initial question of whether the bankruptcy court has discretion is a legal one, a bankruptcy court's exercise of that

ARGUMENT

I. The Bankruptcy Court Properly Exercised Its Discretion to Deny Tribal Arbitration of Ms. Moses' Claims.

The bankruptcy court properly exercised its discretion in denying CashCall's motion to compel tribal arbitration of Ms. Moses' claims under a straightforward application of this Court's precedent. *White Mountain* established the standard for when courts may deny motions to compel arbitration: Where sending bankruptcy claims to arbitration would conflict with "the purpose of the bankruptcy laws," namely "centraliz[ing] all disputes concerning a debtor's legal obligations so that reorganization can proceed efficiently," "protect[ing] reorganizing debtors and their creditors from piecemeal litigation," and preventing an arbitrator from "decid[ing] a core issue," then a bankruptcy court has the discretion to deny a motion to compel arbitration and decide the claims in bankruptcy. 403 F.3d at 169, 170. Here, because both of Ms. Moses' claims involve and implicate a central question about the legality of CashCall's claim against the estate and because both will impact Ms. Moses' reorganization plan, under *White Mountain*, they may properly be kept in bankruptcy.

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discretion in a given case is reviewed for clear error. *See White Mountain*, 403 F.3d at 170 (assessing whether the bankruptcy court's exercise of discretion was "clearly erroneous"); *see also In re Eber*, 687 F.3d 1123, 1131 (9th Cir. 2012) ("When a bankruptcy court considers conflicting policies," an appellate court must "acknowledge [the bankruptcy court's] exercise of discretion and defer to its determinations that arbitration will jeopardize a core bankruptcy proceeding.").

A. This Court's Decision in *White Mountain* Controls.

Although CashCall mentions *White Mountain*, it appears to resist the idea that it supplies the governing framework for resolving efforts to remove bankruptcy claims to arbitration. *See* CashCall Br. 27 (setting the stage by discussing Third Circuit cases). Yet lower courts within this Circuit have consistently found *White Mountain*'s framework controlling. *See, e.g.*, *In re Davis*, 2013 WL 425162, at *5 (Bankr. D.S.C. Feb. 1, 2013) (describing *White Mountain* and applying its principles); *TP, Inc.*, 479 B.R. at 382 (same); *Ford Motor Credit*, 2010 WL 4286077, at *2-3 (same). This case is no different. *See* JA 84 (following "Fourth Circuit precedent" in determining whether sending the two bankruptcy claims to arbitration would be inconsistent with core bankruptcy goals).

In *White Mountain*, this Court was asked to decide whether a bankruptcy court had, and properly exercised, discretion to deny a motion to compel arbitration of bankruptcy claims. In the underlying Chapter 11 bankruptcy proceeding, Joseph Phillips, a part-owner of a company, had brought an adversary proceeding against the debtor company, White Mountain Mining, and the other owners, claiming that some money held by the company was in fact a debt owed to Phillips. *White Mountain*, 403 F.3d at 167. He also sought a declaratory judgment that he "was not obligated to advance additional monies to White Mountain." *Id.* One of the other owners then filed a motion to compel arbitration of Phillips'

claims, pointing to an arbitration agreement they all had signed, and noting that the arbitration had already begun in London. *Id.*

The bankruptcy court refused to compel arbitration. First, it found that, because one of the claims sought a determination that Phillips "is owed money by the Debtor," the proceeding was statutorily core under § 157(b)(2)(B). *White Mountain*, 403 F.3d at 167. Looking at the proposed arbitration, the bankruptcy court concluded that it, too, would have involved the same core issue. *Id.* That overlap, it reasoned, would present a conflict between the goals of the bankruptcy proceeding—to centralize claims surrounding the debtor's estate and to allow the debtor to efficiently reorganize—and the federal policy favoring arbitration. *Id.* at 170. The bankruptcy court resolved this conflict in favor of keeping the claims in bankruptcy and refusing to send them to arbitration. *Id.* at 167 (determining that "the core [bankruptcy] proceeding trumped the arbitration").

This Court affirmed. It first asked whether there existed an "inherent conflict" between the FAA and the Bankruptcy Code that justified the bankruptcy court's decision to deny arbitration. *Id.* at 168. On this question, the Court appropriately began with the Supreme Court's decision in *McMahon*, 482 U.S. 220. In that case, the Supreme Court explained that, although the FAA imposes a strong federal policy in favor of arbitration, that policy can be overridden by another, later-enacted statute. If Congress did intend "to limit or prohibit"

arbitration, "such an intent will be deducible from the statute's text or legislative history or from an inherent conflict between arbitration and the statute's underlying purposes." *White Mountain*, 403 F.3d at 168 (quoting and discussing *McMahon*) (internal quotations and alterations omitted). For purported conflicts between the FAA and the Bankruptcy Code, this Court focused on *McMahon*'s third prong: Whether arbitration and the purposes of the Bankruptcy Act "inherently conflict." *See id.* at 169.

For the *White Mountain* court, the underlying purposes of the Bankruptcy Code and the FAA clearly pose an inherent conflict. The purpose of bankruptcy proceedings, according to *White Mountain*, is "to centralize disputes about a debtor's assets and legal obligations in the bankruptcy courts." *Id.* Doing this allows the debtor a chance at efficient reorganization and permits the payment of any debts in an orderly fashion and in accordance with the debtor's resources. *See id.* at 169-70. Without centralized decisions regarding the debtor's debt and the creditors' claims, uncoordinated and piecemeal proceedings—like arbitration—can seriously impede the reorganization efforts of the bankruptcy court. *Id.* (citing *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989 (2d Cir. 1990)). And allowing an arbitrator to decide issues central to the bankruptcy estate would "make debtor-creditor rights contingent upon an arbitrator's ruling rather than the ruling of the

bankruptcy judge"—throwing another wrench into the orderly administration of a debtor's estate. *Id.* at 169.

Having found an inherent conflict between the two statutory regimes, this Court then asked whether the bankruptcy court's conclusion that the conflict existed in the specific case was "clearly erroneous." *White Mountain*, 403 F.3d at 170. It was not. *Id.* ("The inherent conflict between arbitration and the purposes of the Bankruptcy Code is revealed clearly in this case."). Recall that the main claim in bankruptcy, as well as arbitration, was a dispute over who was entitled to money held by the debtor company. *Id.* at 169, 170. Permitting that claim to proceed in arbitration "would have substantially interfered with the debtor's efforts to reorganize" and hamstrung the centralization process by, among other things, "impos[ing] additional costs on the estate" and "divert[ing] the attention and time" of the debtor away from the bankruptcy process. *Id.* at 170. It also would have permitted an arbitrator to "decide a core issue"—a power that Congress expressly delegated to bankruptcy courts. *Id.* at 169.

In reaching this result, *White Mountain* declined to state a bright-line rule that all statutorily core claims must be resolved in bankruptcy proceedings (or, conversely, that there is *never* discretion to deny motions to compel arbitration of non-core claims). Instead, it has been read as establishing a *general* rule—that, typically, arbitrating statutorily core claims will inherently conflict with

bankruptcy while arbitrating non-core claims will not. It also made clear that a bankruptcy court has discretion to decide, in an individual case, whether such a conflict exists that, in turn, justifies denying a motion to compel arbitration of bankruptcy claims. *See, e.g.*, *In re Barker*, __ B.R. __, 2014 WL 2113684, at *3-*4 (Bankr. W.D.N.C. May 20, 2014); *In re M & M Indep. Farms, Inc.*, 2011 WL 5902606, at *2 (Bankr. E.D.N.C. July 7, 2011); *In re Brown*, 354 B.R. 591, 603 (D.R.I. 2006).[3]

B. The Bankruptcy Court Faithfully Followed *White Mountain* in Rejecting CashCall's Effort to Force a Core Bankruptcy Claim Into Tribal Arbitration.

The bankruptcy court's exercise of its discretion to keep a core claim that directly involves the "allowance or disallowance of claims against the estate," § 157(b)(2)(B), firmly accords with the lessons of *White Mountain*. In *White Mountain*, the "adversary proceeding was a core proceeding" because it "sought a

[3] Other circuits agree with the basic premise of *White Mountain* that the centralizing purpose of bankruptcy laws "inherently conflict" with arbitration, at least in certain circumstances. Not all circuits use the same rule of thumb, but the circuits are generally in agreement on the types of claims that may be kept in bankruptcy in the face of an arbitration clause: those that involve disputes over the claims made on the debtor's estate. The Second and Ninth Circuits ask whether arbitration will "jeopardize a particular core bankruptcy proceeding," *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 107 (2d Cir. 2006); *Eber*, 687 F.3d at 1131. The Third and Fifth Circuits term their standard somewhat differently, asking whether the claim is a bankruptcy action "created for the benefit of the creditors of the estate," *Mintze*, 434 F.3d at 230, or, in other words, "a proceeding whose underlying nature derives exclusively from the provisions of the Bankruptcy Code," *Gandy*, 299 F.3d at 495.

determination" that a creditor was owed money out of the debtor's estate. 403 F.3d at 169. There were other claims in the adversary proceeding, *see id.* at 167, but the heart of the proceeding was the claim seeking "a determination that the advances . . . were loans 'due and owing' from [the debtor] to [the creditor]." *Id.* at 169. That set-up led this Court to conclude that forcing that claim into arbitration would "inherently conflict" with the purposes of the Bankruptcy Code. *Id.* So too here.

As both the bankruptcy and district court recognized, at the center of this adversary proceeding is CashCall's claim to recover its loan out of Ms. Moses' estate, and Ms. Moses' responsive declaratory action seeking a declaration that the loan agreement on which CashCall's proof of claim rests is invalid. The resolution of that matter directly impacts the claims on the estate and the plan for Ms. Moses' financial reorganization—the *raison d'etre* of Chapter 13 bankruptcy proceedings. *See* JA 86, 125-27; *see Thorpe*, 671 F.3d at 1021 ("[R]egardless of how Continental characterizes its claim, Continental filed a proof of claim, and Thorpe objected to the claim, so under 28 U.S.C. § 157(b)(2)(B), the allowance or disallowance of that claim was a core proceeding" which "directly impacted the administration of the bankruptcy estate."). Therefore, just as the dispute in *White Mountain* over the validity of the creditor's claim on the estate was critical to the reorganization plan, so too is the resolution of Ms. Moses' declaratory judgment claim with regard to her ability to reorganize. Other courts—within and outside of

this Circuit—have easily rejected similar efforts by creditors with respect to core Chapter 13 claims. *See In re Butler*, 2013 WL 2102969, at *3 (S.D. W.Va. May 14, 2013); *Ford Motor Credit*, 2010 WL 4286077, at *3; *Zimmerli v. Ocwen Loan Servicing, LLC*, 432 B.R. 238, 244 (Bankr. N.D. Tex. 2010); *Brown*, 354 B.R. at 603. To hold, as CashCall urges, that a court lacks discretion to deny a motion to compel arbitration in such a circumstance—where the very validity of a claim against the estate is at stake—would virtually overturn *White Mountain*.

In an effort to sidestep all of this, CashCall contends (repeatedly) that it "will receive nothing" from Ms. Moses' bankruptcy, "regardless" of the fact that it "filed a valid proof of claim." CashCall Br. 45-46; *see also* CashCall Br. 50. That is wrong. As the bankruptcy court explained, because Ms. Moses' first claim requires a determination of whether "the underlying loan agreement is void," it "would undoubtedly alter the claim amount." JA 87. Indeed, a decision to allow or disallow a claim against the estate is, by definition, an example of a decision that directly impacts the administration of the bankruptcy estate. § 157(b)(2)(B).

To see why it matters here, and why CashCall is mistaken that litigation over the validity of the proof of claim "will not in any way affect the Debtor's reorganization or benefit other creditors," CashCall Br. 46, consider first this Court's recent decision in *Carroll*, 735 F.3d 147. There, this Court explained that, in Chapter 13 bankruptcy proceedings, the confirmation of a plan is not the end of

a debtor's bankruptcy case. Instead, Congress extended "a Chapter 13 bankruptcy estate's reach until the Chapter 13 case is closed, dismissed, or converted." *Id.* at 151. In exchange for certain "significant benefits," like being able to "retain encumbered assets," a Chapter 13 debtor "makes a multi-year commitment to repay obligations under a court-confirmed plan," which "remains subject to modification for reasons including a debtor's decreased ability to pay according to plan, as well as the debtor's increased ability to pay." *Id.* (citing 11 U.S.C. § 1329). What this means is that, for a Chapter 13 debtor and her creditors (both secured and unsecured), a change in finances will result in a modification of the repayment plan. And where a debtor's "financial fortunes improve, the creditors should share some of the wealth." *Id.* (quoting *Arnold*, 869 F.2d at 243).[4]

An example might help hammer this point home. Assume that, soon, Ms. Moses finds a new job that pays her substantially more income than she is currently earning each month. *E.g.*, *Arnold*, 869 F.2d at 241. Her plan has already

[4] That is not the case in a Chapter 7 proceeding, in which, by contrast, "the estate is identified with a snapshot taken of the debtor's property when his petition for relief is filed." *Carroll*, 735 F.3d at 151 n.1. For these proceedings, unsecured creditors may not benefit from any later increase in the estate, and "the debtor is not subject to multi-year repayment obligations." *Id.* So, had this case arisen in the context of a Chapter 7 proceeding, the decision might have been different. *See, e.g.*, *D & B Swine Farms*, 2011 WL 6013218, at *3 n.6 (sending claims to arbitration in converted Chapter 7 proceeding after denying motion to compel when case was Chapter 11 proceeding); *Hill*, 436 F.3d at 110 (compelling arbitration where Chapter 7 bankruptcy case was closed, the debtor's assets liquidated, the debtor had been discharged, and, unlike in a Chapter 13 bankruptcy, there was no ongoing reorganization plan that could later be modified).

been confirmed, *see* JA 50, but if her gross total monthly income were to substantially increase, the Bankruptcy Code permits "a debtor, trustee or *holder of an allowed unsecured claim*" to "request modifications to a plan after confirmation." *In re Brice*, 2013 WL 5701050, at *3 (E.D. Va. Oct. 18, 2013) (emphasis added); *see also Arnold*, 869 F.2d at 241 (when debtor's new job increased monthly income, unsecured creditor sought "modification of the plan to increase the amounts [the debtor] would be forced to pay"). In this way, resolving CashCall's claim to an enforceable loan against Ms. Moses' estate is central to all parties'—the debtor's, creditors', the trustee's, and the bankruptcy court's—understanding of who has a legitimate claim if and when the estate is augmented, and who may petition the bankruptcy court for a modification in plan terms. If CashCall's claim is determined to be valid, it will be a "holder of an allowed unsecured claim," and so could petition the court to modify the plan and share in any addition to the estate; if CashCall's claim is invalid, then it would not be able to recover, and other creditors would gain a greater share of whatever increase the estate experiences. *See, e.g.*, *id.* at 244 (affirming bankruptcy court's decision to force debtor "to share part of his new-found financial gains with his creditors," especially where unsecured creditors received little under the original plan); *In re Euerle*, 70 B.R. 72 (Bankr. D.N.H. 1987) (receipt of inheritance allowed for 100% payment to unsecured creditors); *In re Koonce*, 54 B.R. 643 (Bankr. D.S.C. 1985)

(lottery winnings warranted 100% payment to unsecured creditors). That is why resolving the validity of CashCall's claim directly impacts the administration of the bankruptcy estate, and why the bankruptcy court was right to deny CashCall's effort to shunt the claim into tribal arbitration. *See M & M Independent Farms*, 2011 WL 5902606, at *4 (explaining that keeping claims in bankruptcy is especially crucial for cases—like Chapter 12 or Chapter 13 proceedings—which "remain[] under the supervision of the trustee for the duration of the plan").

For another reason as well, the bankruptcy court's denial of CashCall's effort to compel Ms. Moses' claim to arbitration is even more compelling than in *White Mountain*. In *White Mountain*, the parties had already begun arbitration on the contested issue. *See* 403 F.3d at 167 (noting that more than six months before Phillips filed his bankruptcy petition, Phillips was served with an arbitration demand). In some cases, the presence of a preexisting arbitration has led other courts to come down in favor of sending claims to arbitration. *In re Fries*, 2007 WL 1073868, at *1 (Bankr. D. Md. Jan. 17, 2007). Here, however, no arbitration has begun. That fact cuts strongly in favor of a bankruptcy court keeping the claims. *See In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1069 n.21 (5th Cir. 1997) (affirming conclusion that, where no arbitration proceeding has been commenced, a bankruptcy court "constitutes the most efficient and effective forum in which to determine the core Bankruptcy Code issues"); *Zimmerli*, 432 B.R. at 244 (same).

Moreover, the underlying facts of this case—that the arbitration would take place according to rules that do not exist, and in front of an arbitrator that also very likely does not exist—only heightens the conflict between arbitration and bankruptcy. Sending any of the claims in this case to arbitration could prevent Ms. Moses' complete reorganization from ever happening.

To illustrate this point, suppose that the arbitration never reached final resolution, or at least, that it did not do so within the life of Ms. Moses' Chapter 13 repayment period. Given the uncertainty—even impossibility—of CashCall's arbitration process, it is no stretch to think that the claims might dangle for years in some kind of dispute resolution limbo. After all, a number of courts have looked at CashCall's arbitration agreement and doubted that it could offer any meaningful dispute resolution forum. *See Heldt*, 2014 WL 1330924, at *21; *Inetianbor*, 962 F. Supp. 2d at 1309. If true, what then? *See National Gypsum*, 118 F.3d at 1069 n.21 (explaining that where delay caused by arbitration would cause prejudice, arbitration is contrary to the purposes of bankruptcy law). One court in this Circuit found it "[o]f great significance" that "an arbitration would take far more time to complete than would an adversary proceeding in this court," thus "impeding" the "efficient administration of the estate" and "potentially disrupting the successful completion" of the reorganization plan. *M & M Independent Farms*, 2011 WL 5902606, at *4. The possibility of a multi-year delay in resolving the adversary

proceeding if sent to arbitration was "entirely inconsistent with the underlying purpose of the bankruptcy laws." *Id.*

At base, where the heart of an adversary proceeding involves claims directly affecting a debtor's estate, her reorganization plan, and her ability to pay creditors, sending the entire proceeding, or even a piece of it, to arbitration will very often frustrate the entire point of bankruptcy. A bankruptcy case is a "centralized and collective proceeding for which a special court and special rules were created." *In re Payton Constr. Corp.*, 399 B.R. 352, 363 (Bankr. D. Mass. 2009). To hamstring the bankruptcy process, by forcing a bankruptcy court to give up control over claims and issues that matter to both the debtor and her creditors, would serve no one save for the lone party seeking an end-run around what Congress intended to be "the principal and usual, if not exclusive, forum for most matters in bankruptcy." *Id.*

C. The Bankruptcy Court Properly Exercised Its Discretion To Deny Tribal Arbitration of the *Stern* Claim.

Shifting gears, CashCall argues in the alternative that, even if the core claim was properly kept in bankruptcy, the *Stern* claim *must* be sent to tribal arbitration. Doing this would necessarily bifurcate the adversary proceeding and break up two claims that are, as both lower courts found, "inextricably intertwined," but, for CashCall, this is irrelevant. In its view, no court has *ever* kept a non-core claim in bankruptcy when a party seeks to move it to arbitration, and so what happened here

is per se error. *See, e.g.*, CashCall Br. 28 (contending that "courts have universally held that the FAA requires bankruptcy courts to compel arbitration" of non-core claims).

CashCall is wrong. *First*, as we explain, CashCall dramatically misreads the case law. Courts across the country have *not* adopted a per se rule requiring bankruptcy courts to send *Stern* claims (or even statutorily non-core claims) to arbitration. Instead, courts recognize that sending even *Stern* claims to arbitration can pose an inherent conflict with bankruptcy, and so a bankruptcy court remains free to exercise its discretion to keep those claims within its jurisdiction. *Second*, because the *Stern* claim at issue here is premised on the illegality of CashCall's alleged loan it necessarily rises or falls on the resolution of Ms. Moses' core claim. The bankruptcy court was therefore correct in concluding (and the district court was correct in affirming) that sending Ms. Moses' claim to arbitration would inherently conflict with the Bankruptcy Code's goal of centralizing disputes, avoiding piecemeal litigation, and preventing inconsistent judgments.

1. Courts May Deny Motions to Compel Arbitration of *Stern* Claims when Arbitration Would Inherently Conflict with the Purposes of the Bankruptcy Code.

Contrary to CashCall's apparent belief that courts "universally" require non-core claims to be sent to arbitration, CashCall Br. 28, the cases hold otherwise. Take *Gandy*, the first case CashCall cites in support of its universally-must-

arbitrate theory. *See* CashCall Br. 28. Even a quick read disproves CashCall's theory because the Fifth Circuit there *explicitly* held that even non-core claims can be kept in bankruptcy where a core claim is at the "heart" of the case. *Gandy*, 299 F.3d at 497 (affirming a bankruptcy court's discretion to deny arbitration of both core and non-core claims).

In *Gandy*, the debtor had filed an adversary proceeding that included statutorily core claims under the Bankruptcy Code and claims that were clearly statutorily non-core (for civil RICO conspiracy, insider fraud, and to establish alter ego). *See id.* at 493. The Fifth Circuit could hardly have been clearer that, even where some claims are non-core, "a bankruptcy court retains significant discretion to refuse to stay the adversary proceeding and compel arbitration" where "the bankruptcy causes of action predominate." *Id.* at 495, 497. In reaching this conclusion, the Fifth Circuit explained that, even though a number of the debtor's claims in that case were unrelated to the bankruptcy proceeding, "[t]he heart of Debtor's complaint concerns the avoidance of fraudulent transfers and implicates non-bankruptcy contractual and tort issues in only the most peripheral manner." *Id.* at 497. There are scores of cases taking this same approach. *See, e.g.*, *In re Huffman*, 486 B.R. 343, 365 (Bankr. S.D. Miss. 2013) (denying motion to compel arbitration where bankruptcy proceeding "center[s] upon four core issues and only one noncore issue"); *AmeriCorp, Inc. v. Hamm*, 2012 WL 1392927, at *7 (N.D.

Ala. Apr. 23, 2012) (affirming bankruptcy court order denying motion to compel arbitration of a non-core claim); *In re Russell*, 402 B.R. 188, 193-94 (Bankr. N.D. Miss. 2009) (same).

In *Zimmerli*, 432 B.R. 238, for instance, the court explained that a proper determination of whether or not to compel arbitration of a bankruptcy proceeding "is not simply a numbers game to determine whether the causes of action are derived exclusively from the Code" because "[m]any issues in bankruptcy cases arise under state law but *must* be subject to the bankruptcy court's jurisdiction for it to do its job." *Id.* at 243. Instead, the "critical factor is what causes of action dominate." *Id.*; *see also id.* (noting that the key question is whether the "thrust" of the proceeding is centered on the bankruptcy laws). In that case—a post-plan confirmation Chapter 13 proceeding that involved both statutorily core claims and a number of non-core claims—the court made clear that a bankruptcy court can exercise jurisdiction "if a post-confirmation dispute involves implementation or execution of a confirmed plan." *Id.* (quoting *In re Burns*, 2006 WL 2385252, *7 (Bankr. N.D. Tex. Aug. 9, 2006) (emphasis omitted)).

And, in *Payton Construction*, 399 B.R. 352, the court explained that the "same reason[s]" that motivated the Fifth Circuit to "reject[] a position that would categorically have deemed arbitration of core bankruptcy proceedings inherently irreconcilable with the Bankruptcy Code" weigh strongly in favor of an approach

that "noncore matters should not, *a priori*, be channeled into arbitration without benefit of an inherent-conflict analysis: the core or noncore status of a particular proceeding is not a dispositive indicator of whether arbitration of the matter would conflict with a purpose of the Bankruptcy Code." *Id.* at 362-63.

Within this Circuit, too, courts have followed an approach that applies a common-sense balancing of competing interests, without a hyper-technical focus on the "core-ness" of the claims, to decide whether to enforce a motion to compel arbitration. In *M & M Independent Farms*, 2011 WL 5902606, at *2-4, for instance, the bankruptcy court denied a motion to compel arbitration of a breach of contract claim and an unfair and deceptive practices claim, claims similar to the *Stern* claim here. In rejecting a creditor's desire to bifurcate the proceeding, the court explained that, for the *Stern*-like claims, any non-exempt "monies [the debtor] ultimately might recover would be assets of the estate." *Id.* at *4. Thus, "[t]he arbitration process would impose additional, unnecessary litigation costs on the estate," depleting the resources potentially available to pay creditors. *Id.* Ultimately, applying the lessons of *White Mountain*, the court concluded that "[o]rdering arbitration and staying the adversary proceeding would substantially interfere with [the debtor's] efforts to reorganize, which evidences an inherent

conflict between arbitration and the underlying purpose of the bankruptcy laws." *Id.*[5]

Stern and *Arkison* do nothing to change the framework a bankruptcy court must follow when determining whether to send even *Stern* claims to arbitration. *See, e.g.*, *Eber*, 687 F.3d 1123 (making no mention of *Stern* in addressing the question of whether arbitrating bankruptcy claims is inconsistent with the Bankruptcy Code). That is because the most *Stern* did was transform a certain set of claims—those "that are defined as 'core' under § 157(b) but may not, as a constitutional matter, be adjudicated as such"—from core to non-core. *EBIA*, 2014 WL 2560461, at *7 (U.S. June 9, 2014) (explaining that a bankruptcy court should "simply treat[] the claims as non-core"). For *Stern* claims, a bankruptcy court must still, then, decide whether there is an "inherent conflict" between the Bankruptcy

[5] *D & B Swine Farms*, 2011 WL 6013218, a case in which the bankruptcy court sent a *Stern* claim to arbitration, is not to the contrary. That decision simply shows that it is within the bankruptcy court's discretion to decide whether sending claims to arbitration would interfere with the goals of the bankruptcy proceeding. In that case, the bankruptcy court had initially voiced concerns over bifurcating the claims, but when those concerns evaporated, the court saw no conflict and so sent the claims to arbitration. *Id.* at *3 n.6 (compelling arbitration where there "are no longer 'core proceedings'" in the case and where the "case has been converted to chapter 7"); *see also Barker*, 2014 WL 2113684, at *6 (compelling arbitration where the party against whom the claim was filed was not creditor and had not submitted a claim against the estate); *In re Gurga*, 176 B.R. 196, 199 (B.A.P. 9th Cir. 1994) (compelling arbitration of noncore claims that did not touch on "any substantive right created in the Bankruptcy Code," but, rather, involved "the right to have a contract claim decided in the bankruptcy court").

Code and the FAA, and must still exercise its discretion to decide whether sending the claims to arbitration would frustrate the core objectives of bankruptcy. *See, e.g.*, *Edwards*, 2013 WL 5718565, at *2 (evaluating whether to send *Stern* claims to arbitration under the *White Mountain* test and opting to send them to arbitration); *Butler*, 2013 WL 2102969, at *3 (discussing bankruptcy court's decision, under *White Mountain* balancing test, to decide against sending *Stern* claims to arbitration).

2. Sending the *Stern* Claim to Tribal Arbitration Would Inherently Conflict with the Purposes of the Bankruptcy Code.

Because the *White Mountain* framework still applies, the bankruptcy court was well within its discretion to keep the *Stern* claim in bankruptcy. Here, Ms. Moses' *Stern* claim is based on the allegation that CashCall illegally attempted to collect on an illegal and invalid loan agreement, a claim that itself rests on the resolution of Moses' declaratory judgment claim. It is, therefore, "inextricably intertwined with Moses' first claim for relief," JA 127; *see also* JA 86, and not amenable to bifurcation. *See Thorpe*, 671 F.3d at 1022 (agreeing that, where a claim is "inextricably intertwined" with a bankruptcy proceeding, deciding the claim "in any forum other than a bankruptcy court would conflict with fundamental bankruptcy policy"); *Gandy*, 299 F.3d at 499 ("Although it is technically possible that the Debtor's case be divided and some claims be sent to arbitration," such an approach "would be of disservice to the parties and defeat the

purposes of the Bankruptcy Code."). Moreover, because, as the bankruptcy court found, "the bankruptcy estate will recover any non-exempt funds and disburse them to claims in accordance with the bankruptcy code," Ms. Moses' *Stern* claim directly affects the estate and the ability of Ms. Moses to pay her debts. *See* JA 87; *M & M Independent Farms*, 2011 WL 5902606, at *4.[6]

CashCall contends that in no case may a bankruptcy court refuse to compel arbitration for claims that are "inextricably intertwined" and would "largely stand or fall" on a core claim. CashCall Br. 40. In support, it focuses largely on *Summer Rain v. Donning Co./Publishers, Inc.*, 964 F.2d 1455 (4th Cir. 1992), and implies that this Court has already rejected such a basis for declining to send even "inextricably intertwined" bankruptcy claims to arbitration. CashCall Br. 40. That is highly misleading (for the same reasons discussed below at pps. 48-50). *Summer Rain*, like others that CashCall relies upon, arose *outside* of bankruptcy, in the context of a motion to compel arbitration of garden variety civil claims. *See Summer Rain*, 964 F.2d at 1457-58. There was no bankruptcy proceeding, and there was no discussion of any inherent conflict between a set of statutory regimes.

The point that Ms. Moses' second claim is "inextricably intertwined" with her first, and therefore arbitration of it poses a similarly inherent conflict with the

[6] CashCall contends that the result would be different under the Third Circuit's decision in *Mintze*, 434 F.3d 222. CashCall Br. 48-49. To the extent CashCall is correct, *Mintze* is not, of course, the law in this Circuit; *White Mountain* is.

Bankruptcy Code, is perhaps best illustrated by again imagining what would happen if Ms. Moses' claim was sent to tribal arbitration. Suppose that, before the bankruptcy court rules on Ms. Moses' first claim, an arbitrator reaches the conclusion on Ms. Moses' second claim that the loan agreement was not illegal under the CFA, and, therefore, in turn, that CashCall did not violate the North Carolina Debt Collection Practices Act. What then? Would the bankruptcy court be collaterally estopped from deciding whether CashCall's loan agreement is illegal—an indisputably core bankruptcy question? That setup would "substantially interfere with [the debtor's] efforts to reorganize" and "inherent[ly] conflict" with the intent of the Bankruptcy Code. *White Mountain*, 403 F.3d at 170. It would mean, first, that, an arbitrator would have decided an indisputably core bankruptcy matter that Congress specifically entrusted bankruptcy courts to decide as part of centralized proceedings, and second, it might pit two inconsistent rulings on a key legal question at the heart of CashCall's effort to recover money from Ms. Moses against each other. *See id.* at 169 ("[P]ermitting 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."); *Gandy*, 299 F.3d at 499 ("Parallel proceedings would be wasteful and inefficient, and potentially could yield different results and subject parties to dichotomous obligations."); *Eber*, 687 F.3d at 1131 (affirming the denial of a motion to compel

arbitration when the arbitrator would have had to, as a prerequisite to adjudicating the dispute in question, decide a question that was undoubtedly reserved for bankruptcy proceedings).

II. Categorically Requiring a Bankruptcy Court To Compel Claims Within an Adversary Proceeding to Tribal Arbitration Would Undermine the Bankruptcy Code and Is Not Mandated by the FAA.

CashCall focuses the remainder of its brief on the argument that, more broadly, the objectives of the bankruptcy laws should almost always fall to the FAA's preference for arbitration. But that view fails to recognize—as the courts unanimously have—the inherent conflict between arbitration and centralized bankruptcy proceedings.

A. Unlike Other Contexts, the Objectives of the Bankruptcy Code Pose an Inherent Conflict with the FAA and Justify a Bankruptcy Court's Denial of Arbitration.

CashCall bristles at the idea that core bankruptcy interests—for example, centralization of disputes concerning a debtor's legal obligations and protecting creditors and reorganizing debtors from piecemeal litigation—can ever justify a court's decision to keep a claim otherwise subject to arbitration in bankruptcy. CashCall Br. 14-25. That is wrong—and courts have said exactly the opposite. *See White Mountain*, 403 F.3d at 170 and cases cited at p. 32 n.3.

Looking for a way around these cases, CashCall argues that a bankruptcy court's decision to deny arbitration is nothing more than an "example of the

longstanding judicial hostility to arbitration agreements," and points to a host of cases outside the Bankruptcy context as evidence. *See* CashCall Br. 33-35 (citing, *e.g.*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 80 (2000); *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983); and *Summer Rain*, 964 F.2d at 1459). But this completely misses the point. Whatever happens outside of bankruptcy is irrelevant for determining what should happen inside bankruptcy—precisely because the objectives of the Bankruptcy Code are so different. As the Second Circuit recognized in *United States Lines*, disputes involving the Bankruptcy Code and the FAA often "present[] a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution." 197 F.3d at 640; *see also Thorpe*, 671 F.3d at 1023 n.9 (rejecting a creditor's argument "that judicial economy and centralization of disputes are not sufficient bases for nonenforcement of an otherwise applicable arbitration clause" because the typical rules governing enforcement of arbitration "do[] not hold in the bankruptcy context"). The upshot: bankruptcy is different.

In fact, in *National Gypsum*, the Fifth Circuit rejected CashCall's exact argument that courts may not "weigh[]" the "competing" efficiency and centralization concerns of bankruptcy. *See* CashCall Br. 35. There, a creditor also pointed to *Moses Cone* and argued that "the Bankruptcy Court improperly relied

on efficiency concerns to refuse enforcement of the . . . arbitration provision." *National Gypsum*, 118 F.3d at 1069 n.21. The court rejected this analogy to cases outside bankruptcy. Unlike in cases involving other federal statutes, the court explained, "[i]n the bankruptcy context . . . efficient resolution of claims and conservation of the bankruptcy estate assets are integral purposes of the Bankruptcy Code." *Id.* Thus, "insofar as efficiency concerns might present a genuine conflict between the Federal Arbitration Act and the [Bankruptcy] Code—for example where . . . severe delays would prejudice the rights of creditors or the ability of a debtor to reorganize—they may well represent legitimate considerations." *Id.*[7]

The point here is that, for bankruptcy, "secur[ing] a prompt and effectual administration and settlement of the estate" is of prime importance. *Katchen v. Landy*, 382 U.S. 323, 328 (1966). Centralization means that disputes are resolved quickly, finally, and more cheaply for both the creditors and debtors. And *de*centralization poses an enormous threat for bankruptcy—it "exacerbates losses" and creates additional burdens on already limited estates that would be "devastating." Br. of Amicus Am. College of Bankr., at 3, *EBIA v. Arkison*, __ S.

[7] That is why CashCall's reliance on *KPMG LLP v. Cocchi*, __ U.S. __, 132 S. Ct. 23 (2011), is also misplaced. Courts that have considered the effect of that case on a bankruptcy court's discretion to deny arbitration has disagreed with CashCall. *See, e.g.*, *Eber*, 687 F.3d at 1131 (rejecting the creditor's reliance on *KPMG* because it "was not a bankruptcy case").

Ct. __, 2014 WL 2560461 (June 9, 2014). Categorically *de*-centralizing any claims, including *Stern* claims—which is what CashCall has urged here—would "threaten the orderly administration of our bankruptcy system" because the basis of the bankruptcy system *is* centralization and efficiency. *Id.* at 2.

Moreover, centralization and efficiency are not the only core objectives that can play a role in a bankruptcy court's decision on a motion to compel arbitration. As numerous courts have explained, other factors—including interests CashCall explicitly disavows—are also relevant considerations. These include the risk of inconsistent judgments (and the possibility of collateral estoppel for core bankruptcy issues), the avoidance of parallel proceedings, the absence of a pre-existing arbitration proceeding, the potentially indefinite delay associated with trying to arbitrate an adversary proceeding, the imposition of additional and unnecessary litigation costs on the parties, and interference with a bankruptcy court's administration of the estate. *See, e.g.*, *Eber*, 687 F.3d at 1131 (risk of inconsistent judgments and possibility of collateral estoppel coupled with absence of pre-existing arbitration proceeding); *Gandy*, 299 F.3d at 499 (desire to avoid bifurcation); *National Gypsum*, 118 F.3d at 1069 n.21 (absence of pre-existing arbitration); *M & M Independent Farms*, 2011 WL 5902606, at *4 (substantial delay and imposition of unnecessary litigation costs); *Thorpe*, 671 F.3d at 1022 (interference with administration of estate).

Against this weight of authority, the best CashCall can do are two cases that referred non-core claims to arbitration, CashCall Br. 33, but in neither of these cases had the *creditor* initiated a bankruptcy proceeding by filing a proof of claim and asking the bankruptcy court to resolve it. So, for instance, in *TP, Inc.*, a debtor haled an unwilling creditor into bankruptcy, seeking to litigate state-law claims that the creditor had already begun litigating in state court. *See* 479 B.R. at 377. And, the bankruptcy court explicitly found that the non-core claims were *not* "inextricably intertwined" with the core claims, so it made sense to refer them to arbitration. *Id.* at 385; *see also D & B Swine Farms*, 2011 WL 6013218, at *3 n.6 (sending claims to arbitration only where core claims were "no longer" in the case and where case had been converted to Chapter 7 proceeding). And, in *Fries*—another case CashCall cites repeatedly—the bankruptcy court chose to send a core claim to arbitration, but only because an earlier (and similar) claim had already been sent to, and resolved in, arbitration. 2007 WL 1073868, at *1. The proceeding had already been broken up, so there was no "need to protect anyone from piecemeal litigation." *Id.*

These cases say nothing about a bankruptcy court's discretion when faced with a creditor, like CashCall, that *itself* has invoked the jurisdiction of the bankruptcy court to resolve its claim and is trying to force into arbitration claims that will affect a debtor's reorganization process, will require an arbitrator to

decide a core debtor-creditor right, will spark parallel proceedings, and will risk inconsistent judgments.

B. This Case Perfectly Illustrates How Adopting CashCall's Position Would Seriously Jeopardize the Fundamental Operation of the Bankruptcy Courts.

With the rising tide of individual Chapter 13 bankruptcy proceedings, along with the increasing number of small dollar payday loan lenders, allowing a payday lender to siphon off key disputes into arbitration after losing out in bankruptcy would fundamentally threaten the ability of bankruptcy courts across the country to do their job.

In part, the problem is one of sheer numbers—having to bifurcate issues or pause bankruptcy proceedings interferes with the adjudication of tens of thousands of bankruptcy proceedings and could threaten the system itself. *See* Am. College of Bankr. *EBIA* Br., at 2-3. At the end of 2012, there were over 70,000 adversary proceedings pending in bankruptcy courts, *id.* at 34, and in the Eastern District of Virginia alone there were over 13,000 cases involving *Stern* claims between 2009 and 2013, Br. of Amicus Am. Bar Ass'n, at 21, *EBIA v. Arkison*, __ S. Ct. __, 2014 WL 2560461 (June 9, 2014). The problem is particularly pernicious in individual consumer bankruptcy proceedings, where the estate is small, meaning every claim has a potentially large impact, and the costs of bifurcation and delay could threaten to overwhelm the estate—a problem for both the creditors and

debtors. *See* Br. of Amicus Nat'l Ass'n of Ch. Thirteen Trustees, at 26-27, *EBIA v. Arkison*, __ S. Ct. __, 2014 WL 2560461 (June 9, 2014) (explaining how multi-forum litigation could deplete a small consumer bankruptcy estate).

Nevertheless, CashCall insists that sending Ms. Moses' claims to arbitration will not actually have an impact on her case because, according to CashCall, "there is no real procedural difference" between having the bankruptcy court's conclusions of law and findings of fact be finally entered by a district court and have the claim be heard by an arbitrator. CashCall Br. 31. Not so.

As an initial matter, CashCall's effort to withdraw its proof of claim was a pure attempt to deprive the bankruptcy court of jurisdiction and strengthen its effort to shift the claims to arbitration. CashCall filed its motion to withdraw nine minutes before it filed its motion to compel arbitration, arguing that the FAA required the enforcement of the payday loan's arbitration clause. In similar circumstances, courts have looked suspiciously on motions to withdraw claims as "really an attempt[ ] to evade an adverse ruling" and "forum shop." *Roberson v. Ford Motor Credit Co.*, 2011 WL 1740534, at *2 (D. Md. Apr. 29, 2011).

And that effort to forum shop would, almost certainly, have forced Ms. Moses' adversary proceeding fully down Alice's Rabbit Hole—delaying indefinitely (and perhaps permanently) any resolution of the claims. As we explained earlier, to say that this arbitration agreement has "problems," *Heldt*,

2014 WL 1330924, at *16, is an understatement. Despite advertising its arbitration process as "simple[]," JA 75, multiple courts have explained that CashCall's arbitration agreement amounts to an arbitration black hole, in which potential litigants are required to litigate their claims under nonexistent rules, sometimes before nonexistent arbitrators, in a forum that, itself, may not actually exist. This is not hyperbole.

In *Heldt*, the court explained that CashCall's requirement that the arbitration is to "be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules" suffers from two major problems. 2014 WL 1330924, at *19. "First, the Cheyenne River Sioux Tribe does not have 'consumer dispute rules;' and, second, at least with respect to a previous arbitration, the arbitrator chosen was not an 'authorized representative' of the Cheyenne River Sioux Tribal Nation." *Id.* at *18. Other courts have reached the same conclusion. *See Inetianbor*, 962 F. Supp. 2d at 1305, 1309 (finding that CashCall's reference to arbitration "conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules" is an impossibility because it would require any arbitration to take place in

an "arbitral forum that is not available," under "consumer dispute rules [that] do not exist").[8]

There are hundreds of these types of claims filed in Chapter 13 bankruptcy proceedings across the country each year. To allow CashCall to remove every one of them—once challenged—to an arbitral forum that very possibly has never arbitrated a single claim and very possibly has no legitimate arbitrator would make a mockery of the dispute resolution system, and would do untold damage to those debtors who need resolution over their financial affairs. In short, arbitration in this case would almost certainly mean no arbitration at all, eliminating any ability of the debtor to have her claims resolved, and leaving a gaping hole in her ability to reorganize and obtain a fresh start. That interference runs headlong into the purposes of the bankruptcy laws.

CONCLUSION

For these reasons, the judgment below should be affirmed.

[8] Nor is the arbitration agreement's reference to legitimate arbitration forums—AAA or JAMS—curative; it only confuses matters more. In passing on this clause, the court in *Heldt* explained that it poses another "conundrum"—it conflicts with the earlier requirement that the arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative." 2014 WL 1330924, at *19. There is no evidence that any "authorized representative" of the Cheyenne River Sioux Tribal Nation is an arbitrator in the AAA or JAMS system. *Id.*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,709 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

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June 26, 2014

CERTIFICATE OF SERVICE

I certify that on June 26, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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