16-2496

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re: Orrin S. Anderson, AKA Orinn S. Anderson, AKA Orrin Scott Anderson,
Debtor

Orrin S. Anderson, on behalf of himself and all others similarly situated, AKA Orrin Scott Anderson,
Plaintiff-Appellee,

v.

Credit One Bank, N.A.
Defendant-Appellant

On Appeal from the United States District Court for the Southern District of New York, No. 15-cv-04227, Hon. Nelson S. Román

BRIEF OF PLAINTIFF-APPELLEE ORRIN S. ANDERSON

BOIES, SCHILLER & FLEXNER LLP
George F. Carpinello, Esq.
Adam R. Shaw, Esq.
Anne M. Nardacci, Esq.
Jenna C. Smith, Esq.
30 South Pearl Street
Albany, NY 12207
(518) 434-0600
Email: *gcarpinello@bsfllp.com*
ashaw@bsfllp.com
anardacci@bsfllp.com
jsmith@bsfllp.com

CHARLES JUNTIKKA & ASSOCIATES
Charles Juntikka, Esq.
30 Vesey Street, Suite 100
New York, NY 10007
(212) 315-3755
Email: *charles@cjalaw.com*

Attorneys for Plaintiff-Appellee Orrin S. Anderson

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STATEMENT OF THE ISSUES

1. Whether the bankruptcy court properly exercised its discretion in denying Defendant Credit One's motion to compel arbitration of Plaintiff Orrin Anderson's claim for violation of the discharge injunction in 11 U.S.C. § 524, where compelling arbitration would inherently conflict with the purposes of the Bankruptcy Code.

2. Whether enforcement of a bankruptcy court's discharge injunction under § 524 of the Bankruptcy Code is outside the scope of a private arbitration agreement.

STATEMENT OF THE CASE

In January 2015, Plaintiff Orrin Anderson brought this class action against Defendant Credit One Bank, N.A. ("Credit One") for willfully seeking to collect a discharged debt in violation of the discharge injunction found in 11 U.S.C. § 524. This adversary proceeding is one of six adversary proceedings pending in bankruptcy court in the Southern District of New York against creditors JP Morgan Chase, GE Capital, Citibank, Bank of America, Credit One and Capital One. All defendants are alleged to have engaged in the same illegal conduct against similarly situated classes of plaintiffs.[1]

[1] *See Haynes v. Chase Bank USA, N.A. (In re Haynes),* Adv. Proc. No. 13-08370-RDD; *Belton v. GE Capital Consumer Lending, Inc. a/k/a GE Money Bank (In re Belton),* Adv. Proc. No. 14-8223-RDD; *Bruce v. Citigroup, Inc., et al (In re*

Motions to compel arbitration were made in this and two other related proceedings, *Belton v. GE Capital Consumer Lending, Inc.* and *Bruce v. Citigroup, Inc., et al*. The bankruptcy court denied the defendants' motions to compel arbitration in all three actions. JA 528; *In re Belton*, Adv. Proc. No. 14–08223 (RDD) (Bankr. S.D.N.Y. Nov. 10, 2014), Dkt. No. 79, SA 34 ("*Belton I*") and *In re Bruce*, Adv. Proc. No. 14-08224 (RDD), Dkt. No. 38. This appeal concerns the bankruptcy court's denial of Credit One's motion to compel arbitration in the proceedings below.

I. Credit One's Violation of the Discharge Injunction.

Providing debtors with a fresh start is one of the most fundamental and salutary purposes of the Bankruptcy Code. The Bankruptcy Code provides and protects the fresh start by broadly enjoining any effort to collect debts that have been discharged in bankruptcy. *See* 11 U.S.C. § 524(a)(2) ("A discharge in a case under this title operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived."). Here, Plaintiff Anderson's credit card debt owed to Defendant

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Bruce), Adv. Proc. No. 14-08224-RDD; *Echevarria v. Bank of America Corporation, et al. (In re Echevarria)*, Adv. Proc. No. 14-08216-RDD; *Anderson v. Credit One Bank, N.A. (In re Anderson)*, Adv. Proc. No. 15-08214-RDD; *Anderson v. Capital One Bank (USA), N.A. (In re Anderson)*, Adv. Proc. No. 15-08342-RDD. These six proceedings have been coordinated for all pretrial purposes.

Credit One was discharged in his Chapter 7 bankruptcy proceedings. Credit One reported Plaintiff's and other putative class members' credit card debts as due and owing and refused to correct that reporting even though it knew the credit card debt had been discharged in bankruptcy. Credit One does this to pressure debtors to pay the discharged debt to Credit One or to third party debt collectors who buy the debt from Credit One.

Courts in this Circuit and elsewhere have held that refusing or failing to update credit reporting to pressure debtors to pay discharged debts—in the manner that Credit One has done here—violates the discharge injunction. *See, e.g., Torres v. Chase Bank USA, N.A.* (*In re Torres*), 367 B.R. 478, 486 (Bankr. S.D.N.Y. 2007) (finding that "false or outdated reporting to credit reporting agencies, even without additional collection activity, can constitute an act to extract payment of a debt in violation of Section 524(a)(2)") (collecting cases); *McKenzie-Gilyard v. HSBC Bank Nevada N.A. (In re McKenzie-Gilyard)*, 388 B.R. 474, 487-88 (Bankr. E.D.N.Y. 2007) (denying summary judgment, stating that "a failure to update a tradeline to reflect the status of an account may be an intentional—and effective—tool to induce a debtor to make payments on an account"); *Russell v. Chase Bank USA, N.A. (In re Russell)*, 378 B.R. 735, 741 (Bankr. S.D.N.Y. 2007) (denying motion to dismiss where plaintiff had alleged "a deliberate refusal to correct information previously supplied to credit reporting agencies, for the purpose of coercing him to repay a discharged debt").

In *Torres*, Chase Bank refused to correct its credit reporting to reflect that a debt had been discharged in bankruptcy. The court held that "a credit report that continues to show a discharged debt as 'outstanding,' 'charged off,' or 'past due' is unquestionably inaccurate and misleading, because end users will construe it to mean that the lender still has the ability to enforce the debt personally against the debtor, that is, that the debtor has not received a discharge, that she has reaffirmed the debt notwithstanding the discharge, or that the debt has been declared non-dischargeable." *Id*. at 487-88. The court further ruled that it was reasonable to infer that Chase, whose business involves making and evaluating credit disclosures, knows that the existence of such inaccurate and misleading entries on their credit reports pressures the plaintiffs to pay their discharged debts. *Id*. at 486-87.

The bankruptcy court followed the same reasoning when it denied motions to dismiss in the six related actions below. *See, e.g.*, *Haynes v. Chase Bank USA, N.A. (In re Haynes)*, Adv. Proc. No. 13-08370-RDD, 2014 WL 3608891, at *5 (Bankr. S.D.N.Y. July 22, 2014).

II. The Bankruptcy Court's Denial of Credit One's Motion to Compel Arbitration.

Credit One moved to compel arbitration in the adversary proceeding below on March 3, 2015. JA 401. On May 5, 2015, the bankruptcy court held a hearing on the motion. JA 444. On May 14, 2015, the bankruptcy court entered an order

denying Credit One's motion. JA 528. The bankruptcy court, exercising its discretion, denied the motion for all the reasons stated at the hearing on the matter, which included all the reasons set forth in its opinion denying the similar motion made by GE Capital in the related *Belton* action. JA 528; JA 491-92.

In *Belton I*, the bankruptcy court held that, under the facts presented, which were virtually identical to the facts in this case, arbitration would inherently conflict with the underlying purposes of the Bankruptcy Code. SA 44-64. Noting that no court had ever compelled arbitration of a claim to enforce the discharge injunction standing alone, the bankruptcy court applied the inherent conflict analysis set forth by the Supreme Court in *Shearson/American Express v. McMahon*, 482 U.S. 220, 226-27 (1987) and this Court in *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104 (2d Cir. 2006). *Id*. The court found that the discharge (and the related fresh start that it provides a debtor) is *the* fundamental purpose underlying the Bankruptcy Code. SA 57-58. The court also concluded that forcing arbitration of violations of the discharge injunction, like the one alleged by Plaintiff here, would seriously jeopardize the value of the discharge and the related fresh start and would undermine the adjustment of debtor/creditor relations that are committed to bankruptcy courts and, as such, those claims should not be arbitrated. SA 61. The bankruptcy court noted that its ruling was consistent with this Court's ruling in *Hill*, which "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." SA 59 (citing *Hill*, 436 F.3d at 104).

The bankruptcy court also noted that obtaining injunctive relief (such as the enforcement of the discharge injunction) in arbitration is "uncertain and cumbersome, with enforcement power resting in the district court, not the arbitrator or arbitration panel that issued the decision." SA 66. For that reason, the bankruptcy court concluded that it was more likely that Congress intended the enforcement of the discharge injunction to be left to the bankruptcy court. SA 66. In addition, the bankruptcy court found that "complete and consistent relief is more likely to occur if [the disputes are] determined by … a bankruptcy court [rather] than on an arbitration-by-arbitration basis of separate alleged violations of the discharge." SA 66. Accordingly, these findings and determinations are at issue here.

III. The District Court's Affirmance of the Bankruptcy Court's Denial of Credit One's Motion to Compel Arbitration.

Following the bankruptcy court's denial of its motion to compel arbitration, Credit One appealed to the district court. JA 592. On June 14, 2016, the district court affirmed the bankruptcy court's order denying Credit One's motion to compel arbitration. SA 31. As did the bankruptcy court, the district court properly considered the conflicting policies of the FAA and the Bankruptcy Code in accordance with the law. The district court applied the inherent conflict analysis

articulated by the Supreme Court in *McMahon* and this Court in *Hill* and reached the same conclusion as the bankruptcy court—it held that there is an inherent conflict between Plaintiff's claim for violation of the discharge injunction and arbitration. SA 23-32. The district court reasoned that, as this Court stated in *Hill*, providing debtors with a financial fresh start is a central objective of the Bankruptcy Code and because "the discharge is so fundamentally related to a debtor's fresh start," Plaintiff's claim for violation of the discharge injunction cannot be arbitrated. SA 27-28.

Importantly, the district court held that there were two other considerations that supported its holding. SA 28-29. First, the district court held that because the discharge injunction is an affirmative order of the bankruptcy court, and because bankruptcy courts are uniquely suited to interpret and enforce their own orders, Plaintiff's claim could not be arbitrated. SA 28 (citing, *inter alia*, *Hill*, 436 F.3d at 108-09 (finding that bankruptcy court has "undisputed power . . . to enforce its own orders"); *Deep v. Copyright Creditors*, 122 F. App'x 530, 533 (2d Cir. 2004) (citing *In re Casse*, 198 F.3d 327, 333 (2d Cir. 1999) ("The bankruptcy court [is] in the best position to interpret its own orders.")). Second, just as the bankruptcy court found, the district court also found that uniform application of the Bankruptcy Code is an important policy goal and that goal is "furthered by federal, class action litigation." SA 29. By contrast, arbitrating individual claims in separate arbitrations "could create wildly inconsistent results," especially given

that arbitrators have broad discretion in determining whether to apply collateral estoppel offensively. SA 30.

Thus, the district court affirmed the bankruptcy court's denial of Credit One's motion to compel arbitration. SA 31. On July 13, 2016, Credit One filed a notice of appeal, which it then amended on July 26, 2016. JA 619.

IV. District Court Proceedings in *Belton* and *Bruce*.

Even though the *Belton* and *Bruce* cases are not at issue here, their procedural history bears mentioning. Defendants in *Belton* and *Bruce* also appealed the bankruptcy court's denial of their motions to compel arbitration in those actions. On appeal, District Court Judge Briccetti reached a result contrary to District Court Judge Román in the instant case, and reversed the bankruptcy court's decision in those actions. *See Belton v. GE Capital Consumer Lending, Inc. (In re Belton), Bruce v. Citigroup, Inc. (In re Bruce)*, Nos. 15-cv-01934 (VB), 15-cv-03311 (VB), 2015 WL 6163083 (S.D.N.Y. Oct. 15, 2015) ("*Belton II*"). The district court summarily ruled that the bankruptcy court had "misread" *Hill* and held that *Hill* "cannot be construed as supporting the notion that arbitration is unavailable whenever 'the debtor's fresh start is at issue.'" *Id*. at *7 (quoting *Belton I*, SA 59).

Instead the district court held that "*Hill* stands for the more modest proposition that claims alleging violations of the Bankruptcy Code should not be arbitrated if those claims are 'integral to [the] bankruptcy court's ability to

preserve and equitably distribute assets of the estate' or if arbitration would 'substantially interfere with [the debtor's] efforts to reorganize.'" *Id*. at *7 (quoting *Hill*, 436 F.3d at 110). The court went on to state that under *Hill*, arbitration of claims under the Bankruptcy Code is required when 'arbitration would not interfere with or affect the distribution of the estate' or 'would not affect an ongoing reorganization,' as was the case there." *Id*. (*quoting Hill*, 436 F.3d at 109-10).

According to the *Belton II* court, because arbitration would not interfere with or affect the distribution of the estates and would not affect any ongoing reorganization in *Belton* and *Bruce*, there was no inherent conflict between arbitration of the plaintiffs' claims to enforce the discharge injunction and the purposes of the Bankruptcy Code. *Id*. at *6-9. As such, it reversed the bankruptcy court's denial of the defendants' motions to compel arbitration. *Id*. at *9.

Contrary to the standard of review recently set forth by this Court in *In re Lehman Bros. Holdings Inc.*, the district court afforded no deference to the bankruptcy court's findings of fact or analysis of the policies underlying the Bankruptcy Code. *In re Lehman Bros. Holdings Inc.*, __ F. App'x __, 2016 WL 5853265 (2d Cir. Oct. 6, 2016).

The plaintiffs in *Belton* and *Bruce* subsequently sought mandamus relief from this Court. *Belton v. GE Capital Consumer Lending, Inc.* (*In re Belton*), 16-833, Dkt. 1-2; *Bruce v. Citigroup Inc., et al.* (*In re Bruce*), 16-830, Dkt 1-2. This

Court ordered the defendants to respond to the mandamus petitions, which they did in August 2016. 16-833, Dkt. Nos. 26, 33; 16-830, Dkt. Nos. 26, 33. On December 15, 2016, the Court issued an order staying the mandamus proceedings in *Belton* and *Bruce* pending a ruling in this appeal. 16-833, Dkt. No. 68; 16-830, Dkt. No. 69.

V. Current Status of this Action.

Proceedings in the bankruptcy court continue. During a hearing before the bankruptcy court on September 22, 2016, Credit One was found to have engaged in significant misconduct with respect to the discovery process. *See* JA 257 at 53:3-55:3; *see also id*. at 55:6-64:18. On November 10, 2016, Judge Drain ruled from the bench that the sanction for this misconduct would be a default judgment as to the merits of the action. *See Anderson v. Credit One Bank, N.A. (In re Anderson)*, Adv. Proc. No. 15-08214 (RDD), Dkt. No. 101 at 4:13-15 ("I have concluded . . . that the appropriate sanction here is a default judgment on the merits, but not with respect to class certification or damages."). Currently, the parties are proceeding with class certification and adjudicating damages.[2]

[2] In the course of the litigation, each of the five defendant banks in the related actions have ceased their inaccurate reporting and corrected prior inaccurate reporting. By contrast, Credit One repeatedly refused to do so until after the bankruptcy court threatened it with a default judgment on the merits. *See Anderson v. Credit One Bank, N.A. (In re Anderson)*, Adv. Proc. No. 15-08214 (RDD), Dkt. No. 101 at 9:3-11:9.

SUMMARY OF THE ARGUMENT

The district court's order should be affirmed because compelling arbitration of claims to enforce the discharge injunction would strip bankruptcy courts of their exclusive contempt and equitable powers and put them in the hands of private arbitrators. Federal courts should not be forced to yield these powers to arbitrators. Indeed, courts have held the exact opposite—federal courts alone have the power to police court orders.

If claims to enforce the discharge injunction can be compelled to arbitration, bankruptcy courts will not only be deprived of the power to enforce court orders, but they will be deprived of their power to protect the financial fresh start provided by their discharge orders, one of the most important purposes, if not *the* most important purpose, of the Bankruptcy Code. Such a result would extend far beyond what Congress intended in adopting the Federal Arbitration Act ("FAA"), which was enacted to ensure the validity of *private agreements* to arbitrate private disputes. The FAA was never intended to strip courts of their power to enforce their orders, especially orders at the core of bankruptcy courts' jurisdiction. Thus, there is an inherent conflict between arbitration of Plaintiff's claim and the Bankruptcy Code; it would be antithetical to the fundamental purpose of the Bankruptcy Code to require bankruptcy judges to cede enforcement of their discharge orders to private arbitrators.

Further, requiring claims for contempt of bankruptcy court orders to go to arbitration undermines the salutary purposes of the Bankruptcy Code such as centralization of claims arising under the Bankruptcy Code, adjustment of debtor/creditor relations, and protection from piecemeal litigation. Arbitration of discharge injunction violations also prevents bankruptcy courts from addressing widespread harms, like Credit One's wrongful conduct here, which *systemically* affects debtors and the bankruptcy courts. This is especially so under the unique facts of this case.

Here, hundreds of thousands of putative class members assert virtually identical claims against Credit One for violation of the discharge injunction. Moreover, all six banks that are defendants in the related cases have engaged in the same conduct, and altogether their actions have affected millions of former debtors. Bankruptcy Judge Drain, before whom all six cases have been brought, has a much broader perspective on the issue and how it affects former debtors than any individual private arbitrator hearing only the claims of one former debtor against one creditor.

Unlike bankruptcy judges, private arbitrators are not specialists and need not even be attorneys, and they do not have the ability or experience to promote institutional bankruptcy policies and procedures and protect against systemic harms the same way that Article I bankruptcy judges do. As the bankruptcy court explained, it adjudicates cases dealing with violations of § 524 on an almost daily

basis. That court sees firsthand the effect of such violations on the ability of debtors to obtain a fresh start, and that court applies that experience every time it decides what remedy is appropriate where there is a violation. And it does so in the context of adjusting debtor/creditor relations under powers committed to the bankruptcy court. A private arbitrator has none of that background or experience.

For all of these reasons, it is not surprising then that no court—save one—has ever compelled arbitration of a § 524 claim standing alone. *See Belton I*, SA 58 ("[E]very 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.").

Credit One's argument relies predominantly on the decision in *Belton II*. The district court's decision in *Belton II* misapplies this Court's decision *Hill* and runs afoul of the standard of review set forth in both *Hill* and *Lehman Bros.* *Hill* repeatedly distinguished between an automatic stay claim, which had virtually no impact on the underlying bankruptcy proceeding and did not involve a court order, and a claim to enforce the discharge injunction, which directly affected the "fresh start" mandated by the Bankruptcy Code and implicated an affront to the integrity of the court.

In *Hill*, the debtor's bankruptcy was over and she was complaining about a violation of the automatic stay during her already-completed bankruptcy. The

fresh start guaranteed to all debtors was not implicated by the *Hill* plaintiff's automatic stay claim, whereas here, the fresh starts of Plaintiff and the putative class are at the heart of the claims asserted against Credit One. As such, in the present case, the bankruptcy court below properly applied the *Hill* Court's "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." SA 59.

Finally, although the lower courts did not so find, this Court should find that the arbitration sought by Credit One does not come within the scope of the relevant arbitration agreement. Plaintiff agreed to arbitrate disputes with Credit One concerning their credit arrangement. This proceeding is not a private contractual dispute between Plaintiff and Credit One *per se*; it is a proceeding to hold Credit One in contempt for violation of the § 524 discharge orders issued by the bankruptcy court on behalf of Plaintiff and the putative class. Accordingly, the bankruptcy court is in effect one of the parties to the dispute. The bankruptcy court did not agree to arbitrate enforcement of its orders.

For all of these reasons, and as further explained below, the lower courts' orders should be affirmed.

ARGUMENT

I. Standard of Review

This Court reviews bankruptcy court decisions like the one below under an abuse of discretion standard and affords a significant measure of due deference to the bankruptcy court's findings and analysis.

As this Court recently stated, it "accept[s] the [lower] court's factual findings unless they are clearly erroneous and review[s] its conclusions of law *de novo*." *Lehman Bros.*, 2016 WL 5853265, at *1 (citing *Hill*, 436 F.3d at 107).

In order to determine whether to compel arbitration of a core bankruptcy proceeding, a bankruptcy court must determine whether there is an inherent conflict between arbitration of the claim at issue and the underlying purposes of the Bankruptcy Code. *Id.* ("[A] court must consider whether enforcing the arbitration provision[] would seriously jeopardize any underlying purpose of the Bankruptcy Code") (internal quotation omitted). To do so, the court must make "a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy." *Hill*, 436 F.3d at 108. Where a bankruptcy court determines that "arbitration would severely conflict with the . . . purposes of the Bankruptcy Code, the [] court has discretion to compel or to stay the arbitration." *Lehman Bros.*, 2016 WL 5853265, at *2. Whatever choice the bankruptcy court makes, this Court "review[s] its exercise of that choice for abuse of discretion." *Id.*

This Court does not second guess a bankruptcy court's reasonable analysis of the policies of the Bankruptcy Code and arbitration. "Where the bankruptcy court has properly considered the conflicting policies [of the Federal Arbitration Act and the Bankruptcy Code] in accordance with law, we acknowledge its exercise of discretion and show due deference to its determination that arbitration will seriously jeopardize a particular core bankruptcy proceeding." *Id.* (quoting *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc.* (*In re U.S. Lines, Inc.*), 197 F.3d 631, 641 (2d Cir. 1999)); *see also Hill*, 436 F.3d at 107 (same).

Here, as discussed below, the bankruptcy court conducted a careful analysis concerning the underlying purposes of the Bankruptcy Code and whether compelling arbitration of the dispute would jeopardize any of these purposes. The bankruptcy court determined that there was a severe conflict between the underlying purposes of the Bankruptcy Code and arbitration of Plaintiff's claim. For that reason, the bankruptcy court exercised its discretion to deny the motion to compel arbitration. The district court properly affirmed the bankruptcy court's exercise of discretion.[3] *See Lehman Bros.*, 2016 WL 5853265, at *2 (ruling

[3] The district court here conducted a *de novo* review. The district court's decision predated this Court's decision in *Lehman Bros.*, which clarified the proper standard of review. The district court's use of the more exacting *de novo* standard of review, however, led it to the very same conclusion as the bankruptcy court—*i.e.*, that there is an inherent conflict between the arbitration of Plaintiff's claim and the

that appellants did not "overcome that deferential standard" where the court found that the bankruptcy court had conducted a "careful analysis" of the impact of arbitrating the claim at issue and "agree[d] with the district court that the bankruptcy court did not abuse its discretion in denying the motion to compel arbitration").

Credit One acknowledges that abuse of discretion is the correct standard, Br. at 2, but then fails to apply that standard throughout its argument, instead arguing as if this Court should conduct a *de novo* review of all the issues. That is not the case. This Court's decision in *Lehman Bros.* makes clear that the lower courts are entitled to deference and to exercise discretion in denying a motion to compel arbitration.

II. The Bankruptcy Court Did Not Abuse Its Discretion in Holding That There is an "Inherent Conflict" Between the FAA and the Purposes of the Bankruptcy Code.

In deciding whether to compel arbitration in a bankruptcy context, courts apply a two-part test. First, the court must determine whether the proceeding at issue is a core or non-core bankruptcy proceeding. If the proceeding is non-core, generally the bankruptcy court does not have discretion to refuse to compel arbitration. Second, if the proceeding is core, a court must determine whether there is an inherent conflict between arbitration of the claim at issue and the

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purposes of Bankruptcy Code. SA 31.

underlying purposes of the Bankruptcy Code. If the court reasonably determines that there is an inherent conflict, it has discretion to refuse to compel arbitration. *Lehman Bros.*, 2016 WL 5853265, at *1.

Here, the bankruptcy court held that the proceeding at issue is core and further that there is an inherent conflict between arbitration of Plaintiff's claim and the purposes of the Bankruptcy Code. SA 61-66. The parties do not dispute that the matter is core, Br. at 26 n.9, but do dispute whether there is an inherent conflict. The bankruptcy court engaged in a careful analysis of the relevant law and facts in order to reach its determination that here is an inherent conflict, and thus that determination is entitled to due deference. *See Lehman Bros.*, 2016 WL 5853265, at *2. For this reason, the district court properly affirmed the bankruptcy court's denial of Credit One's motion to compel arbitration.

The inherent conflict test was first articulated by the Supreme Court in *Shearson/American Express v. McMahon*, 482 U.S. 220, 226-27 (1987). *McMahon* states that "[l]ike any statutory directive the [Federal Arbitration Act's] mandate may be overridden by a contrary congressional command." *Id.* *McMahon* goes on to state that a party can demonstrate that a contrary congressional command exists by making a 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." *Id.* at 227.

Thus, under *McMahon*, a party may rely on (1) a statute's text; (2) its legislative history; or (3) an inherent conflict between arbitration and the statute's underlying purposes to demonstrate that Congress intended that particular claims should not be arbitrated.[4]

In a bankruptcy action, the inherent conflict test requires a determination of "whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause." *U.S. Lines*, 197 F.3d at 640. If arbitration would "seriously jeopardize the objectives of the [Bankruptcy] Code," the arbitration clause should not be enforced. *Id.*; *Lehman Bros.*, 2016 WL 5853265, at *2. As discussed in Section I, a bankruptcy court must "properly consider[] the conflicting policies [of the Federal Arbitration Act and the Bankruptcy Code] in accordance with law." *Lehman Bros.*, 2016 WL 5853265, at *1 (quoting *U.S. Lines*, 197 F.3d at 641). If it does so, the appellate court will "show due deference to its determination that arbitration will seriously jeopardize a particular core bankruptcy proceeding." *Id*. at *2.

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[4] Credit One suggests that the Supreme Court's decision in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), "casts doubt on the continuing vitality of the 'inherent conflict' test" set forth in *McMahon*. Br. at 31-32 & n.11. This is a mischaracterization of *CompuCredit*. *CompuCredit* addressed only the issue of whether the text of a statute exempts a claim from arbitration. *CompuCredit* did not address situations in which Congress's intent to exempt a claim from arbitration is evident from the legislative history of the statute or, as here, from an inherent conflict between arbitration and underlying purposes of the statute. As such, *CompuCredit* does not address the inherent conflict test and it does not cast doubt on that test, as Judge Briccetti held. *Belton II*, 2015 WL 6163083, at *5.

This Court's recent decision in *Lehman Bros.* is instructive on the proper analysis of the inherent conflict test for a claim brought under the Bankruptcy Code. This Court found that the bankruptcy court had "considered the conflicting policies of the Federal Arbitration Act and the Bankruptcy Code, made a particularized inquiry into the nature of the claims and the facts of LBI's bankruptcy, and found that an underlying purpose of the Bankruptcy Code would be jeopardized by enforcing an arbitration clause in this case." *Id*. at *2 (citing *Hill*, 436 F.3d at 108). The Court further found that the bankruptcy court had "reasonably determined" that Congress did not intend the bankruptcy claims at issue to be arbitrated under non-Bankruptcy Code, New York Stock Exchange rules. *Id*. Based on its "independent review of the record and the relevant case law," the Court concluded that "the bankruptcy court did not abuse its discretion in denying plaintiffs' motion to compel arbitration" because compelling arbitration would in fact jeopardize the objectives of the Bankruptcy Code. *Id*. The Court thus afforded the bankruptcy court's decision due deference and found that, given the bankruptcy court's careful analysis of the impact of arbitrating the claim at issue, the appellants could not overcome the deferential abuse of discretion standard. *Id*.

Here, the district court properly affirmed the bankruptcy court's exercise of discretion, finding that there was an inherent conflict between the arbitration of Plaintiff's claim and the underlying purposes of the Bankruptcy Code because (i)

bankruptcy courts have the undisputed power to interpret and enforce their own orders and delegating that power to private arbitrators would jeopardize the underlying purposes of the Bankruptcy Code; (ii) providing and protecting the financial "fresh start" is a fundamental purpose of the Bankruptcy Code and the discharge injunction is the mechanism through which the fresh start is achieved; thus, there is an inherent conflict between arbitration of Plaintiff's claim and the underlying purposes of the Bankruptcy Code; and (iii) uniform application of bankruptcy law is another purpose underlying the Bankruptcy Code and that purpose is jeopardized by arbitration. As described below, each of these determinations is well-founded.

A. Arbitration of Plaintiff's Claim Would Strip the Bankruptcy Court of Its Power to Enforce its Own Orders.

Plaintiff brings a claim, on behalf of himself and the putative class, against Credit One for seeking to collect discharged debts in violation of the discharge injunction found in 11 U.S.C. § 524. Courts evaluate such claims for violation of § 524 under the standard for civil contempt sanctions. *See, e.g., In re Torres*, 367 B.R. 478, 490 (Bankr. S.D.N.Y. 2007); *In re McKenzie-Gilyard*, 388 B.R. 474, 481-82 (Bankr. E.D.N.Y 2007). Thus, in order to prevail, Plaintiff must satisfy the standard for civil contempt sanctions by proving that Credit One had actual or constructive knowledge of the discharge injunctions of the bankruptcy courts and willfully violated them by continuing with the activity complained of. *Torres*, 367

B.R. at 490. This type of claim, which seeks to enforce the injunctions of bankruptcy courts protecting the fresh starts of former debtors and which is adjudicated under the civil contempt standard, is exactly the type of claim that should not go to arbitration.

As the district court explained, the discharge injunction is "an affirmative order of the bankruptcy court" and bankruptcy courts have "undisputed power" to enforce their own affirmative orders. SA 28 (citing *Hill*, 436 F.3d at 108-09). Indeed, "courts in the Second Circuit consistently recognize the unique power of a bankruptcy court to interpret its own orders." *Id*. (citing, *inter alia*, *Deep v. Copyright Creditors*, 122 F. App'x 530, 533 (2d Cir. 2004) (citing *In re Casse*, 198 F.3d 327, 333 (2d Cir. 1999) ("The bankruptcy court [is] in the best position to interpret its own orders."); *In re Texaco Inc.*, 182 B.R. 937, 947 (Bankr. S.D.N.Y. 1995) ("A bankruptcy court is undoubtedly the best qualified to interpret and enforce its own orders including those providing for discharge and injunction"); *see also Belton I*, SA 49 (recognizing "'the undisputed power of a bankruptcy court to enforce its own orders'" as one an underlying purpose of the Bankruptcy Code) (quoting *Hill*, 436 F.3d at 108 (in turn, quoting *Nat'l Gypsum*, 118 F.3d at 1069)). As such, the district court found that this consideration supported its refusal to compel arbitration.

The district court's finding is supported by overwhelming precedent and academic authority. Indeed, it is elemental that federal courts have the exclusive

power to enforce their orders and, equally importantly, determine the appropriate remedy for violations of their orders. That power to enforce orders—the power of contempt—cannot be delegated or outsourced to private parties. Placing that contempt power in the hands of private arbitrators is repugnant to our judicial system. *See, e.g.*, *PRL USA Holdings, Inc. v. United States Polo Ass'n, Inc.*, No. 14–cv–764, 2015 WL 1442487, at *6 (S.D.N.Y. Mar. 27, 2015) ("Federal courts, and federal courts alone, possess the inherent authority to enforce their judgments, and the FAA may not be construed to divest courts of their traditional powers to police their own orders. A pending arbitration cannot prevent this judicial function, regardless of what the parties may have privately agreed.") (internal quotation and citation omitted). *See also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798-99 (1987). A contempt of a court order, which can be punished both civilly and criminally, cannot be left in the hands of an arbitrator who cannot provide the constitutional protections required for such a proceeding, and the integrity of a bankruptcy judge's order should not be at the mercy of a private arbitrator. Only a court should have the power to determine contempt of a court order.[5]

[5] Credit One argues that because the discharge injunction is a form order and not a handcrafted order, an arbitrator is competent to interpret and enforce it. Br. at 46-47. But the issue is not just who is most competent to interpret the discharge injunction, but who is best suited to preserve the integrity of the court and to determine the appropriate remedy for violation of the discharge injunction.

Because it is an underlying purpose of the Bankruptcy Code that bankruptcy judges have the ability to interpret and enforce court orders, especially in a contempt setting, courts have held that sending § 524 claims to arbitration conflicts with the Bankruptcy Code. Indeed, other than the rogue decision in *Belton II*, no court has ever compelled arbitration of a § 524 claim to enforce the discharge injunction standing alone. *Belton I,* SA 58 ("[E]very 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").

While neither the Supreme Court nor this Court has ruled on the issue, the Fifth Circuit has squarely held that § 524 claims are not arbitrable. *Ins. Co. of N. Am. v. N.G.C. Settlement Trust and Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1071 (5th Cir. 1997) (declining to compel arbitration of a § 524 claim and stating that "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 addition, just last month a bankruptcy court in the Southern District of Texas denied a motion to compel arbitration on this ground. *Haas v. Navient, Inc.*,

Case No. 16-03175-H2-ADV, Dkt. No. 88 (Bankr. S.D. Tex. Jan. 9, 2017).[6] The court was clear that a claim to enforce the discharge injunction in § 524 is a form of contempt. Tr. at 16 ("They're essentially seeking to have you held in contempt. A discharge injunction is my Order. They're seeking to hold you responsible for violating my Order. That's contempt."). Moreover, the court emphasized that enforcement of the discharge injunction is at the heart of the bankruptcy process. *Id*. at 20-21 ("No, but you're going to the very heart of the integrity of the bankruptcy process itself. I mean, I took an oath to defend and enforce the bankruptcy system. And if the conduct that is alleged turns out to be true, I mean, how can folks come in here and ask for a discharge . . . and if they don't have any confidence that the discharge that they get is going to be enforced, then what's the process worth at that point?"). The court further noted that it is not a party to the arbitration agreement between the creditor and the debtors and thus that private agreement cannot strip the court of its enforcement powers. *Id*. at 11, 18. Counsel for the defendant there argued that *Hill* and *Belton II* required arbitration, but the court was not persuaded. *Id*. at 20 The court denied the motion to compel arbitration, stating that the defendant's argument was "about as frivolous as it gets," that "the motion ha[d] no foundation in the applicable law," and thus denying the motion was "not even a close call." *Id*. at 16, 44.

[6] Currently, this transcript is not publicly available. Pursuant to FRAP 32.1, a copy is attached to this brief as Attachment A.

Other courts have made similar holdings. *See, e.g., Hooks v. Acceptance Loan Co., Inc.*, No. 2:10-CV-999, 2011 WL 2746238, at *5 (M.D. Ala. July 14, 2011) ("[I]t would seem anomalous to allow an arbitrator to construe a court's order in a contempt setting. As a general matter, allowing arbitration of contempt proceedings would effectively strip the courts of their primary enforcement mechanism."); *Grant v. Cole (In re Grant)*, 281 B.R. 721, 724-25 (Bankr. S.D. Ala. 2000) ("Allowing arbitrators to resolve a contempt matter would present a conflict with the Bankruptcy Code in that it would allow an arbitrator to decide whether or how to enforce a federal injunction under §§ 362 and 524"); *Norman v. Applied Card Sys., Inc. (In re Norman)*, Adv. Proc. No. 06-1133, 2006 WL 2818814, at *2 (Bankr. M.D. Ala. Sept. 29, 2006) ("The question of whether a discharge injunction issued by the Federal Bankruptcy Court has been violated ought to be decided by a Bankruptcy Judge and not by an arbitrator"); *see also* Kara J. Bruce, *Vindicating Bankruptcy Rights*, 75 Md. Law Rev. 443, 473-74 (2016) (discussing the fact that "courts and commentators have widely recognized that it would be improper" to allow arbitration of claims, such as § 524 claims, that are either remediable through contempt sanctions or enforceable by operation of the court's equitable authority under § 105 of the Bankruptcy Code).[7]

[7] The one case Credit One cites that allowed a § 524 claim to proceed in arbitration, *Bigelow v. Greentree Financial Servicing Corp.*, No. CV-99-6644, 2000 WL 33596476 (E.D. Cal. Nov. 30, 2000), is distinguishable because of its unique

Moreover, consistent with their refusal to compel arbitration of § 524 claims, courts in this Circuit have also denied motions to compel arbitration of claims under other sections of the Bankruptcy Code, finding that arbitration of those claims would seriously jeopardize the objectives of the Bankruptcy Code. As discussed above, this Court most recently did so in *Lehman Bros.* *See* 2016 WL 5853265, at *2 (affirming denial of motion to compel arbitration of subordination claims brought under to 11 U.S.C. § 502(b) and § 510(a) of the Bankruptcy Code); *see also In re Hostess Brands, Inc*., No. 12-22052, 2013 WL 82914, at *5-6 (Bankr. S.D.N.Y. Jan. 7, 2013) (denying motion to compel arbitration of the debtor's motion pursuant to Bankruptcy Code § 363(c) for use of cash collateral); *Kraken Inv., Ltd. v. Jacobs (In re Salander-O'Reilly Galleries, LLC)*, 475 B.R. 9 (S.D.N.Y. 2012) (proceeding to determine true ownership of consigned valuable artwork would not be sent to arbitration because to do so would conflict with the administration of the bankruptcy case and could possibly prejudice the interests of other creditors); *Bethlehem Steel Corp. v. Moran Towing Corp. (In re Bethlehem Steel Corp*.), 390 B.R. 784, 793-95 (Bankr. S.D.N.Y. 2008) (finding that

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procedural posture. In that case, the plaintiff brought a number of federal statutory claims and a claim for violation of § 524 directly in district court, not bankruptcy court. The district court declined to send any of the claims to bankruptcy court because to do so would deprive the defendant of its right to a jury trial on the non-bankruptcy claims, such as the plaintiff's RICO claim. Thus, the issue of enforceability of the discharge injunction was not, under any circumstances, going to be adjudicated by the bankruptcy court. Under those circumstances, the district court sent all the claims to arbitration without distinguishing the § 524 claim.

preference claims brought on behalf of creditors should not be arbitrated pursuant to international arbitration agreement because to do so would conflict with the policies of the Bankruptcy Code); *Kittay v. Landegger* (*In re Hagerstown Fiber Ltd. Partnership)*, 277 B.R. 181, 209-10 (S.D.N.Y. 2002) (sending most claims arising out of the contract to arbitration, but denying arbitration of the turnover claim because, *inter alia*, doing so would conflict with important policies of the Bankruptcy Code) .

Thus, the district court's determination that this consideration supported its refusal to compel arbitration was exceedingly well-grounded and the district court properly affirmed the bankruptcy court's exercise of discretion.

B. Arbitration of Plaintiff's Claim Would Seriously Jeopardize the Fresh Start, Which is a Fundamental Purpose of the Bankruptcy Code.

As both the bankruptcy court and the district court held, arbitration of § 524 claims would seriously jeopardize the fresh start afforded by the discharge injunction and thus arbitration of Plaintiff's claim is impermissible.

Providing a debtor with a fresh start is the core purpose of the Bankruptcy Code. As the bankruptcy court stated "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." SA 61. The bankruptcy court emphasized that it, rather than a private arbitrator, "sees hundreds of individual debtors in bankruptcy every

month." SA 56. Each debtor makes the very difficult decision to file bankruptcy as "a last resort" in return for the promise of a fresh start. SA 56. "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." SA 57-58. These words make it clear that the bankruptcy court found it incongruous, at least under these facts, that this most important function of the Bankruptcy Code would be relegated to a private arbitrator.

The bankruptcy court was undoubtedly correct, given that ensuring the fresh start through the discharge injunction is at the heart of the bankruptcy court's function. Every single adjudication by the bankruptcy court of a violation of § 524 involves the court's application of bankruptcy law and policy. The court considers the context of the debtor's entire bankruptcy, all other creditors involved in the bankruptcy, and the policies underlying the Bankruptcy Code in determining whether there is a violation and the appropriate remedy for that violation. A claim to enforce the discharge injunction is not merely a dispute between two parties, and it cannot be parceled off from the bankruptcy and ceded to an arbitrator who has

none of the context of the bankruptcy or the institutional knowledge of a bankruptcy court.

For this reason, the district court reached the same conclusion as the bankruptcy court, concluding that the fresh start "is predominantly achieved through the discharge, and, therefore, the question of whether a discharge injunction has been violated is essential to proper functioning of the Bankruptcy Code, and arbitration is inadequate to protect such core, substantive rights granted by the Code." SA 26. Key to Judge Roman's conclusion was the fact that "the discharge is so fundamentally related to a debtor's fresh start." SA 27.

Both the bankruptcy court and the district court relied on this Court's decision in *Hill*, which explicitly recognized that the fresh start is an "important purpose" underlying the Bankruptcy Code. *Hill*, 436 F.3d at 109. The district court further noted that Second Circuit courts have consistently recognized that the fresh start is an important purpose underlying the Bankruptcy Code. SA 26. (collecting cases). The *Hill* court found, based on the unique facts of that case, that the plaintiff's fresh start was not at issue. *Hill*, 436 F.3d at 110. Nevertheless, as discussed further in Section III(A), *infra*, the principles articulated in *Hill* concerning the fresh start dictate that where arbitration would jeopardize the fresh start, as is the case here, there is an inherent conflict.

C. Arbitration is Inconsistent with the Uniform Application of the Bankruptcy Law.

The bankruptcy court recognized that Congress created the specialized bankruptcy courts to ensure uniformity and centralization, not only within each individual bankruptcy proceeding, but across all bankruptcy proceedings so that the Bankruptcy Code is enforced in a consistent manner. "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." SA 46-47. Bankruptcy courts have the jurisdiction to determine all the claims relating to a debtor's estate "in the interests of efficiency, expertise and fairness." SA 47.

The bankruptcy court also stated that "complete and consistent relief is more likely to occur if its 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." SA 66.

The district court also recognized the need for uniformity and found the bankruptcy court's analysis of this issue "compelling." SA 29. The district court noted that "a number of debtors assert claims under virtually identical agreements with one creditor—Credit One. Given that each individual claim would be subject

to separate arbitration, this could create wildly inconsistent results." SA 30. The district court recognized that the need for uniformity "has been recognized consistently in courts throughout this district." SA 26 (citing, *inter alia*, *In re Lehman Bros. Holdings Inc.*, 480 B.R. 179, 196 (S.D.N.Y. 2012) and *In re Extended Stay, Inc.*, 466 B.R. 188, 207 (S.D.N.Y. 2011)). This purpose is best achieved through litigation in the bankruptcy court, which creates transparency, as well as binding legal precedents, and thus encourages consistent outcomes. SA 29 (citing, *inter alia*, *Lehman Bros. Holdings Inc. v. Wellmont Health Sys.*, No. 14 CIV. 01083 LGS, 2014 WL 3583089, at *1 (S.D.N.Y. July 18, 2014) (finding that uniformity in the administration of bankruptcy laws weighs in favor of leaving the case in bankruptcy court, noting that although the claims are principally private and contractual in nature, "they are brought within the context of similar disputes arising out of various [] agreements")).

If each former debtor were forced to arbitrate each claim individually, it is "certainly plausible, if not probable" that the arbitrations would reach disparate outcomes, especially given that arbitrators have broad discretion as to whether to apply collateral estoppel offensively. SA 30 (citing *Bear, Stearns & Co., Bear, Stearns Sec. Corp. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 92 (2d Cir. 2005) ("In view of differing results reached by different panels, the arbitrators had discretion to apply collateral estoppel or not."). For this reason, the district court concluded

that "multiple violations of a discharge injunction by one creditor are more efficiently and uniformly decided by federal litigation." SA 30.

Added to this concern is the fact that Plaintiff, as well as other former debtors, also have similar claims against other creditors, including the five other defendants before Judge Drain. Relegating each plaintiff to separate arbitrations against each creditor could lead to inconsistent results with regard to each tradeline on each plaintiff's credit report.

Of course, creditors employ arbitration agreements precisely to avoid the uniform application of laws through class action litigation, including the Bankruptcy Code, and thus insulate themselves from large scale liability. Mandatory arbitration clauses are ubiquitous in credit documents, especially those relating to consumer debt. Mandatory consumer arbitration clauses are part of a broader corporate effort to preclude or limit aggregate litigation and thereby defeat any meaningful relief. *See* Bruce, *Vindicating Bankruptcy Rights*, 75 Md. Law Rev. at 455-56. As the Consumer Financial Protection Bureau found, corporations rarely seek to enforce arbitration agreements in individual suits, but commonly move to compel arbitration to block a class action. *Id.* at 456 & n.83 (citing Richard Cordray, Prepared Remarks of CFPB Director Richard Cordray at the Arbitration Field Hearing, https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing/ (last visited February 21, 2017); *see also DirecTV, Inc. v. Imburgia*,

136 S.Ct. 463, 476-77 (2015) (Ginsberg, J., dissenting) ("[The Supreme Court's recent decisions concerning no-class-action arbitration clauses] have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws."); Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times, Oct. 31, 2015, http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html ("By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies [have] devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight it legal or deceitful business practices."). "Studies confirm that hardly any consumers take advantage of bilateral arbitration to pursue small dollar claims." *DirecTV*, 136 S.Ct. at 477. Accordingly, "[b]ecause consumers lack bargaining power to change the terms of consumer adhesion contracts ex ante, '[t]he providers [have] won the power to impose a mandatory, no-opt-out system in their own private 'courts' designed to preclude aggregate litigation.'" *Id*. (citations omitted).

For all of these reasons, it is particularly important to create precedent to promote uniform application of the bankruptcy laws, where, as this Court has noted, there has been a historical lack of consistent, reliable precedent. *Weber v. U.S. Trustee*, 484 F.3d 154, 158 & n.1 (2d Cir. 2007) (discussing the "paucity of

settled bankruptcy-law precedent"). The bankruptcy court and the district court properly recognized this important policy goal and found that it supported the conclusion that Plaintiff's claim should not be arbitrated. SA 66; SA 26-27 (collecting cases).

The cases cited by Credit One, Br. at 48, are not to the contrary. Neither of those cases concerned the situation here—multiple violations of the discharge injunction (in fact, hundreds of thousands of violations) by one creditor—and thus they are distinguishable. In *In re Singer Co. N.V.*, No. 00 Civ. 6793, 2001 WL 984678, at *6 (S.D.N.Y. Aug. 27, 2001), the court addressed a situation in which a single plaintiff debtor brought an adversary proceeding against a single defendant creditor, but the defendant also had a claim against the plaintiff's estate. Likewise, in *In re Friedman's, Inc.*, 372 B.R.530, 542-43 (Bankr. S.D. Ga. 2007), the court addressed a situation in which a single plaintiff brought both arbitrable and non-arbitrable claims against two related corporate defendants. In those situations, the courts found that arbitrating some claims but not others for the single plaintiff at issue did not create an inherent conflict.

III. Credit One Cannot Overcome the Substantial Deference Given to the Bankruptcy Court's Determination That There Is an Inherent Conflict.

Credit One advances three primary arguments as to why the lower courts' holdings are incorrect. Credit One argues that (i) the lower courts' holding are inconsistent with this Court's decision in *Hill*; (ii) Plaintiff has not satisfied the

effective vindication doctrine; and (iii) neither the text nor the legislative history of the Bankruptcy Code evidence Congress' intent to preclude arbitration of claims to enforce the discharge injunction. As described below, none of these arguments have merit and certainly none are sufficient to overcome the substantial deference given to the bankruptcy court's determination that there is an inherent conflict.

A. The Lower Courts' Decisions are Consistent with this Court's Decision in *Hill*.

As both the bankruptcy court and the district court properly held here, this Court's decision in *Hill* supports the conclusion that Plaintiff's claim is not arbitrable. Both of the lower courts conducted careful and thorough analyses of *Hill* and its application to the facts of this action. As both courts found, although the claims at issue in *Hill* and the facts of that case differ from those here, applying the principles articulated in *Hill* dictates that Plaintiff's claim should not be arbitrated.

The facts in *Hill* were that, prior to filing for bankruptcy, plaintiff Hill had authorized the defendant, MBNA, to withdraw monthly payments of $159.01 from her bank account to pay down the balance she owed MBNA on a consumer loan. *Hill*, 436 F.3d at 105. Hill then filed for bankruptcy and MBNA received notice of Hill's bankruptcy in October 2001, but it withdrew $159.01 from Hill's account in early November 2001 in violation of the automatic stay provision of the Bankruptcy Code. *Id*. Hill later brought suit on behalf of herself and a putative

class and MBNA sought to arbitrate Hill's claim for violation of the automatic stay.

In *Hill*, this Court reaffirmed that bankruptcy courts have the discretion to deny enforcement of arbitration provisions where such enforcement would present an inherent conflict with the underlying purposes of the Bankruptcy Code. *Id*. at 108. Nevertheless, it allowed Hill's § 362 claim for violation of the automatic stay provision to go to arbitration under the unique facts of that case. *Id*. at 110. There, the bankruptcy proceedings had ended; there was no violation of a court order; the violation was related to the automatic stay, which had ceased to operate under the terms of the statute once the proceedings ended; and MBNA had already agreed to repay the $159.01 that had been collected in violation of the automatic stay. Thus, the bank's conduct had no implications for Hill's ability to get a fresh start and arbitration would not inherently conflict with the underlying purpose of the Bankruptcy Code. *Id*. Nor would arbitration of the overpayment require adjudication of a contempt since MBNA did not, unlike Credit One here, violate a court order.

In the course of its analysis, the *Hill* Court emphasized that the unique facts before it distinguished the case from others in which appellate courts had held that bankruptcy courts had discretion to refuse to send claims to arbitration. *Id*. It also repeatedly distinguished between automatic stay claims and claims to enforce the discharge injunction, emphasizing that the latter protected the fresh start. *See id*.

The bankruptcy court, in a thorough and well-reasoned opinion in *Belton I*, examined this Court's decision in *Hill* and applied it to the facts in *Belton I*—which are substantially identical to those here—and concluded that § 524 claims such as the plaintiff's should not be arbitrated. In *Hill*, the need for bankruptcy court involvement was over. That is clearly not the case here where Credit One is attempting to collect on discharged debts, thereby denying Plaintiff and the other members of the putative class their fresh start. The bankruptcy court noted that *Hill* "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." SA 59 (citing *Hill*, 436 F.3d at 104). Given that the discharge injunction and the fresh start that it provides to debtors are most definitely at issue here, the bankruptcy court concluded that "it is clear that if the issue before me had been presented to the Second Circuit in [*Hill*], 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." SA 61.

The district court in this action also interpreted *Hill* in this fashion. Following a careful analysis, Judge Román agreed with the bankruptcy court's interpretation of *Hill*, finding that *Hill* "confirmed [a] central objective of the Bankruptcy Code–providing debtors with a fresh start–which also has been recognized consistently by Second Circuit courts." SA 24-25 (citing, *inter alia*, *Hill*, 436 F.3d at 109; *In re Bogdanovich*, 292 F.3d 104, 107 (2d Cir. 2002)

("Congress made it a central purpose of the [B]ankruptcy [C]ode to give debtors a fresh start in life and a clear field for future effort unburdened by the existence of old debts."); *In re Hayes*, 183 F.3d 162, 167 (2d Cir. 1999) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)) ("one of the primary purposes of the bankruptcy act is to ... permit [the honest debtor] to start afresh") (alteration in original)). The district court also concluded that because the fresh start was at issue here, under *Hill*, Plaintiff's claim could not be arbitrated. SA 26-27.

In contrast with both of the lower courts here, Credit One argues that *Hill* only precludes arbitration where it would (i) interfere with or affect the distribution of the estate; or (ii) affect an ongoing reorganization. Br. at 35-36. In this regard, Credit One adopts the flawed reasoning of the district court in *Belton II*. In *Belton II*, the district court summarily ruled that the bankruptcy court had "misread" *Hill*. *Belton II*, 2015 WL 6163083 at *7. Instead, the *Belton II* court held that:

> *Hill* stands for the more modest proposition that claims alleging violations of the Bankruptcy Code should not be arbitrated if those claims are integral to the bankruptcy court's ability to preserve and equitably distribute assets of the estate or if arbitration would substantially interfere with the debtor's efforts to reorganize. Conversely, under *Hill*, arbitration of claims under the Bankruptcy Code is required when arbitration would not interfere with or affect the distribution of the estate or would not affect an ongoing reorganization, as was the case there.

Id. at *7 (internal quotations omitted).

The *Belton II* court's decision is incorrect in several respects. First, the *Belton II* court failed to apply the standard set forth by the Second Circuit in both

Lehman Bros. and *Hill*, which dictates that an appellate court should acknowledge a bankruptcy court's exercise of discretion and show due deference to its determination that arbitration will seriously jeopardize a particular core bankruptcy proceeding where the bankruptcy court "has properly considered the conflicting policies in accordance with law…." *Lehman Bros.*, 2016 WL 5853265, at *1 (quoting *U.S. Lines*, , 197 F.3d at 641); *see also Hill*, 436 F.3d at 107 (same).

Second, the *Belton II* court misconstrued the bankruptcy court's decision, asserting that the bankruptcy court held that, under *Hill*, "arbitration is unavailable whenever 'the debtor's fresh start is at issue.'" *Belton II*, 2015 WL 6163083 at *7 (quoting *Belton I*, SA 59). However, the bankruptcy court's holding was not nearly as broad as the *Belton II* court suggests. Instead, both the bankruptcy court and the district court held that in this case, where, under these facts, the fresh start was directly threatened, arbitration of Plaintiff's claim would seriously jeopardize this fundamental right afforded by the Bankruptcy Code. As this Court admonished in *Hill*, both of the lower courts here undertook "a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy." *Hill*, 436 F.3d at 108. The bankruptcy court did not make a broad pronouncement about all claims under the Bankruptcy Code more generally, and neither did the district court.

Third, the *Belton II* court's reading of *Hill* would totally eviscerate the fresh start. The *Belton II* court held that *Hill* stands for the proposition that claims

alleging violations of the Bankruptcy Code should not be arbitrated only where (i) arbitration would interfere with or affect the distribution of the estate; or (ii) would affect an ongoing reorganization. *Belton II*, 2015 WL 6163083, at *7. If that reasoning were accepted by this Court, the result would be that *every* § 524 claim would be subject to arbitration. The § 524 discharge injunction, by definition, operates post-bankruptcy, *after* distribution of assets and reorganization. The Court could not have intended to apply *Hill* so broadly as to strip bankruptcy courts of *all* contempt power for violations of the discharge injunctions.

Fourth, *Hill* did not involve contempt. The Court affirmed a violation of a statutory stay, not violation of a court order, as alleged here. While a violation of the automatic stay is serious, it does not implicate the integrity of the court and its orders. The *Hill* Court very clearly described the importance of this difference when considering whether claims are arbitrable:

> [W]e are not persuaded that a stay, which arises by operation of statutory law and not by any affirmative order of the bankruptcy court, is so closely related to an injunction that the bankruptcy court is uniquely able to interpret and enforce its provisions. An arbitrator of a § 362(h) [automatic stay] claim would be asked to interpret and enforce a statute, not an order of the bankruptcy court.

Hill, 436 F.3d at 110. The obvious implication of the *Hill* Court's statement is that the bankruptcy court *is* uniquely able to interpret and enforce bankruptcy court orders and, more importantly, utilize its vast experience to determine the appropriate remedy for their violation.

Fifth, unlike *Hill*, where the bankruptcy court's interest and involvement had ended, here, Plaintiff needs the bankruptcy court's protection at the most critical time—when a creditor seeks to eviscerate the discharge order. Thus, the *Hill* Court found that the plaintiff there no longer needed the protection of the automatic stay to ensure her fresh start, given that her bankruptcy had been fully adjudicated. *Hill*, 436 F.3d at 110 ("Hill's bankruptcy case is now closed and she has been discharged . . . 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."). Indeed, MBNA's demand for payment appeared to be an isolated event that had no material impact on Hill's bankruptcy.

Here, Plaintiff and the putative class continue to need the protection of the discharge injunction to ensure their fresh starts. Credit One's continued refusal to correct erroneous credit reports showing discharged debts as due and owing has been persistent and based on company-wide practices. Those practices have threatened Plaintiff's and other former debtors' ability to move on with their lives, free of the discharged debts. As set forth in expert declarations submitted in the *Belton* action, these practices have a severe deleterious effect on former debtors' creditworthiness, and impact their ability to obtain mortgages and employment, among other things. *See Belton v. GE Capital Consumer Lending, Inc. (In re Belton)*, Adv. Proc. No. 14-8223-RDD, Dkt. Nos. 82 and 83. The actions of Credit One and of the other defendants in the related cases have affected millions of

former debtors. Thus, the most important purpose of the Bankruptcy Code, giving debtors a fresh start, is at issue here and it is directly threatened by Credit One's conduct.

Finally, unlike in the *Hill* scenario, the discharge injunction comes at the end of an adjudication of all parties' rights. Each party has been afforded due process and its claims have been heard. The Bankruptcy Code's interest in finality is compromised when a creditor ignores the court's adjudication and continues to pursue collection.

B. The Legislative History of the Bankruptcy Code Evidences Congress' Intent to Preclude Arbitration of Claims to Enforce the Discharge Injunction.

As described above, under *McMahon*, a party may rely on (1) a statute's text; (2) its legislative history; or (3) an inherent conflict between arbitration and the statute's underlying purposes to demonstrate that Congress intended that particular claims should not be arbitrated. Credit One devotes a significant amount of its appeal to arguing that the text and legislative history of the Bankruptcy Code do not evidence Congress's intent to preclude arbitration of claims to enforce the discharge injunction. *See, e.g.*, Br. at 27-31. Credit One did not make this argument below and the district court did not rule on the basis of either the text or the legislative history of the Bankruptcy Code. SA 18 n.3 ("The parties in the instant case do not assert that any such [congressional] intent is present in the

statute's text or history. Therefore, the Court confines it focus to whether there is an inherent conflict between arbitration and the Bankruptcy Code.").

Nevertheless, to the extent that the text or legislative history of the discharge injunction shed light on Congress' intent, it shows that its intent was exactly the opposite of what Credit One claims—Congress intended for bankruptcy courts to enforce the discharge. In fact, Congress ultimately enacted the discharge injunction in order to prevent creditors from filing state court actions seeking to collect on previously discharged debts. This had been a common practice of creditors and unsuspecting former debtors would often default in those state court lawsuits. Unless they appeared in the action and raised the discharge as an affirmative defense, they would default and have to pay on discharged debts, which undermined the efficacy of the bankruptcy discharge. 4 Collier on Bankruptcy P 524.LH[1], (15th rev. ed., Lawrence P. King ed. 2000).

The legislative history of Section 14(f) of the Bankruptcy Act, which is the predecessor to Section § 524 of the Bankruptcy Code, demonstrates that Congress enacted it to stop creditors from bringing such suits in state court by ensuring that bankruptcy courts enforce the discharge. The House Committee on the Judiciary stated that "the major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors," who it noted "bring suit in State courts after a discharge in bankruptcy has been granted . . . in the hope the debtor will not appear in that action, relying to

his detriment upon the discharge." *Id*.; *see also id*. (quoting floor statement of Rep. Wiggins that under Section 14(f), "the bankruptcy court would be vested with authority to determine not only the bankrupt's right to a discharge but also the effect of a discharge when granted"). Moreover, "[t]he reasons behind the enactment of section 524(a), which is certainly comparable to and, in effect, amounts to a continuation of Section 14f of the Act, include those that originally prompted the enactment of Section 14f itself." *Id*.

Thus, the legislative history demonstrates that Congress' intent was that bankruptcy courts would enforce the discharge and former debtors would not have to defend harassing actions in state court:

> Accordingly, if a creditor brings a collection suit after discharge, and obtains a judgment against the debtor, the judgment is rendered null and void by section 524(a). The purpose of the provision is to make it absolutely unnecessary for the debtor to do anything at all in the collection action. Before the enactment of Section 14f, a debtor could not safely ignore a post discharge collection action; the discharge had to be pled as an affirmative defense.
>
> Moreover, because the provisions of the discharge order take the form of an automatic injunction, if they are violated by a creditor subject to the order, ***the creditor will be subject to citation for contempt in the bankruptcy court*** upon application of the debtor.

Id. (emphasis added).

Thus, to the extent that Credit One argues that the text of the Bankruptcy Code evidences Congress's intent to *allow* arbitration of such claims, Credit One is very plainly incorrect. Credit One argues that because Congress did not grant

bankruptcy courts exclusive jurisdiction over claims to enforce the discharge injunction, and instead permits those claims to be adjudicated in federal district court, as well, this Court should infer that Congress did not intend to preclude arbitration of such claims. Br. at 29. In this regard, Credit One again adopts the reasoning of the district court in *Belton II*. *Belton II*, 2015 WL 6163083, at *7. Contrary to that reasoning, however, Congress's decision to grant non-exclusive jurisdiction to the bankruptcy courts over claims to enforce the discharge injunction has no bearing on whether Congress intended for those claims to be subject to arbitration.

Credit One relies on two cases in which the Supreme Court found that Congress's grant of concurrent jurisdiction to federal and state courts with respect to other federal claims suggested that those claims could be arbitrated. Br. at 29-30 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (asserting that Congress' grant of concurrent federal-state jurisdiction over ADEA claims supported the conclusion that those claims are arbitrable); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 482-83 (1989) (asserting that Congress' grant of concurrent federal-state jurisdiction over claims under the Securities Act suggested that those claims are arbitrable).

However, these cases are inapposite. As the bankruptcy court has explained, bankruptcy court jurisdiction differs from either federal district court or state jurisdiction in fundamental ways. SA 44-51. Congress made a clear policy

determination, implicit throughout the Bankruptcy Code and the related provisions of the Judicial Code that create the bankruptcy courts, "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." SA 46-47. For this reason, Congress has granted bankruptcy courts "specialized" and "deep" jurisdiction over "issues central to the bankruptcy process in the interests of efficiency, expertise and fairness." SA 47 (citing *Continental Ins. Co. v. Thorpe Insulation Co.* (*In re Thorpe Insulation Co.*), 671 F.3d 1011, 1022-23 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 119 (2012); *Hill*, 436 F.3d at 108; *Phillips v. Congelton, L.L.C.* (*In re White Mining Co., L.L.C.*), 403 F.3d 164, 169-79 (4th Cir. 2005); *In re Nat'l Gypsum Co.*, 118 F.3d at 1069)).[8] Moreover, in the cases cited by Credit One, there was not explicit legislative history demonstrating Congress' intent with respect to the claims in question.

[8] Credit One also relies on this Court's decision in *Hill*, Br. at 30, but *Hill* is not to the contrary. Although the *Hill* court mentioned that the bankruptcy court did not have exclusive jurisdiction over automatic stay claims, its decision to reverse and compel arbitration turned on whether there was an inherent conflict between the automatic stay and the FAA. The *Hill* court determined that automatic stay claims were not central enough to the bankruptcy process to preclude arbitration of those claims. *Hill*, 436 F.3d at 110.

Thus, the bankruptcy court concluded that where a matter concerns issues central to the bankruptcy process, it has discretion to refuse to compel arbitration. SA 48-49 (citing, *inter alia*, *Bohack Corp. v. Truck Drivers Local Union No. 807, Int'l Bhd. 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); *In re Nat'l Gypsum*, 118 F.3d at 1069)). This conclusion is supported by the legislative history of § 524(a) of the Bankruptcy Code and its predecessor, Section 14(f) of the Bankruptcy Act, which demonstrates Congress' intent to have bankruptcy courts enforce the discharge.

C. Credit One Confuses the Inherent Conflict Test and the Effective Vindication Doctrine; Plaintiff Need Only Satisfy the Former.

As the Supreme Court has made clear, the inherent conflict test and the effective vindication doctrine are separate and distinct analyses. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013). Plaintiff has satisfied the inherent conflict test and that is all that is required of him under the law.

Credit One asserts that in order for the court to find that there is an inherent conflict between arbitration of Plaintiff's claim and the purposes of the Bankruptcy Code, Plaintiff must demonstrate that he cannot "effectively vindicate" his rights in arbitration. Br. at 32. This is not an accurate statement of the law. While a showing that Plaintiff cannot effectively vindicate his rights in arbitration provides grounds for a court to refuse to enforce an arbitration agreement, such a showing is

not necessary to demonstrate that there is an inherent conflict between arbitration and the underlying purposes of a statute.

As discussed above, the inherent conflict test is a method of determining congressional intent—whether Congress intended a particular claim to be arbitrable or not. *McMahon*, 482 U.S. at 226-27. By contrast, the effective vindication doctrine is a "judge-made exception" to the FAA, in which courts will invalidate, on public policy grounds, arbitration agreements that "'operate . . . as a prospective waiver of a party's right to pursue statutory remedies.'" *Italian Colors*, 133 S. Ct. at 2310 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)). The Supreme Court has stated that the effective vindication doctrine "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.

Thus, the inherent conflict test and the effective vindication doctrine are two entirely separate grounds on which courts may refuse to enforce arbitration agreements. Indeed, the inherent conflict test requires a showing that the underlying purposes of the Bankruptcy Code would be seriously jeopardized *if a party's claim went forward in arbitration*, while the effective vindication doctrine requires a showing that *a party would very likely be unable to pursue his or her claim in arbitration* due to an arbitration clause prohibiting the assertion of certain

statutory claims or due to the costs associated with arbitration being significant enough to prevent a party from accessing arbitration.

In *Belton I*, the bankruptcy court held that there was an inherent conflict and stated that the plaintiff need not make any other showing to prevail. SA 61-62 (plaintiff "should have to prove nothing more [than an inherent conflict] in order to defeat [defendant's] motion to compel arbitration"). The court nevertheless found that there were "other, lesser concerns" that also supported the plaintiff's objection to arbitration, including whether the plaintiff could effectively vindicate her rights in arbitration. SA 62. The court went on to separately consider whether the fees associated with arbitrating in that action, among other things, would be likely to prevent the plaintiff from arbitrating her claim. SA 63-64.

In this action, Credit One never argued the effective vindication doctrine in the bankruptcy court, nor did the parties raise it with the district court. Thus, Credit One has waived the argument.

IV. Credit One's Violation of the Discharge Injunction is Outside the Scope of the Parties' Arbitration Agreement.

` The bankruptcy court recognized that the question of whether there was an inherent conflict between the Bankruptcy Code and the FAA is closely tied to the question of whether adjudication of rights between debtors and creditors is outside the scope of any pre-bankruptcy arbitration agreement. SA 44-45. The court concluded that it was best to analyze the issue through the lens of inherent conflict

rather than scope of the agreement. The bankruptcy court recognized, however, that an argument can be made that "the purely bankruptcy issue of the extent 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." SA 50.

The district court did not address the scope issue. Rather, it found that the plaintiff had waived this argument because it had not raised it explicitly in the bankruptcy court. SA 17, n.1. That ruling was incorrect.

Credit One's motion to compel arbitration was the third such motion made by a defendant in the six related proceedings below. Responding to the first such motion in the *Belton* action, the plaintiff clearly raised the scope argument, but, as noted above, the bankruptcy court rejected it. For the second motion to compel arbitration in *Bruce*, the plaintiff again raised the scope argument. *In re Bruce*, Adv. Proc. No. 14-08224-RDD, Dkt. No. 14 at 2-4. It made no sense for Plaintiff to re-argue the scope issue in this third motion for a stay. Plaintiff simply argued to the bankruptcy court (in one paragraph of a brief devoted to multiple motions) that it should apply its decision in *Belton I* because the facts were nearly identical and the same legal principles applied. *In re Anderson*, Adv. Proc. No. 15-08214-RDD, Dkt. No. 9 at 5-6. The bankruptcy court did in fact apply its decision in *Belton I* to both *Bruce* and this action, in both instances issuing one-page orders stating that the motions to compel were denied, *inter alia*, for all the reasons stated

in *Belton I*. JA 491-92; *In re Bruce*, Adv. Proc. No. 14-08224-RDD, Dkt. No. 38. Moreover, the district court acknowledged that the bankruptcy court "relied principally on" *Belton I* in its decision here and analyzed the bankruptcy court's analysis in *Belton I*. SA 23.

The purpose of the waiver rule is to allow the lower court the opportunity to address the issue before it is addressed at the appellate level. Here, the bankruptcy court clearly addressed the scope issue in *Belton I*. It would have been futile to make it again in this case. Moreover, the parties and the lower courts acknowledged that the *Belton I* analysis applied in this case.

The nature of this proceeding renders it outside the scope of the parties' arbitration agreement, even given its broad language. Where, as here, a debtor brings a claim under §§ 105(a) and 524 alleging that the creditor has violated the discharge injunction issued by the bankruptcy court, an arbitration clause between the debtor and the creditor is not implicated. This case involves the invocation of the Bankruptcy Court's contempt powers, not private contractual claims by Belton and Bruce. *See Haynes v. Chase Bank USA, N.A., Adv. Proc. No.* 13- 08370-RDD, Dkt. No. 63 at 26 (July 22, 2014) ("The Court has its own contempt power, but it also has Section 105A, which goes beyond its own contempt power."). As such, the bankruptcy court itself is party to each action, since it is the bankruptcy court's injunction that has allegedly has been violated and it is the bankruptcy court's equitable powers under § 105(a) and its contempt powers that provide the means

through which the violation can be remedied. However, although it is the bankruptcy court's injunctions that are at issue, the bankruptcy court is, of course, not a party to the arbitration agreement between Credit One and Plaintiff. Moreover, it is black letter law that "a contract [to arbitrate] cannot bind a non-party." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002) (*cited in Belton I*, SA 46).

Courts considering whether a § 524 claim is within the scope of an arbitration agreement have found the same. For example, as the court held in *Grant v. Cole (In re Grant)*, 281 B.R. 721 (S.D. Ala. 2000), an arbitration clause between the debtor and the creditor is not implicated by a claim alleging that the creditor violated a stay and discharge order. The *Grant* court reasoned:

> This Court entered those orders. This Court is a party to those orders and the Court is an entity offended if the orders are not obeyed. A party who has not agreed to arbitration of its claim cannot be forced to arbitrate. This Court does not agree to arbitrate the claims. Therefore, the arbitration clause cannot require arbitration of the claims alleging violations of §§ 362 and 524 of the Code.

281 B.R. at 724; *see also Haas v. Navient, Inc.*, Case No. 16-03175-H2-ADV, [transcript at 11-18] (Bankr. S.D. Tex. Jan. 9, 2017) (denying the defendant's motion to compel arbitration of a § 524 claim and noting that the court was not a party to the arbitration agreement).

Credit One and Plaintiff entered into an arbitration agreement whereby they agreed to arbitrate their private disputes. They cannot—and did not purport to—

bind the bankruptcy court to relinquish its jurisdiction to adjudicate a contempt of that court's orders, and no reading of the arbitration agreements supports such a conclusion.

Courts have also held that claims brought by a former debtor under the Fair Debt Collection Practices Act were not subject to arbitration despite a broad arbitration clause in the original credit agreement because the bankruptcy discharge rendered the parties' arbitration agreement unenforceable. For example, the court in *Jernstad v. Greentree Servicing, LLC.*, No 11 C 7974, 2012 WL 8169889 at *2 (N.D. Ill. Aug. 2, 2012), held as much, finding that because the creditor's claim was discharged in bankruptcy "[n]ecessarily then, the pre-bankruptcy Arbitration Agreement – entered into in consideration of the mortgage loan (outlining the borrower's promise to pay) – is unenforceable." *See also Harrier v. Verizon Wireless Personal Commc'n, LP*, 903 F. Supp. 2d 1281, 1283 (M.D. Fla. 2012) (same); *Greentree Servicing, LLC v. Fisher*, 162 P.3d 944, 948 (Okla. App. Ct. 2007) (same). *But see Greentree Servicing, LLC v. Brough*, 930 N.E.2d 1238, 1242-43 (Ind. App. Ct. 2010) (contra). Moreover, the cases cited by the bankruptcy court are not to the contrary, as they concern enforcing lien and leasehold interests *in rem* and rejection of contracts under section 365 of the Bankruptcy Code. *See* SA 48-54.

Plaintiff submits that for the reasons set forth in *Jernstad*, *Harrier* and *Fisher*, the arbitration agreement here is unenforceable. Much as in those cases,

Plaintiff's obligations under his credit agreement were discharged in bankruptcy and the parties have not entered into a reaffirmation of the credit agreement. Thus, the agreement to arbitrate is no longer in force.

Dated: February 21, 2017

BOIES, SCHILLER & FLEXNER LLP
George F. Carpinello
Adam R. Shaw
Anne M. Nardacci
Jenna C. Smith

CHARLES JUNTIKKA & ASSOCIATES LLP
Charles Juntikka

By: /s/ George F. Carpinello

Attorneys for Plaintiff-Appellee
Orrin S. Anderson

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. PROC. 32(G)

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/s/ George F. Carpinello
Attorney for Plaintiff-Appellee
Orrin S. Anderson

Dated: February 21, 2017