APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 16-2496

IN RE ORRIN S. ANDERSON, AKA ORRIN S. ANDERSON, AKA ORINN SCOTT ANDERSON,

Debtor,

ORRIN S. ANDERSON, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, AKA ORINN SCOTT ANDERSON

Plaintiff-Appellee,

v.

CREDIT ONE BANK, N.A.,

Defendant-Appellant.

August Term, 2017
Argued October 11, 2017
Decided March 7, 2018
[884 F.3d 382]

Before: POOLER and DRONEY, *Circuit Judges*, and RAMOS,[1] *District Judge*.

Credit One Bank, N.A. appeals from an order of the United States District Court for the Southern District

[1] Judge Edgardo Ramos, United States District Court for the Southern District of New York, sitting by designation.

of New York (Nelson S. Román, *J.*), affirming the decision of the United States Bankruptcy Court for the Southern District of New York (Robert D. Drain, *Bankr. J.*) denying Credit One's motion to compel arbitration. Credit One sought to compel arbitration on the basis of a clause in the cardholder agreement between Credit One and Anderson. The bankruptcy court denied that motion, holding that Anderson's claims implicated core bankruptcy proceedings and that arbitration would present an inherent conflict with the congressional intent underlying the Bankruptcy Code. Credit One was entitled to an immediate appeal of the bankruptcy court's decision pursuant to the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(A). The district court affirmed the decision of the bankruptcy court, for substantially the same reasons.

On appeal, we conclude that Anderson's claim is not arbitrable. The parties now agree that the dispute concerns a core bankruptcy proceeding, so our sole inquiry is whether arbitrating the matter would present an inherent conflict with the goals of the Bankruptcy Code. We carefully consider the particular facts of this case in light of the expressed congressional preference for arbitration and conclude that Anderson's claims present an inherent conflict between arbitration and the Bankruptcy Code. The bankruptcy court did not abuse its discretion in denying the motion to compel arbitration in this case.

Affirmed and remanded.

GEORGE F. CARPINELLO, Boies, Schiller & Flexner LLP (Adam R. Shaw, Anne M. Nardacci, and Jenna C. Smith, *on the brief*), Albany, NY, for *Plaintiff-Appellee*.

Charles Juntikka, New York, NY, *for Plaintiff-Appellee (on the brief)*.

NOAH A. LEVINE, Wilmer Cutler Pickering Hale and Dorr, LLP (Alan E. Schoenfeld, *on the brief*), New York, NY, *for Defendant-Appellant*.

Michael David Slodov, Chagrin Falls, OH, *for Defendant- Appellant*.

Evan M. Tager, Charles E. Harris, II, Mayer Brown LLP, Washington, D.C. and Kate Comerford Todd, Warren Postman, U.S. Chamber Litigation Center, *for amicus curiae Chamber of Commerce of the United States of America in support of Defendant-Appellant Credit One Bank, N.A.*

Tara Twomey, National Consumer Bankruptcy Rights Center, San Jose, CA *for amici curiae Professors Ralph Brubaker, Robert M. Lawless, and Bruce A. Markell in support of Plaintiff-Appellee Orrin S. Anderson.*

POOLER, *Circuit Judge*:

Orrin Anderson was a credit card holder with a predecessor in interest of Credit One Bank, N.A. ("Credit One"). In March 2012, Credit One "charged off" Anderson's delinquent debt, which means the bank changed the outstanding debt from a receivable to a loss in its own accounting books. It then sold Anderson's debt to a third-party buyer. Credit One reported the change in the debt's status to Equifax, Experian, and Transunion, indicating both that the bank had made the internal accounting change and that the debt remained unpaid. In 2014, Anderson filed a voluntary Chapter 7 bankruptcy petition and on May 6, 2014, the

United States Bankruptcy Court for the Southern District of New York (Drain, *Bankr. J.*) entered a Discharge of Debtor Order of Final Decree ("discharge order") providing that Anderson was released from all dischargeable debts and closing Anderson's Chapter 7 case.

Anderson's claim arises from Credit One's subsequent refusal to remove the charge-off notation on Anderson's credit reports. In December 2014, the bankruptcy court permitted Anderson to reopen his bankruptcy proceeding to file a putative class action complaint against Credit One. Anderson alleges that Credit One's refusal to change his credit report is an attempt to coerce Anderson into paying a debt that has already been discharged through bankruptcy, which is a violation of the bankruptcy court's discharge injunction. Credit One moved to stay the proceedings and initiate arbitration in accordance with an arbitration clause in Anderson's cardholder agreement with the bank. The bankruptcy court held that Anderson's claim was non-arbitrable because it was a core bankruptcy proceeding that went to the heart of the "fresh start" guaranteed to debtors under the Bankruptcy Code. Credit One filed an interlocutory appeal of that ruling, as is its right under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 16(a)(1)(A). The United States District Court for the Southern District of New York (Nelson S. Román, *J.*) agreed with the bankruptcy court.

The parties agree that the issues raised concern "core" bankruptcy proceedings and arguments regarding legislative history and statutory text were not raised below. Accordingly, we need only inquire whether arbitration of Anderson's claim presents the sort of inherent conflict with the Bankruptcy Code that

would overcome the strong congressional preference for arbitration. We agree with both lower courts that Anderson's complaint is non-arbitrable. The successful discharge of debt is not merely important to the Bankruptcy Code, it is its principal goal. An attempt to coerce debtors to pay a discharged debt is thus an attempt to undo the effect of the discharge order and the bankruptcy proceeding itself. Because the issue strikes at the heart of the bankruptcy court's unique powers to enforce its own orders, we affirm the district court decision below.

BACKGROUND

In October 2002, Orrin Anderson opened a credit card account with First National Bank of Marin, a predecessor in interest to Credit One. Anderson's cardholder agreement contained an arbitration clause. Specifically, the arbitration agreement provided that "either [Anderson] or [Credit One] may, without the other's consent, require that any controversy or dispute . . . be submitted to mandatory, binding arbitration." App'x at 426.

In September 2011, Anderson's Credit One credit card account became delinquent and it remained so until March 2012, when Credit One "charged off" Anderson's account, reclassifying Anderson's debt from a receivable to a loss.[2] In May 2012, Credit One sold Anderson's account to a third-party debt buyer. Credit

[2] Federal regulations require banks to "charge off" debt that is past due by over 180 days. Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36,903, 36,904 (June 12, 2000) ("[O]pen-end retail loans that become past due 180 cumulative days from the contractual due date should be classified Loss and charged off").

One then reported the charge-off and the sale of the debt to the three major consumer credit reporting agencies Equifax, Experian, and TransUnion.

On January 31, 2014, Anderson filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York. On May 6, 2014, the bankruptcy court entered an order discharging all of Anderson's dischargeable debts and closing his Chapter 7 case.

In September 2014, Anderson contacted Credit One and asked it to remove the charge-off from his credit reports since the Credit One debt had been discharged in his bankruptcy proceeding. Credit One refused to contact the credit reporting agencies to correct the alleged error on Anderson's credit report. In October 2014, Anderson moved the bankruptcy court to reopen his case in order to pursue Credit One's "alleged violations of [Anderson's] discharge injunction." App'x at 94. In December 2014, the bankruptcy court granted Anderson's motion to reopen. Anderson thereafter filed an amended class action complaint in the bankruptcy court alleging that Credit One violated 11 U.S.C. § 524(a)(2) by "knowingly and willfully failing to update the credit reports of [c]lass [m]embers to signify the debts owing to [Credit One] have been discharged in bankruptcy." App'x at 398. In essence, Anderson alleged that Credit One refused to update the credit reporting agencies regarding the discharged debt in an effort to coerce payment on the discharged debt in violation of the Section 524 discharge injunction.

In March 2015, Credit One moved to compel arbitration pursuant to the terms of the cardholder agreement and to stay the bankruptcy proceeding. The bankruptcy court held a hearing on May 5 and denied

the motion nine days later. Less than a month later, in June 2015, Credit One filed an interlocutory appeal of the bankruptcy court's denial of its motion to compel arbitration. The district court affirmed the decision of the bankruptcy court a year later in June 2016. Credit One timely filed its notice of appeal on July 13, 2016 and amended it on July 26, 2016.

Oral argument was held in this case on October 11, 2017, and thereafter we asked the parties to submit supplemental briefs on the issue of mootness, given Credit One's stipulation that it would update the credit reports of Anderson and other consumers. The parties submitted supplemental briefs on October 23, 2017. We agree with both parties that the stipulation does not moot the appeal because the question presented and the relief sought both remain unsettled, such that we retain jurisdiction under Article III's "case" or "controversy" requirement. U.S. Const. Art. III, § 2. We thus proceed to consider the merits of the appeal.

DISCUSSION

I. STANDARD OF REVIEW

We begin by clarifying the standard of review, which we acknowledge has been inconsistently or imprecisely applied by this Court. Bankruptcy court decisions are subject to appellate review in the first instance by the district court, pursuant to the statutory scheme articulated in 28 U.S.C. § 158. The same section of the code grants jurisdiction to the circuit courts to hear appeals from the orders of the district court. 28 U.S.C. § 158(d). Because this scheme requires district courts to operate as appellate courts, we engage in plenary, or de novo, review of the district court decision. *In re Manville Forest Prod's Corp.*, 896 F.2d 1384, 1388

(2d Cir. 1990). We then apply the same standard of review employed by the district court to the decision of the bankruptcy court. Accordingly, we review the bankruptcy court's findings of fact for clear error and its legal determinations de novo. *In re U.S. Lines, Inc.*, 197 F.3d 631, 640-41 (2d Cir. 1999).

Our review procedure is further dictated by the specific question posed in this case, namely, whether arbitration may be compelled in this bankruptcy proceeding. That decision requires the bankruptcy court to determine first whether the issue involves a "core" or "non-core" proceeding, a distinction we explain in more detail below (*infra*, section II). If the proceeding is "non-core," "bankruptcy courts generally must stay" the proceedings "in favor of arbitration." *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 166 (2d Cir. 2000). If the matter involves a core proceeding, the bankruptcy court is tasked with engaging in a "particularized inquiry into the nature of the claim and the facts of the specific bankruptcy." *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006). If the bankruptcy court determines that arbitration would create a "severe conflict" with the purposes of the Bankruptcy Code, it has discretion to conclude that "Congress intended to override the Arbitration Act's general policy favoring the enforcement of arbitration agreements." *Id.*

We agree with the district court that the bankruptcy court's discretion to stay the proceedings may only be exercised if it properly assessed the factors related to the analysis of a potential inherent conflict between arbitration and the bankruptcy proceeding. *In re Anderson*, 553 B.R. 221, 226 (S.D.N.Y. 2016). Accordingly, we engage in de novo review of the bankruptcy court's determinations of whether the proceeding is core or

non-core and whether arbitration would present the sort of "severe conflict" with the Bankruptcy Code that would make arbitration inappropriate. *Hill*, 436 F.3d at 108. If we find that the bankruptcy court's legal analysis was correct, we review its decision to either stay the proceedings or decline to enforce the arbitration agreement for abuse of discretion. *In re U.S. Lines, Inc.*, 197 F.3d at 641.

In sum, we engage in clear error review of the bankruptcy court's findings of fact and de novo review of its legal conclusions, including the core/non-core and inherent conflict determinations. If an inherent conflict was properly found, we review the decision of whether to enforce the arbitration agreement under the deferential abuse of discretion standard.

II. CORE OR NON-CORE BANKRUPTCY PROCEEDINGS

In 28 U.S.C. § 157(b)(2), Congress articulated "a nonexclusive list of 16 types of proceedings" that it considers "core" to the power of the bankruptcy court. *Wellness Intern. Network, Ltd. V. Sharif*, 135 S. Ct. 1932, 1940 (2015). Proceedings that are "core" are those that involve "more pressing bankruptcy concerns." *In re U.S. Lines, Inc.*, 197 F.3d at 640. We have previously held that "[b]ankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters." *Hill*, 436 F.3d at 108.

The parties now agree that Anderson's claim is a "core" proceeding. Accordingly, we turn to the second step of our analysis to assess whether Congress intended for this statutory right to be non-arbitrable, such that the bankruptcy court had the discretion to refuse

to compel arbitration in this core bankruptcy proceeding.

III. CONGRESSIONAL INTENT

The Federal Arbitration Act, 9 U.S.C. § 1 et seq., "establishes a federal policy favoring arbitration." *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (internal quotation marks omitted). This preference, however, is not absolute. "Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." *Id.*, 482 U.S. at 226. In *McMahon*, the Supreme Court explained that "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 227. Congressional intent may be discerned through the "text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *Id.* (internal quotation marks and citation omitted).

Though Credit One argues on appeal that intent may be discerned through the text and legislative history, these arguments were not raised by either party below. *In re Anderson*, 553 B.R. at 227 n. 3. "It is well settled that arguments not presented to the district court are considered waived and generally will not be considered for the first time on appeal." *Anderson Group, LLC v. City of Saratoga Springs*, 805 F.3d 34, 50 (2d Cir. 2015). That doctrine is, of course, "entirely prudential" and we are free to consider the arguments if doing so is "necessary to avoid a manifest injustice." *Id.* (quoting *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008)). However, "the circumstances normally do not militate in favor of an exercise of discretion to address ... new arguments on ap-

peal where those arguments were available to the parties below and they proffer no reason for their failure to raise the arguments below." *In re Nortel*, 539 F.3d at 133 (internal brackets and quotation marks omitted). Accordingly, we decline to consider this new argument, which did not benefit from the analysis of the courts below. We need only consider whether there is an "inherent conflict between arbitration" and the Bankruptcy Code. *McMahon*, 482 U.S. at 227.

In order to determine whether enforcement of an arbitration agreement would present an inherent conflict with the Bankruptcy Code, we must engage in a

> particularized inquiry into the nature of the claim and the facts of the specific bankruptcy. The objectives of the Bankruptcy Code relevant to this inquiry include the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.

Hill, 436 F.3d at 108 (citation and internal quotation marks omitted).

Anderson's complaint alleges that Credit One violated Section 524(a)(2) of the Bankruptcy Code when it refused to update the credit reports of Anderson and other similarly situated discharged debtors. Section 524(a)(2) explains that a bankruptcy discharge

> 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 lia-

> bility of the debtor, whether or not discharge of such debt is waived.

11 U.S.C. § 524(a)(2). Anderson specifically alleges that Credit One's refusal reflected "a policy of not updating credit information for debts that are discharged in bankruptcy for the purpose of collecting such discharged debt." App'x at 384. Anderson has alleged that debt marked as "charged off" rather than "discharged" is more valuable to third-party debt buyers, who believe debtors will be compelled to pay the discharged debt in order to clear this negative item from their credit reports. This behavior is alleged to occur across a class of debtors.

It is well established that the discharge is the foundation upon which all other portions of the Bankruptcy Code are built. We have observed that "[b]ankruptcy allows honest but unfortunate debtors an opportunity to reorder their financial affairs and get a fresh start. This is accomplished through the statutory discharge of preexisting debts." *In re DeTrano*, 326 F.3d 319, 322 (2d Cir. 2003) (internal citation and quotation marks omitted). We have previously described the "fresh start" procured by discharge as the "central purpose of the bankruptcy code" as shaped by Congress, permitting debtors to obtain a "fresh start in life and a clear field unburdened by the existence of old debts." *In re Bogdanovich*, 292 F.3d 104, 107 (2d Cir. 2002). The "fresh start" is only possible if the discharge injunction crafted by Congress and issued by the bankruptcy court is fully heeded by creditors and prevents their further collection efforts. Violations of the injunction damage the foundation on which the debtor's fresh start is built.

Following the logic of *U.S. Lines* and *Hill*, we find that arbitration of a claim based on an alleged violation of Section 524(a)(2) would "seriously jeopardize a particular core bankruptcy proceeding." *In re U.S. Lines, Inc.*, 197 F.3d at 641. We come to this conclusion because 1) the discharge injunction is integral to the bankruptcy court's ability to provide debtors with the fresh start that is the very purpose of the Code; 2) the claim regards an ongoing bankruptcy matter that requires continuing court supervision; and 3) the equitable powers of the bankruptcy court to enforce its own injunctions are central to the structure of the Code. The fact that Anderson's claim comes in the form of a putative class action does not undermine this conclusion.

First, discharge is the paramount tool used to effectuate the central goal of bankruptcy: providing debtors a fresh financial start. In *Hill*, we distinguished that claim involving an automatic stay in an already-closed bankruptcy case from those cases in which courts found the claim to be non-arbitrable by observing that "Hill's bankruptcy case is now closed and she has been discharged. Resolution of Hill's claim against MBNA therefore cannot affect an ongoing reorganization, and arbitration would not conflict with the objectives of the automatic stay." 436 F.3d at 110. In the non-arbitrable cases on the other hand, "resolution of the arbitrable claims directly implicated matters central to the purposes and policies of the Bankruptcy Code." 436 F.3d at 110. Because there is no matter more "central to the purposes and policies of the Bankruptcy Code" than the fresh start provided by discharge, arbitration of Anderson's claim presents an inherent conflict with the Bankruptcy Code.

Second, Anderson's claims center on alleged violations of a discharge injunction that was still eligible for active enforcement. In *Hill*, we declined to find an inherent conflict where the debtor "no longer require[d] the protection of the stay to ensure her fresh start" because her estate had been fully administered. *Id.* Anderson alleges the precise opposite in his complaint: the protection of the injunction is absolutely required to ensure his fresh start and he claims that Credit One violated that injunction. Unlike the automatic stay, the discharge injunction is likely to be central to bankruptcy long after the close of proceedings. The automatic stay exists only while bankruptcy proceedings continue to ensure the status quo ante, while the integrity of the discharge must be protected indefinitely. Enforcement of the arbitration agreement in this case would interfere with the fresh start bankruptcy promises debtors, which would create an inherent conflict with the Code.

Third, enforcement of injunctions is a crucial pillar of the powers of the bankruptcy courts and central to the statutory scheme. In *Hill*, we recognized that we must consider "the undisputed power of a bankruptcy court to enforce its own orders" as part of our "particularized inquiry into the nature of the claim and the facts of a specific bankruptcy." *Id.* at 108 (quoting *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1069 (5th Cir.1997)). In that case we determined that the automatic stay "which arises by operation of statutory law" was not "so closely related to an injunction that the bankruptcy court is uniquely able to interpret and enforce its provisions." *Id.* at 110. Credit One argues that because the discharge injunction at issue here is based in a statute and executed by the court as a standard form using boilerplate language, the unique

powers of the bankruptcy court are not implicated in any meaningful way. We disagree. Though the discharge injunction itself is statutory and thus a standard part of every bankruptcy proceeding, the bankruptcy court retains a unique expertise in interpreting its own injunctions and determining when they have been violated. Congress afforded the bankruptcy courts wide latitude to enforce their own orders, specifically granting these specialty courts the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code.[3] 11 U.S.C. § 105(a). We have previously observed that "[t]he statutory contempt powers given to a bankruptcy court under § 105(a) complement the inherent powers of a federal court to enforce its own orders." *In re Kalikow*, 602 F.3d 82, 96 (2d Cir. 2010). Neither the statutory basis of the order nor its similarity—even uniformity—across bankruptcy cases alters the simple fact that the discharge injunction is an order issued by the bankruptcy court and that the bankruptcy court alone possesses the power and unique expertise to enforce it. Indeed, as one set of amici noted in their brief, violations of a discharge injunction simply cannot be described as "claims" subject to arbitration and the typical tools of contract interpretation.[4] Instead, violations of this court-ordered injunction are

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[3] Though it is not at issue in this appeal, amici persuasively document the judicial and legislative history of the discharge injunction and argue that "Congress deliberately chose to vest the federal court presiding over a bankruptcy case with injunctive power to enforce the bankruptcy debtor's discharge." Amici Curiae Br. for Professors Ralph Brubaker, Robert M. Lawless, and Bruce A. Markell in Support of Appellee ("Amici Professors Br.") at 5.

[4] Amici Professors Br. at 12-18.

enforceable only by the bankruptcy court and only by a contempt citation.

The power to enforce an injunction is complementary to the duty to obey the injunction, which the Supreme Court has described as a duty borne out of "respect for judicial process." *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 387 (1980) (internal quotation marks omitted). That same respect for judicial process requires us to hold that the bankruptcy court alone has the power to enforce the discharge injunction in Section 524. Arbitration of the claim would thus present an inherent conflict with the Bankruptcy Code.

Finally, we observe that the class action nature of this case does not alter our analysis. In *Hill*, we determined that the posture of the claim as a putative class action cut against Hill's argument that her claim was "integral to her individual bankruptcy proceeding." *Hill*, 436 F.3d at 110. We have already established that the discharge injunction at issue here is absolutely integral to the fresh start assured by Anderson's bankruptcy proceeding. We further observe that the procedural posture of Hill's case—a claim for a violation of the automatic stay long after that stay had been rendered moot by the closing of her bankruptcy case—undercut the claimed class action in a way that is not relevant to Anderson's claim. We observed that like the plaintiff herself, many of Hill's putative class members were "no longer in bankruptcy proceedings" and that the effort to tie her claim to this larger amorphous class suggested a "lack of close connection" between her claim and the underlying bankruptcy case. *Id.* Again, the facts of Anderson's case are easily distinguished. Unlike violations of stays that are already mooted by the conclusion of bankruptcy proceedings,

where the putative class members are all allegedly victims of willful violations of the discharge injunction issued by the bankruptcy court there is a continuing disruption of the debtors' ability to obtain their fresh starts.

IV. Discretion to Decline to Enforce Arbitration Agreement

Because we determine there is an inherent conflict between arbitration of Anderson's claim and the Bankruptcy Code, we must also assess whether the bankruptcy court abused its discretion in declining to enforce the arbitration agreement.

We find that the bankruptcy court "properly considered the conflicting policies in accordance with law." *In re U.S. Lines, Inc.*, 197 F.3d at 641. Accordingly, "we acknowledge its exercise of discretion and show due deference to its determination that arbitration will seriously jeopardize a particular core bankruptcy proceeding." *Id.* We hold that the bankruptcy court did not abuse its discretion by denying Credit One's motion to compel arbitration in this case.

CONCLUSION

For the foregoing reasons, we hereby AFFIRM the order of the district court and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 15-cv-4227 (NSR)

IN RE ORINN S. ANDERSON,

Debtor,

CREDIT ONE FINANCIAL,

Appellant,

-against-

ORRIN S. ANDERSON, A/K/A ORINN ANDERSON, A/K/A ORINN SCOTT ANDERSON,

Appellee, on behalf of himself and all others similarly situated.

Signed June 14, 2016
[553 BR 221]

OPINION & ORDER

NELSON S. ROMÁN, United States District Judge

Credit One appeals from an order of the United States Bankruptcy Court for the Southern District of New York (Drain, J.) (the "Bankruptcy Court") dated May 14, 2015 (ECF No. 3, Exhibit A), denying Credit One's motion to compel arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. For the

following reasons, the Bankruptcy Court's order is AFFIRMED.

BACKGROUND

Plaintiff-Appellee Orrin Anderson opened a credit card account with Defendant-Appellant Credit One in 2002. Mr. Anderson's cardholder agreement contained an arbitration agreement, which provided that, "[y] ou and we agree that either you or we may, without the other's consent, require that any controversy or dispute between you and us (all of which are called "Claims"), be submitted to mandatory, binding arbitration." (Appx. at 203, ECF No. 33:3.) The agreement additionally provided that "[c]laims subject to arbitration include, but are not limited to, disputes relating to the establishment, terms, treatment, operation, handling, limitations on or termination of your account; … credit reporting… or collections matters relating to your account; … and any other matters relating to your account, a prior related account or the resulting relationships between you and us." (*Id.* at 204.)

In 2011, Mr. Anderson defaulted on the account, and the account was closed in December 2011. Mr. Anderson filed a voluntary bankruptcy with the Bankruptcy Court on January 31, 2014. As a result of the bankruptcy proceedings, Mr. Anderson received a discharge of consumer debt, including the Credit One account. Despite the discharge, the debt remained on Mr. Anderson's credit report as "charged off" (i.e., not discharged in bankruptcy). Mr. Anderson subsequently contacted Credit One to notify it that the debt had been discharged in bankruptcy and to request that Credit One update his credit report. According to Mr. Anderson, Credit One took no action and Mr. Anderson's

credit report continues to show the debt as charged off rather than discharged in bankruptcy.

On October 17, 2014, Mr. Anderson moved to reopen the bankruptcy proceeding and after a hearing, the Bankruptcy Court reopened the case to "permit the Debtor to commence and pursue an adversary proceeding… against Credit One Bank with respect to alleged violations of the Debtor's discharge injunction." (Bank. Doc. 14-22147-rdd, ECF No. 26.) Thereafter, Mr. Anderson filed an Amended Class Action Complaint (the "Class Action Complaint"), seeking to represent a class of persons having credit reports with remaining entries for discharged debts. In the Class Action Complaint, Mr. Anderson asserts a cause of action pursuant to 11 U.S.C. § 524 ("§ 524") and 11 U.S.C. § 105 ("§ 105"). Under § 524, a discharge in a bankruptcy action acts as an injunction against all efforts to collect a discharged debt. 11 U.S.C. § 524. Section 105(a) of the Bankruptcy Code empowers a bankruptcy court with authority to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

On March 3, 2015, Credit One filed a combined motion to compel arbitration, among other requests. The Bankruptcy Court held a hearing on May 5, 2015, and on May 14, 2015, the Bankruptcy Court issued an order denying Credit One's motion to compel arbitration, relying principally on the analysis in *In re Belton*, No. 12-23037 (RDD), 2014 WL 5819586 (Bankr. S.D.N.Y. Nov. 10, 2014), *rev'd*, No. 15 CV 1934 VB, 2015 WL 6163083 (S.D.N.Y. Oct. 14, 2015), *motion to certify appeal denied*, No. 15 CV 1934 (VB), 2016 WL 164620 (S.D.N.Y. Jan. 12, 2016) (hereinafter, *Belton I*). Credit One now appeals that denial.

STANDARD OF REVIEW

A district court "may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree." Fed. R. Bankr. P. 8013. A district court reviews a bankruptcy court's conclusions of law *de novo* and its findings of fact under a clearly erroneous standard. *See In re Ames Dep't Stores, Inc.*, 582 F.3d 422, 426 (2d Cir. 2009) (citing *Momentum Mfg. Corp. v. Emp. Creditors Comm.*, 25 F.3d 1132, 1136 (2d Cir. 1994)).

DISCUSSION

V. APPLICABLE STANDARD OF REVIEW

As an initial matter, the parties dispute the applicable standard of review. More specifically, Mr. Anderson contends that this Court must afford due deference to the Bankruptcy Court's determination, relying on *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104, 107 (2d Cir. 2006) (hereinafter, *Hill*). *Hill* states that "[i]f the bankruptcy court 'has properly considered the conflicting policies 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)). However, due deference is only afforded to a bankruptcy court's *exercise of discretion*. But a bankruptcy court will not always have this discretion; only where "it finds that the [core] proceedings are based on provisions of the Bankruptcy Code that inherently conflict with the [FAA] or that arbitration of the claim would necessarily jeopardize the objectives of the Bankruptcy Code" will the bankruptcy court have discretion to override

the arbitration agreement. *In re Salander-O'Reilly Galleries*, LLC, 475 B.R. 9, 25-26 (S.D.N.Y. 2012) (citing *Hill*, 436 F.3d at 108). The determination of whether a bankruptcy court has this discretion is "a matter of law that must be reviewed de novo." *In re Lehman Bros. Holdings, Inc.*, No. 14 CIV. 7643 ER, 2015 WL 5729645, at *4 (S.D.N.Y. Sept. 30, 2015) (citing *In re Winimo Realty Corp.*, 270 B.R. 108, 117 (S.D.N.Y. 2001) (internal citations omitted)). Accordingly, this Court is required to review *de novo* the Bankruptcy Court's determination of whether the proceedings for violations of discharge injunctions inherently conflict with the FAA. If, and only if, there is an inherent conflict, the Bankruptcy Court is afforded discretion to override the arbitration agreement, an exercise of which is then entitled to due deference.

VI. ARBITRABILITY OF VIOLATION OF DISCHARGE INJUNCTION CLAIMS

The issue before the Court, therefore, is whether the Bankruptcy Court had discretion to override the arbitration agreement.[1] A bankruptcy court has discretion to refuse arbitration where it finds that "Congress intended to preclude a waiver of judicial remedies

[1] Although Mr. Anderson raises arguments regarding the validity and scope of the arbitration agreements, (Brief of Plaintiff-Appellee Orrin S. Anderson, ECF No. 34, at 21-23), these issues are raised for the first time on appeal and therefore will not be considered. *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) ("it is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.") (internal citations omitted). (*See also* Hearing Transcript, ECF No. 3, Exhibit B, at 38: 12-15 ("I don't believe that the plaintiff disputes that there is, in fact, a valid agreement to arbitrate or that the scope of the agreement covers the claims that are being made here."))

for the statutory rights at issue." *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987).[2] Proof of such congressional intent could "be discoverable in the text of the [statute], its legislative history, or *an inherent conflict between arbitration and the [statute's] underlying purposes*," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (internal quotation marks omitted) (emphasis added).[3] Mr. Anderson contends—and the Bankruptcy Court agreed—that congressional intent to preclude arbitration is evident due to an inherent conflict between arbitration and the purposes of the Bankruptcy Code. On appeal, Credit One urges the Court to find that no such

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[2] The FAA establishes a "federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A court has a duty to stay proceedings and refer the matter to arbitration if it is satisfied that the issue before it is arbitrable, and "[t]his duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S. at 226. However, where a court finds that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," the issue is not arbitrable and no stay should be granted. *Id.* at 227

[3] *Gilmer's* discussion of congressional intent makes clear that intent may be established any one of those three ways (i.e. text, legislative history, **or** inherent conflict). 500 U.S. at 26. *See also In re U.S. Lines, Inc.*, 197 F.3d at 640 (finding congressional intent to prohibit arbitration through an inherent conflict, when no conflict was apparent in the text or legislative history of the statute). The parties in the instant case do not assert that any such 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.

conflict exists.[4] Accordingly, the Court must determine if Congress demonstrated an intent to preclude a waiver of judicial remedies by asking whether or not an inherent conflict exists between arbitration and the underlying purposes of the Bankruptcy Code.

In addressing inherent conflicts between the Bankruptcy Code and the FAA, the Second Circuit has drawn a distinction between core and non-core proceedings. *See In re U.S. Lines, Inc.*, 197 F.3d at 640. "[B]ankruptcy courts generally *do not* have discretion to *decline* to stay *non-core* proceedings in favor of arbitration," because in non-core proceedings, the interest of the Bankruptcy Court is not as great. *See In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 166 (2d Cir. 2000). Core proceedings, on the other hand, implicate more pressing bankruptcy concerns and thus are more likely to "present a conflict sufficient to override by implication the presumption in favor of arbitration." *Id.* Nevertheless, the bankruptcy court does not always have the discretion to override an arbitration agreement in core proceedings. Only proceedings that "are premised on provisions of the Code that 'inherently conflict' with the [FAA]" and proceedings where "arbitration [would] necessarily jeopardize the objectives of the Bankruptcy Code" present the type of severe conflict necessary to demonstrate congressional intent to preclude a waiver of judicial remedies. *Insurance Co. of N. Am. v. NGC Settlement Trust & Asbes-*

[4] In Reply, Credit One argues, by analogy to the FCRA, that a pre-discharge credit reporting of accurate information does not violate the discharge injunction. (Reply Brief of Defendant-Appellant Credit One Bank, N.A., ECF No. 36, at 3-5.) This argument goes to the substance of the proceeding before the Bankruptcy Court and is irrelevant for purposes of determining this appeal.

tos Claims Mgmt Corp. (In re Nat'l Gypsum Co.), 118 F.3d 1056, 1067 (5th Cir. 1997).

Therefore, to determine that the Bankruptcy Court had discretion to override the arbitration agreement, the Court must find an inherent conflict. Because only core issues present an inherent conflict, the Court must first determine if the issues are core or non-core to the Bankruptcy Code. If the issues are core, the Court must then decide whether arbitration would present a severe, inherent conflict with or necessarily jeopardize the objectives of the Bankruptcy Code.

A. Core versus non-core

In this case, Mr. Anderson's claim pursuant to § 524 of the Bankruptcy Code is properly characterized as a core issue. *See Haynes v. Chase Bank USA, N.A. (In re Haynes)*, Adv. Pro. No. 13–08370–rdd, 2014 WL 3608891, at *7 (Bankr. S.D.N.Y. Jul. 22, 2014) ("A 'core proceeding' includes enforcement of the discharge, there being few matters as 'core' to the basic function of the bankruptcy courts as the enforcement of the discharge under Sections 524 and 727 of the Bankruptcy Code."); *In re Torres*, 367 B.R. 478, 481 (Bankr. S.D.N.Y. 2007) ("There is no question that the plaintiffs' claims to enforce Bankruptcy Code section 524(a)(2)'s discharge injunction are core proceedings…."); *In re Texaco Inc.*, 182 B.R. 937, 945 (Bankr. S.D.N.Y. 1995) (citing *In re Kiker*, 98 B.R. 103, 103-04 (Bankr. N.D. Ga. 1988) for the proposition that a debtor's motion to reopen a Chapter 13 case to enjoin an alleged violation of the discharge provision of 11 U.S.C. § 524 is a core proceeding); *In re Russell*, 378 B.R. 735, 738 (Bankr. E.D.N.Y. 2007) (holding that a "claim brought under 11 U.S.C. § 524(a)(2) [] constitutes a core proceeding.").

Credit One acknowledges that Mr. Anderson's individual claim to enforce the discharge injunction is a "core" claim under the Bankruptcy Code, but it contends that the class claims are "non-core" claims that should be arbitrated because (1) the Bankruptcy Court lacks jurisdiction over the putative class's claims because they do not relate to Mr. Anderson's bankruptcy, and (2) the Bankruptcy Court does not have subject matter jurisdiction to enforce discharge injunctions entered in other districts. (Credit One Memo at 17-22.)

The Bankruptcy Court previously heard and disposed of the core/non-core issue:

> [The putative class members] are debtors, too. They also got a discharge. They got a discharge under the Bankruptcy Code, specific provisions of the Bankruptcy Code, 11 U.S.C. 524 and 727. Consequently, I believe under 28 U.S.C. Sections 157(a) through (b) and 1334, those claims which arise under the Bankruptcy Code, those rights to enforce the discharge which arise under the Bankruptcy Code, i.e. 524 and 727, Congress specifically provided that the bankruptcy court has core jurisdiction. … This is like fundamentally core. There's nothing more fundamental than the discharge, as every court that has considered this issue has ruled.

(Hearing Transcript at 48: 10-22.) Moreover, the arguments regarding jurisdiction were made in and rejected by the Bankruptcy Court, and this Court refused to grant Credit One leave to appeal those determinations. *See Anderson v. Credit One Bank. N.A. (In re Anderson)*, No. 15–cv–4227(NSR), 2016 WL 787481 (S.D.N.Y. Feb. 22, 2016) (declining to hear an appeal of (1) wheth-

er the Bankruptcy Court has subject matter jurisdiction to entertain a putative nationwide class action over non-core claims for alleged violations of the discharge orders of other bankruptcy courts, and (2) whether the Bankruptcy Court has subject matter jurisdiction to award declaratory or injunctive relief or punitive damages for an alleged violation of the discharge injunction). Thus, those matters are not currently before the Court.

In any event, the determination of whether a matter is core or non-core depends on the nature of the proceeding. *See In re Best Products Co.*, 68 F.3d 26, 31 (2d Cir. 1995). Specifically:

> [c]ore proceedings are those that are found to be arising under the Bankruptcy Code or arising in a bankruptcy case. Proceedings arising under the Bankruptcy Code are those that clearly invoke substantive rights created by federal bankruptcy law. Proceedings arising in a bankruptcy case are those claims that are not based on any right expressly created by the Bankruptcy Code, but nevertheless, would have no existence outside of the bankruptcy.

In re Robert Plan Corp., 777 F.3d 594, 596-97 (2d Cir.), *cert. denied sub nom. Kirschenbaum v. Dep't of Labor*, 136 S. Ct. 317, 193 L. Ed. 2d 227 (2015) (internal citations, quotation marks, and alterations omitted). The discharge is clearly a right created by federal bankruptcy law, and an enforcement proceeding concerning that discharge therefore arises under the Bankruptcy Code. *See In re Nat'l Gypsum Co.*, 118 F.3d at 1064 ("[A] proceeding to enforce or construe a bankruptcy court's section 524(a) discharge injunction … necessarily arises under title 11"). Thus, a proceeding concern-

ing a violation of a discharge injunction is a core proceeding. *See*, *e.g.*, *In re Torres*, 367 B.R. at 481 ("There is no question that the plaintiffs' claims to enforce Bankruptcy Code section 524(a)(2)'s discharge injunction are core proceedings"). Therefore, given that the issues are core, the Court must proceed to the second inquiry and determine whether enforcement of the discharge injunction by arbitration inherently conflicts with or necessarily jeopardizes the objectives of the Bankruptcy Code.

B. Inherent Conflict or Necessarily Jeopardized Objectives

To make a determination that an inherent conflict exists, a court must engage in "a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy."[5] *Hill*, 436 F.3d at 108. A court may find that an "inherent conflict" exists where arbitration of a claim would "necessarily jeopardize" the objectives of the Bankruptcy Code, which include "the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." *Hill*, 436 F.3d at 108 (citing *In re Nat'l Gypsum Co.*, 118 F.3d at 1069). Such a severe conflict exists "where arbitration is inadequate to protect the substantive rights at is-

[5] "Disputes that involve both the Bankruptcy Code and the [FAA] often present conflicts of 'near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach toward dispute resolution.'" *Hill*, 436 F.3d at 108 (citing *In re U.S. Lines, Inc.*, 197 F.3d at 640 (quoting *Societe Nationale Algerienne Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v. Distrigas Corp.*, 80 B.R. 606, 610 (D. Mass. 1987)).

sue." *McMahon*, 482 U.S. at 226. "If a severe conflict is found, then the court can properly conclude that, with respect to the particular Code provision involved, Congress intended to override the [FAA's] general policy favoring the enforcement of arbitration agreements." *Hill*, 436 F.3d at 108.

Here, the Bankruptcy Court refused to stay the proceedings and compel arbitration on the grounds that the discharge is the fundamental right of the debtor obtained in bankruptcy, as it guarantees a debtor's fresh start, which is a central purpose of the Bankruptcy Code, and that purpose should not be jeopardized by decentralized resolution of claims through arbitration. (*See* Hearing Transcript at 45-50.) In so holding, the court relied primarily on its analysis in Belton I and Second Circuit precedent in *MBNA America Bank, N.A. v. Hill*.

The Court agrees that arbitrating Plaintiffs-Appellees' § 524 claims would necessarily jeopardize the objectives of the Bankruptcy Code.

In coming to this conclusion, the Court considers and applies the analysis from the seminal case on point, *MBNA America Bank, N.A. v. Hill*, where the Second Circuit enumerated three justifications for not finding an inherent conflict. 436 F.3d at 109. In addition, the Court takes into account an additional consideration—uniform application of the bankruptcy law.

i. Hill Analysis

In *Hill*, the Second Circuit ruled that arbitration of the claim would not seriously jeopardize the objectives of the Bankruptcy Code because "(1) Hill's estate has now been fully administered and her debts have been discharged, so she no longer requires protection of the

automatic stay and resolution of the claim would have no effect on her bankruptcy estate; (2) as a purported class action, Hill's claims lack the direct connection to her own bankruptcy case that would weigh in favor of refusing to compel arbitration; and (3) a stay is not so closely related to an injunction that the bankruptcy court is uniquely able to interpret and enforce its provisions." *Id.* Applying each of these justifications to the instant case, the Court finds that the weight of authority compels the opposite conclusion.

In *Hill*, the court noted that, first and most importantly, arbitration of Hill's § 362(h) claim would not jeopardize the important purposes that the automatic stay serves, including "providing debtors with a fresh start, protecting the assets of the estate, and allowing the bankruptcy court to centralize disputes concerning the estate." *Hill*, 436 F.3d at 109. The court explained that, because the bankruptcy case had closed, the automatic stay (which operates during the adjudication of the bankruptcy) was no longer necessary, so arbitration would not conflict with the objectives of the automatic stay. This distinguished Hill's case from the cases in which "resolution of the arbitrable claims directly implicated matters central to the purposes and policies of the Bankruptcy Code." *Id.* (citing *In re U.S. Lines, Inc.*, 197 F.3d at 641 (core insurance claims were integral to bankruptcy court's ability to preserve and equitably distribute assets of the estate where debtor faced mass tort actions); *In re Gandy*, 299 F.3d 489, 495-99 (5th Cir. 2002) (core claims represented almost entirety of the debtor's estate, the claims concerned the equitable distribution of the assets among creditors, and one of the remedies sought was not available in arbitration); *Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co., L.L.C.)*, 403 F.3d 164, 170 (4th Cir.

2005) (bankruptcy court's conclusion that arbitration of the claims would "substantially interfere with [the debtor's] efforts to reorganize" not clearly erroneous)).

In the instant case, the Court must instead examine the purposes and objectives of the *discharge* (rather than the automatic stay) and whether Mr. Anderson still requires protection of the discharge.

The Bankruptcy Code stems from "Congress's determination, rooted in Article 1, Section 8 of the Constitution, that debtors should be able to discharge their debts and creditors should have the benefit of uniform bankruptcy laws premised on that ultimate quid pro quo." *Belton I*, 2014 WL 5819586, at *8. Accordingly, "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 Bogdanovich*, 292 F.3d 104, 107 (2d Cir. 2002). The effectiveness of a bankruptcy proceeding therefore relies exclusively on a functioning discharge.[6] In other words, only through enforcement of the discharge order can the discharge provided by the Bankruptcy Court provide the debtor with a "fresh start," a central objective to the bankruptcy laws. *In re DeTrano*, 326 F.3d 319, 322 (2d Cir. 2003) (citing *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998)) ("Bankruptcy allows 'honest but unfortunate' debtors an opportunity to reorder their financial affairs and get a fresh start. This is accomplished through the statutory discharge of preexisting debts."); *In re Nassoko*, 405 B.R. 515, 522 (Bankr. S.D.N.Y. 2009) (citing *Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992)).

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[6] For this reason, the Bankruptcy Court ruled that "[t]here's nothing more fundamental than the discharge." (Hearing Transcript at 48.)

Moreover, the discharge is the mechanism through which debtors are protected *after* the resolution of their bankruptcy proceedings and distribution of their estates. Thus, whereas *Hill* "no longer require[d] the protection of the stay to ensure her fresh start," the discharge is essential in the post-bankruptcy context, and its objective is still—if not primarily—implicated after the estate is fully administered. In other words, in *Hill*, the automatic stay was at issue, and the automatic stay by definition operates during the debtor's bankruptcy, which explains the *Hill* court's reluctance to hold that an inherent conflict exists where the bankruptcy proceeding had concluded and the estate had been administered. In contrast, the discharge operates post-bankruptcy to ensure the objectives of the bankruptcy are carried out. Therefore, a central purpose of the Bankruptcy Code is implicated by the discharge even after the conclusion of bankruptcy proceedings, and arbitration of a discharge violation would jeopardize this central objective.[7]

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[7] This conclusion is reinforced by the Fifth Circuit's decision in *In re Nat'l Gypsum Co.*, 118 F.3d at 1056. In *Nat'l Gypsum*, the debtors alleged that the creditor's collection efforts—preconfirmation claims that the creditor was attempting to enforce in a series of demand letters—violated their discharge obtained in bankruptcy. *Id.* at 1059-60. After recognizing that "not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the [FAA]," the court went on to hold that, nevertheless, "arbitration of a core bankruptcy adversary proceeding brought to determine whether [the creditor's] collection efforts were barred by the section 524(a) discharge injunction … would be inconsistent with the Bankruptcy Code." *Id.* at 1067, 1071. Because the dispute involved "adjudication of federal bankruptcy rights wholly divorced from inherited contractual claims," the court found that "importance of the federal bankruptcy forum provided by the Code is at its zenith." *Id.* at 1068.

Accordingly, the Court does not read *Hill* to imply that arbitration is inappropriate only if it would substantially interfere with equitable distribution of the estate assets or debtors' efforts to reorganize.[8] Indeed, as the Second Circuit stated, "[f]irst, and most importantly, arbitration of Hill's § 362(h) claim would not jeopardize the important purposes that the automatic stay serves: providing debtors with a fresh start. …" 436 F.3d at 109. Clearly, then, *Hill* confirmed an additional, central objective of the Bankruptcy Code–providing debtors with a fresh start–which also has been recognized consistently by Second Circuit courts. *See In re Bogdanovich*, 292 F.3d at 107 ("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 Stoltz*, 315 F.3d 80, 94 (2d Cir. 2002) (same); *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). *See also Schwab v. Reilly*, 560 U.S. 770, 791 (2010) (holding that the fresh start is a fundamental

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[8] On this point, the Court notes that it is in disagreement with In re Belton, No. 15 CV 1934 VB, 2015 WL 6163083, at *7 (S.D.N.Y. Oct. 14, 2015), *motion to certify appeal denied*, No. 15 CV 1934 (VB), 2016 WL 164620 (S.D.N.Y. Jan. 12, 2016) (hereinafter, *Belton II*). In *Belton II*, the 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.* (citing *Hill*, 436 F.3d at 110 (internal quotation marks omitted)). For the reasons above, this Court respectfully disagrees with this conclusion.

bankruptcy concept); *United States v. Johns*, No. 11–3299, 2012 WL 2899060, at *11 (7th Cir. July 17, 2012) ("one of the central purposes of the Bankruptcy Code ... is to give debtors a fresh start.") (citations omitted). This objective 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.[9] *See, e.g.*, *In re Norman*, No. 04-11682, 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 In re Haemmerle*, 529 B.R. 17, 25 (Bankr. E.D.N.Y. 2015) ("The discharge injunction is intended to further one of the primary purposes of the Bankruptcy Code: giving the debtor an opportunity to make a financial fresh start, unburdened by efforts to collect debts she no longer owes.") (collecting cases). This is not to say that whenever the debtor's fresh start is at issue, arbitration is unavailable; however, in the instant case, where

[9] Although it is true that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum," Congress may evince an intent to preclude waiver of judicial remedies where statutory rights are not appropriate for arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (internal quotation marks omitted). In the instant case, given the high barriers individual debtors would face if arbitrating on an individual basis— specifically, cost and efficient resolution of claims—arbitration is inadequate to protect the debtors' rights to a discharge. *See Belton I*, 2014 WL 5819586, at *9.

the discharge is so fundamentally related to a debtor's fresh start, this conclusion is warranted.

The Court now turns to *Hill's* other two bases for holding that arbitration of the plaintiff's automatic stay claim would not seriously jeopardize the objectives of the Bankruptcy Code—the facts that the proceeding was a class action and that a bankruptcy court is not uniquely able to interpret an automatic stay.

The *Hill* court noted, secondly, that the fact that Hill filed her claim as a class action tended to show that the claim is not integral to her individual bankruptcy proceedings, and that lack of direct connection weighed in favor of arbitration. *Hill*, 436 F.3d at 110. "By tying her claim to a class of allegedly similarly situated individuals, many of whom are no longer in bankruptcy proceedings, she demonstrates the lack of close connection between the claim and her own underlying bankruptcy case." *Id.* Here too, the class action nature of the action weighs in favor of arbitration.

Third and finally, *Hill* explained that because an arbitrator would be asked to interpret and enforce a statute, rather than an affirmative order of the bankruptcy court, arbitration is an appropriate and competent forum for the § 362 claim. *Hill*, 436 F.3d at 110. In contrast, the claims here arise from a discharge injunction, which is an affirmative order of the bankruptcy court. As noted in *Hill*, a main objective of the Bankruptcy Code is the "undisputed power of a bankruptcy court to enforce its own orders." *Hill*, 436 F.3d at 108-09. Additionally, courts in the Second Circuit consistently recognize the unique power of a bankruptcy court to interpret its own orders. *See 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 bank-

ruptcy 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 PRL USA Holdings, Inc. v. United States Polo Ass'n, Inc.*, No. 14-CV-764 RJS, 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.") (citing C*ardell Fin. Corp. v. Suchodolski Assoc., Inc.*, 896 F. Supp. 2d 320, 328 (S.D.N.Y. 2012); *Emilio v. Sprint Spectrum L.P.*, No. 08–cv–7147 (BSJ), 2008 WL 4865050, at *2 (S.D.N.Y. Nov. 6, 2008), *rev'd on other grounds*, No. 08 CV 7147(BSJ), 2008 WL 4865050, at *1 (S.D.N.Y. Nov. 6, 2008), *order vacated in part*, No. 08 CV 7147(BSJ), 2008 WL 4865182 (S.D.N.Y. Nov. 6, 2008), and *aff'd*, 315 F. App'x 322 (2d Cir. 2009)). This consideration, therefore, weighs in favor of refusing to compel arbitration, as the Bankruptcy Court is uniquely suited to interpret its discharge order.

In sum, the considerations outlined in *Hill*, as applied to the instant case, weigh against arbitration.

ii. Additional Consideration – Uniformity

In addition to the three considerations in *Hill*, the court in *Belton I*—relied on by the Bankruptcy Court in the instant case—addressed an additional justification for arbitration that this Court finds compelling. Specifically, *Belton I* emphasized the importance of the uniform application of bankruptcy law, which has been recognized consistently in courts throughout this district. *Belton I*, 2014 WL 5819586, at *10; *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"); *In re Lehman Bros. Holdings Inc.*, 480 B.R. 179, 196 (S.D.N.Y. 2012) (recognizing the important policy promoting uniform application of the bankruptcy law); *In re Extended Stay, Inc.*, 466 B.R. 188, 207 (S.D.N.Y. 2011) (same). Accordingly, *Belton I* emphasized the need for "complete and consistent relief," which "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." *Belton I*, 2014 WL 5819586, at *10. *See also In re Nat'l Gypsum*, 118 F.3d at 1070 n. 21 ("Efficient resolution of claims [is an] integral purpos[e] of the Bankruptcy Code."). In other words, uniform application of the Bankruptcy Code is furthered by federal, class action litigation:

> Uniformity in application of the law to the facts in these federal statutory claims is furthered by federal court litigation and not arbitration. … The result is, that certain fact situations may be expected to bring about fairly consistent results, wherever they are tried. To subject these matters to arbitration, before individuals or tribunals with little or no experience in bankruptcy law or practice, and with little or no concern for the rights and interests of the body of creditors, of which the particular defendant is only one, would introduce varia-

> bles into the equation which could potentially bring about totally inconsistent results.[10]

In re Bethlehem Steel Corp., 390 B.R. 784, 794-95 (Bankr. S.D.N.Y. 2008). Here, 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. This is especially true in light of the broad discretion arbitrators have in deciding whether or not to apply collateral estoppel offensively. *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."). In *Bear Stearns*, the Second Circuit upheld an arbitration decision where the arbitrator refused to apply collateral estoppel where differing results had been reached in separate, related arbitrations. *Id.* It is certainly plausible, if not probable, that the same result (i.e., inconsistent decisions) would manifest in the instant case if the disputes were to be sent to separate arbitrations. Thus, multiple violations of a discharge injunction by one creditor are more efficiently and uniformly decided by federal litigation.

In light of the two *Hill* factors weighing against arbitration and the additional consideration of uniform application of the discharge injunction, the Court finds that the Bankruptcy Court had discretion to refuse to

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[10] The Court recognizes that the instant case presents the inverse scenario; namely, a number of debtors and one particular creditor. However, the policy of uniform application of the Bankruptcy Code, as well as concerns about the introduction of numerous variables into the equation, apply in both scenarios equally.

compel arbitration and agrees with the Bankruptcy Court's determination. As stated previously, when the Bankruptcy Court exercises its discretion to override an arbitration agreement, this Court must afford that determination due deference, and the Court finds no clear error in that aspect of the Bankruptcy Court's decision.

CONCLUSION

For the foregoing reasons, the Court AFFIRMS the Bankruptcy Court's order denying Credit One's motion to compel arbitration. Accordingly, Credit One's motion to expedite the appeal and motion to stay the Bankruptcy Court proceedings are mooted. The Clerk of the Court is respectfully requested to terminate the motions at ECF Nos. 22 and 40 and close this case.

Dated: June 14, 2016
White Plains, New York

SO ORDERED

[Signature]
NELSON S. ROMAN
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 7
Case No. 14-22147 (RDD)
Adv. Proc. No. 15-08214 (RDD)

IN RE ORINN S. ANDERSON,

Debtor,

ORINN S. ANDERSON, A/K/A ORINN ANDERSON,
A/K/A ORINN SCOTT ANDERSON,

Debtor and Plaintiff on behalf of himself and all others similarly situated,

v.

CREDIT ONE BANK, N.A. AND
CREDIT ONE FINANCIAL

Defendants.

Filed May 14, 2015

ORDER ON DEFENDANTS' MOTIONS TO COMPEL ARBITRATION, TO STRIKE CLASS ALLEGATIONS, AND TO DISMISS OR STAY

Upon the motions (the "Motions") of the Defendants herein for an order or orders (1) compelling arbitration, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 2-4, Fed.R. Bankr. P. 7012(b), incorporating Fed. R. Civ. P. 12(b)(3), (2) striking the

class allegations, pursuant to Fed.R. Bankr. P. 7012(b), incorporating Fed.R. Civ. P. 12(f), along with Fed.R.Bankr. P. 7023, incorporating Fed. R.Civ. P. 23(c)(1)(A) and 23(d)(1)(D), and the FAA, (3) dismissing the complaint in this adversary proceeding, pursuant to Fed. R. Bankr. P. 7012 and 7021, incorporating Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 21, and (4) staying all activity in this adversary proceeding pending determination of various issues in other pending adversary proceedings, pursuant to 9 U.S.C. § 3 and the Court's inherent authority; and, after due and sufficient notice of the Motions, upon Plaintiffs' opposition thereto (Dkt. #9); and upon all pleadings submitted in connection therewith and the record of the hearing held by the Court on the Motions on May 5, 2015 (the "Hearing"); and, after due deliberation and for the reasons stated by the Court at the Hearing, it is hereby

ORDERED that the Motions to compel arbitration, to strike class allegations, and to dismiss or stay are **DENIED**, with the exception of that the portion of the Motions that seeks the dismissal of the complaint in this adversary proceeding against Credit One Financial, which is **GRANTED** without prejudice.

Dated: May 14, 2015
White Plains, New York

/s/ Robert D. Drain
Honorable Robert D. Drain
United States Bankruptcy Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 7
Case No. 14-22147 (RDD)
Adv. Proc 15-08214 (RDD)

IN RE ORRIN S. ANDERSON,

Debtor.

ORRIN S. ANDERSON,

Plaintiff,

v.

CREDIT ONE BANK, N.A. ET AL,

Defendants.

TRANSCRIPT OF STATUS CONFERENCE;
PRE-TRIAL CONFERENCE;
MOTION TO DISMISS ADVERSARY
PROCEEDING, TO COMPEL ARBITRATION,
TO STRIKE CLASS ALLEGATIONS,
TO STAY PROCEEDINGS

Tuesday, May 5, 2015
11:04 a.m.

BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY COURT JUDGE

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* * *

[*44] other cases.

THE COURT: Okay.

MR. CARPINELLO: Thank you.

THE COURT: All right.

MR. SLODOV: Your Honor, could I respond just briefly?

THE COURT: Sure.

MR. SLODOV: I read through all the transcripts in *Bruce* and *Echevarria* and *Belton* and *Haynes*, and the one thing that I didn't see the Court address, and I grazed it earlier, is the question of how it's possible that a putative class claim becomes a core claim. I don't understand how that's possible.

THE COURT: Well, it's dealt with actually in the *Haynes* opinion, I believe. It's—

MR. SLODOV: I think the Court addressed—

THE COURT: —to enforce a right under Section 524(a) and 105(a) of the Bankruptcy Code, which specifically applies to enforcing rights under Section 524. It arises under the Bankruptcy Code. Therefore, the fact that there's no estate is completely irrelevant since the discharge under Section 524 and 727 are statutory provisions that Congress enacted so that creditors would be precluded from pursuing interest on claims against debtors after they are discharged.

And the statement that there's no private right of **[*45]** action under 524 is essentially a red herring because the courts have clearly recognized that there is a cause of action to enforce the discharge as within the bankruptcy court's authority to enforce a specific code

provision, including Section 524, see *In re Nosek*, 544 F.3d 44 (1st Cir. 2008), which states that the Court has its own contempt power, as well as power under Section 105(a).

So this is really addressed in the *Haynes* opinion, 2014 WL 3608891 (Bankr. S.D.N.Y., July 22, 2014), which addresses the class action issue. It's not separately addressed in the arbitration decision, which is *Belton*, 2014 WL 5819586, *In Re Belton* (Bankr. S.D.N.Y., November 10, 2014).

But, you know, as I noted in *Belton*, nothing is more core to bankruptcy, particularly an individual's bankruptcy, than getting his or her discharge and making it work. And I think you acknowledged that the Court has power to enforce a discharge and award sanctions for failure to do so, as well as issue an order compelling performance or withholding or ceasing the violation of the discharge. And the power to do that is under 105(a), as well as the Court's general contempt power.

So to me the private cause of action point is really a red herring and ignores the jurisdictional structure of the code, which in 1334(b) states that the district courts have jurisdiction over claims arising in and arising under and related to the bankruptcy code and case, and then that **[*46]** jurisdiction is conferred on the bankruptcy court with respect to core matters.

Under 157 as far as—157(a) and (b) as far as arising in and arising under, this clearly arises under the code. There's nothing more central to the Bankruptcy Code than 524 and 727, and 105(a)—

MR. SLODOV: Your Honor, the—

THE COURT: —specifically gives authority to enforce that, and it's not limited to the Court's own specific jurisdiction, but it's to enforcing provisions of the Bankruptcy Code, which is what Congress chose to do. I'm assuming it chose to do that as opposed to just saying follow the All Writs Act because it conferred on bankruptcy courts the power to enforce the Bankruptcy Code, and that encompasses class actions specifically—

MR. SLODOV: Your Honor, if I—

THE COURT: —as set forth in Rule 7023.

MR. SLODOV: If I could interject one point. I just wanted to make the observation that what I'm referring to is congressional intent. And in construct—in construing whether to compel arbitration or not, the Court's required to consider whether or not Congress has indicated an intent to preclude waiver of judicial remedies for the statutory right.

THE COURT: Well, okay.

MR. SLODOV: And—

[*47] THE COURT: And this is your FCRA argument?

MR. SLODOV: No, Your Honor.

THE COURT: Okay.

MR. SLODOV: I was trying to point out that if I understand the Court—

THE COURT: Because the—you know, the Second Circuit in the *Simon* case says that the FCRA doesn't really apply in bankruptcy cases anyway because bankruptcy is special, *In re Simon*. But anyway, I'm sorry I interrupted you.

MR. SLODOV: I'm sorry, Your Honor.

As I understood what the Court held in *Belton*, that under *MBNA v. Hill*, the Court's required to make a determination particularly as to inquiry into the nature of the claims and the facts of the specific bankruptcy to ascertain whether or not that intent is evident—congressional intent, that is. And under *MBNA v. Hill*, the question as I read *MBNA v. Hill* turns on the distinction between what's core and what's non-core.

And my point was, Your Honor, that with respect to absent putative class members, their claims, relative to Mr. Anderson, have to be considered non-core. I don't understand how you can reach the conclusion despite everything you've said, and I don't disagree with the fact that the Court has, you know, authority to enforce the discharge order, impose sanctions, you know, for contempt as it pertains to the debtor.

[*48] My issue here is how do you get to that—from that to a claim of absent class members and finding them to be core claims because if they're non-core claims, per *MBNA v. Hill*, the Court doesn't have discretion and has to refer those claims to arbitration.

THE COURT: But—

MR. SLODOV: That's the point that I was trying to make.

THE COURT: Okay. But I—I'll say this one more time. They are debtors, too. They also got a discharge. They got a discharge under the Bankruptcy Code, specific provisions of the Bankruptcy Code, 11 U.S.C. 524 and 727.

Consequently, I believe under 28 U.S.C. Sections 157(a) through (b) and 1334, those claims which arise

under the Bankruptcy Code, those rights to enforce the discharge which arise under the Bankruptcy Code, i.e. 524 and 727, Congress specifically provided that the bankruptcy court has core jurisdiction.

And it's more than, you know, the items listed in (b)(2). This is like fundamentally core. There's nothing more fundamental than the discharge, as every court that has considered this issue has ruled. And I think I may have left out in the *Belton* decision *In re Norman*, 2006 Bankr. LEXIS 2576 (Bankr. M.D. Ala. 2006), which ruled the same way. So it just—it's at 157(b)(1). It's right there. Arising under Title 11. They separately say arising in, so it's not limited to the case. It's arising under Title **[*49]** 11.

As far as congressional intent is concerned, I have to believe that Congress still thinks that debtors who have actually earned the discharge, the honest but unfortunate debtor, should not be put to having to come up with the cost to initiate an arbitration in front of non-judges, which as I said in an aside in *Belton* is completely contradictory to the Supreme Court's case law under -- or the reading of the Supreme Court's case law under *Stern*, but maybe we'll get an answer to that in the *Wellness* decision where at least two or three of the justices have a hard time with arbitration under the logic of *Wellness*.

But it—this one, I think you're right. You're not going to win on this one. And except to the extent I've supplemented on the record here, I'll rely on the logic in *Belton*. And that includes on this point, as far as the other debtors, i.e. the putative class debtors, the analysis in *Haynes*, which makes clear I think, as Judge Isgur did, as well, in the *Cano* case that I cited, that Section 105 is in furtherance of the and in addition to the

Court's contempt powers and, by its own terms, provides for enforcement of individual provisions of the Bankruptcy Code, which are—clearly include Section 524 and 527. So maybe we should move on off of arbitration.

[*50] I do think that the agreement here differs somewhat from the agreement in *Belton*, but in fact differs in a way that is not helpful to the cause of arbitration in that it would have someone who's just gone through a Chapter 7 bankruptcy. And if it's supposed to work right, and I believe it does work right in this district and elsewhere, the debtor is basically left with his or her income, whatever that is going forward, and exempt assets and nothing else.

So Congress clearly has stated by *MBNA v. Hill*, put a premium on the debtor's fresh start, and it's hard for me to believe that Congress, where there was an allegation that the discharge is being violated, would so jeopardize the fresh start as to require the debtor to shell out the cost of an arbitration and leave it up to the arbitrator and/or the good graces of the credit card company to shift that cost to the credit card company.

I also have concerns that there's no express acknowledgment of equitable relief or injunctive relief. The primary relief being sought here is to stop the allegedly improper violation of the discharge, and as I discussed in *Belton*, that power is at best hazy and time consuming if one goes the arbitration route even when there is an express acknowledgment of injunctive and equitable remedies in the agreement.

So I believe that in this—with regard to these [***51]** types of causative action, I should agree with the other courts that have held that arbitration was not intended by Congress when a violation of a discharge was

at issue and whether that's for an individual debtor before the court in the case before the court—that is the Chapter 7 case before the court—or debtors generally. Congress recognized a class action remedy, and in the jurisdictional sections that I've quoted, gave the Court the power to enforce the code generally. So maybe we should turn to the next issue.

MR. SLODOV: Thank you, Your Honor.

The next issue that was briefed is the motion to dismiss for improper venue. A number of the courts have likened or analogized the arbitration agreement itself as a forum selection clause, and when a case is filed in court as opposed to an arbitration, it's considered to be in the wrong venue.

THE COURT: But this is—

MR. SLODOV: And—

THE COURT: There's no specific venue selection provision here. It's really just premised on the arbitration provision, right?

MR. SLODOV: Yes.

THE COURT: So if I conclude that arbitration doesn't apply, logically I should conclude that this argument doesn't hold water either.

* * *

APPENDIX E

FIRST NATIONAL BANK *of Marin*

M-47416 (06-02)

PARTIALLY SECURED VISA/MASTERCARD CARDHOLDER AGREEMENT, DISCLOSURE STATEMENT AND ARBITRATION AGREEMENT

PLEASE READ THIS PROVISION OF YOUR CARD AGREEMENT CAREFULLY. IT PROVIDES THAT EITHER YOU OR WE CAN REQUIRE THAT ANY CONTROVERSY OR DISPUTE BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY A NEUTRAL ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT. IN ARBITRATION, YOU MAY CHOOSE TO HAVE A HEARING AND BE REPRESENTED BY COUNSEL.

Agreement to Arbitrate:

You and we agree that either you or we may, without the other's consent, require that any controversy or dispute between you and us (all of which are called "Claims"), be submitted to mandatory, binding arbitration. This arbitration provision is made pursuant to a transaction involving interstate commerce, and shall be

governed by, and enforceable under, the Federal Arbitration Act (the "FAA"), 9 U.S.C. §1 et seq., and (to the extent State law is applicable), the State law governing this Agreement.

Claims Covered:

- Claims subject to arbitration include, but are not limited to, disputes relating to the establishment, terms, treatment, operation, handling, limitations on or termination of your account; any disclosures or other documents or communications relating to your account; any transactions or attempted transactions involving your account, whether authorized or not; billing, billing errors, credit reporting, the posting of transactions, payment or credits, or collections matters relating to your account; services or benefits programs relating to your account, whether or not they are offered, introduced, sold or provided by us; advertisements, promotions, or oral or written statements related to (or preceding the opening of) your account, goods or services financed under your account, or the terms of financing; the application, enforceability or interpretation of this Agreement, including this arbitration provision; and any other matters relating to your account, a prior related account or the resulting relationships between you and us. Any questions about what Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced.
- Claims subject to arbitration include not only Claims made directly by you, but also Claims made by anyone connected with you or claiming through you, such as a co-applicant or authorized user of

your account, your agent, representative or heirs, or a trustee in bankruptcy. Similarly, Claims subject to arbitration include not only Claims that relate directly to us, a parent company, affiliated company, and any predecessors and successors (and the employees, officers and directors of all of these entities), but also Claims for which we may be directly or indirectly liable, even if we are not properly named at the time the Claim is made.

- Claims subject to arbitration include Claims based on any theory of law, any contract, statute, regulation, ordinance, tort (including fraud or any intentional tort), common law, constitutional provision, respondeat superior, agency or other doctrine concerning liability for other persons, custom or course of dealing or any other legal or equitable ground (including any claim for injunctive or declaratory relief). Claims subject to arbitration include Claims based on any allegations of fact, including an alleged act, inaction, omission, suppression, representation, statement, obligation, duty, right, condition, status or relationship.
- Claims subject to arbitration include Claims that arose in the past, or arise in the present or future. Claims are subject to arbitration whether they are made independently or with other claims in proceedings involving you, us or others. Claims subject to arbitration include Claims that are made as counterclaims, crossclaims, third-party claims, interpleaders or otherwise, and a party who initiates a proceeding in court may elect arbitration with respect to any Claim(s) advanced in the lawsuit by any other party or parties. Claims subject to arbitration include Claims made as part of a class action

or other representative action, and the arbitration of such Claims must proceed on an individual basis.

- If you or we require arbitration of a particular Claim, neither you, we, nor any other person may pursue the Claim in any litigation, whether as a class action, private attorney general action, other representative action or otherwise.
- Claims are not subject to arbitration if they are filed by you or us in a small claims court, so long as the matter remains in such court and advances only an individual claim for relief.

Initiation of Arbitration: The party filing an arbitration must choose one of the following three arbitration administrators: National Arbitration Forum; American Arbitration Association; or JAMS. These administrators are independent from us, and you must follow their rules and procedures for initiating and pursuing an arbitration. If you initiate the arbitration, you must also notify us in writing at Post Office Box 90249, Henderson, Nevada 89009-0249. If we initiate the arbitration, we will notify you in writing at your then current billing address or (if your account is closed) the last address we have on file for you. Any arbitration hearing that you attend will be held at a place chosen by the arbitrator or arbitration administrator in the same city as the U.S. District Court closest to your billing address, or at some other place to which you and we agree in writing. You may obtain copies of the current rules of each of the three arbitration administrators named above, and other related materials, including forms and instructions for initiating an arbitration, by contacting the arbitration administrators as follows:

National Arbitration Forum
P.O. Box 50191
Minneapolis, MN 55405
Web Site: www.arbitration-forum.com

American Arbitration Association
335 Madison Avenue, Floor 10
New York, NY 10017-4605
Web Site: www.adr.org

JAMS
1920 Main Street, Suite 300
Irvine, CA 92610
Web Site: www.jamsadr.com

Procedures and Law Applicable in Arbitration: A single arbitrator will resolve Claims. The arbitrator will either be a lawyer with at least ten years experience or a retired or former judge. The arbitrator will be selected in accordance with the rules of the arbitration administrator and will be neutral. The arbitration will be conducted under the applicable procedures and rules of the arbitration administrator that are in effect on the date the arbitration is filed unless this arbitration provision is inconsistent with those procedures and rules, in which case this Agreement will prevail. These procedures and rules may limit the amount of discovery available to you or us. The arbitrator will apply applicable substantive law consistent with the FAA and applicable statutes of limitations, and will honor claims of privilege recognized at law. The arbitrator will take reasonable steps to protect customer account information and other confidential information, including the use of protective orders to prohibit disclosure outside the arbitration, if requested to do so by you or us. The

arbitrator will have the power to award to a party any damages or other relief provided for under applicable law, and will not have the power to award relief to, against, or for the benefit of, any person who is not a party to the proceeding. The arbitrator will make any award in writing but need not provide a statement of reasons unless requested by a party. Upon a request by you or us, the arbitrator will provide a brief statement of the reasons for the award.

Costs: If we file the arbitration, we will pay the initial filing fee. If you file the arbitration, you will pay the initial filing fee, unless you seek and qualify for a fee waiver under the applicable rules of the arbitration administrator. We will reimburse you for the initial filing fee if you paid it and you prevail. If there is a hearing, we will pay any fees of the arbitrator and arbitration administrator for the first day of that hearing. All other fees will be allocated in keeping with the rules of the arbitration administrator and applicable law. However, we will advance or reimburse filing fees and other fees if the arbitration administrator or arbitrator determines there is other good reason for requiring us to do so, or we determine there is good cause for doing so. Each party will bear the expense of that party's attorneys, experts, and witnesses, and other expenses, regardless of which party prevails, except that the arbitrator shall apply any applicable law in determining whether a party should recover any or all expenses from another party.

No Consolidation or Joinder of Parties: All parties to the arbitration must be individually named. Claims by persons other than individually named parties shall not be raised or determined. Notwithstanding anything else that may be in this arbitration provision or Agreement, no class action, private attorney

general action or other representative action may be pursued in arbitration, nor may such action be pursued in court if any party has elected arbitration. Unless consented to by all parties to the arbitration, Claims of two or more persons may not be joined, consolidated or otherwise brought together in the same arbitration (unless those persons are applicants, co-applicants or authorized users on a single account and/or related accounts or parties to a single transaction or related transactions); this is so whether or not the Claims (or any interest in the Claims) may have been assigned.

Enforcement, Finality, Appeals: You or we may bring an action, including a summary or expedited motion, to compel arbitration of Claims subject to arbitration, or to stay the litigation of any Claims pending arbitration, in any court having jurisdiction. Such action may be brought at any time, even if any such Claims are part of a lawsuit, unless a trial has begun or a final judgment has been entered. Failure or forbearance to enforce this arbitration provision at any particular time, or in connection with any particular Claims, will not constitute a waiver of any rights to require arbitration at a later time or in connection with any other Claims. Any additional or different agreement between you and us regarding arbitration must be in writing.

Within fifteen days after an award by the single arbitrator, any party may appeal the award by requesting in writing a new arbitration before a panel of three neutral arbitrators designated by the same arbitration administrator. The panel will consider all factual and legal issues anew, follow the same rules that apply to a proceeding using a single arbitrator, and make decisions based on the vote of the majority. Costs will be allocated in the same way they are allocated for arbi-

tration before a single arbitrator. An award by a panel, or an award by a single arbitrator after fifteen days has passed, shall be final and binding on the parties, subject to judicial review that may be permitted under the FAA. An award in arbitration will be enforceable as provided by the FAA or other applicable law by any court having jurisdiction. An award in arbitration shall determine the rights and obligations between the named parties only, and only in respect of the Claims in arbitration, and shall not have any bearing on the rights and obligations of any other person, nor on the resolution of any other dispute or controversy.

Severability, Survival: This arbitration provision shall survive: (i) termination or changes in the Agreement, the account and the relationship between you and us concerning the account; (ii) the bankruptcy of any party; and (iii) any transfer or assignment of your account, or any amounts owed on your account, to any other person. If any portion of this arbitration provision is deemed invalid or unenforceable, the remaining portions shall nevertheless remain in force.

APPENDIX F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 7
Case No. 14-22147 (RDD)

IN RE ORINN S. ANDERSON,

Debtor,

ORINN S. ANDERSON, A/K/A ORINN ANDERSON,
A/K/A ORINN SCOTT ANDERSON,

Debtor and Plaintiff on behalf of himself and all others similarly situated,

v.

CREDIT ONE BANK, N.A. AND
CREDIT ONE FINANCIAL

AMENDED CLASS ACTION
ADVERSARY COMPLAINT

1. Plaintiff, Orinn S. Anderson, on behalf of himself and all others similarly situated, brings this Complaint, by and through his attorneys, for declaratory judgment, injunctive relief and damages arising out of the Defendants' systematic practice of violating the discharge injunction under Section 524(a)(2) of the Bankruptcy Code, 11 U.S.C. Sections 101 *et seq*. by acting to collect discharged debts through their failure to update and correct credit information to credit report-

ing agencies to show that such debts are no longer due and owing and that they have been discharged in bankruptcy.

JURISDICTION AND VENUE

2. This Court has original jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in U.S.C. § 157(b)(2)(A) and (O).

3. Venue is properly in this District pursuant to 28 U.S.C. § 1391(b)(1) and (2), as Defendants resides in this District within the meaning of § 1391(c)(2), Plaintiff resides in this district, and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred here.

PARTIES

4. Plaintiff Orinn S. Anderson resides at 215 South 9th Avenue, Mount Vernon, Westchester County, New York.

5. Upon information and belief, Credit One Bank, N.A. is a banking association existing under the laws of the United States with a place of business in Las Vegas, Nevada and engages in continuous business within the State of New York.

6. Upon information and belief, Credit One Financial is a banking association existing under the laws of the United States with a place of business in Las Vegas, Nevada and engages in continuous business within the State of New York.

7. Credit One Bank, N.A. and Credit One Financial are collectively referred to herein as "Defendants."

8. The debt Plaintiff previously owed to Defendants were reporting to the credit reporting agencies as owed to "Credit One Bank."

BACKGROUND

9. This Complaint alleges that Defendants have violated § 524(a)(2) of the Bankruptcy Code because they have willfully attempted to collect on discharged debts. Specifically: (1) Defendants were aware of Plaintiff's discharge in bankruptcy and the discharge of the debts Plaintiff owed to Defendants; (2) Defendants were aware that they were reporting on the status of Plaintiff's accounts incorrectly; (3) Defendants had the ability to update or correct their reporting on the status of Plaintiff's accounts after Plaintiff received the bankruptcy discharge; and (4) Defendants willfully failed to update or correct Plaintiff's and other Class Members' credit reports because they have adopted a policy of not updating credit information for debts that are discharged in bankruptcy for the purpose of collecting such discharged debt.

10. Even after Plaintiff contacted Defendants in September 20014, Defendants have not changed their policy and continue to refuse to update tradeline information they know is false and detrimental to the "fresh start" that debtors are entitled to receive from the Bankruptcy Code. This continued policy of refusing to update the bankruptcy status of discharged accounts constitutes willful acts to collect discharged debts.

11. Defendants have a deliberate policy of refusing all debtor requests to update credit reports with regard to debts discharged in bankruptcy for accounts sold prior to the filing of the bankruptcy. This refusal policy

applies to all accounts sold prior to the filing of bankruptcy.

12. Upon information and belief, Defendants' refusal policy also applies to accounts that Defendants have not sold prior to filing of the bankruptcy.

13. Defendants' failure to update credit reports is not a matter of inadvertence; it is a willful policy of attempting to lay a trap for Plaintiff and other Class Members until the point that they need an accurate credit report, and they cannot obtain such a credit report without paying on a discharged debt.

14. By refusing to correct former debtors' credit information to reflect that their debts have been discharged in bankruptcy, Defendants enhance the value of the debt they sell to third parties because third parties will pay Defendants more for delinquent debts if the third party knows that Defendants will not update the debtors' credit reports to list the debt as discharged in bankruptcy. Furthermore, since Defendants and their debt purchasers understand that they are prohibited by the Bankruptcy Code from contacting the discharged debtors, they know that their sole method of debt collection is the coercive effect of the negative credit reporting that will pressure the discharged debtors to pay the debt and / or pressure the discharged debtors to contact Defendants or the debt purchasers who can then exert further pressure to pay the debt.

15. Upon information and belief, Defendants have a direct financial interest in the collection of discharged debts, including Plaintiff's debts, because they retain a percentage interest in amounts paid by the discharged debtors directly to Defendants.

16. Defendants also act as agents for the third-party debt purchasers after the sale by forwarding to the debt purchasers amounts paid by the discharged debtors directly to Defendants.

PLAINTIFF ORINN ANDERSON

17. Plaintiff Anderson repeats and realleges the allegations in Paragraphs 1 - 16 as if fully set forth herein.

18. Plaintiff Anderson is among many thousands of persons in the United States who have filed bankruptcies pursuant to Chapter 7 of the U.S. Bankruptcy Code and who have been granted orders of discharge by a U.S. Bankruptcy Court. Under federal bankruptcy laws, such an order fully and completely discharges all statutorily dischargeable debts incurred prior to the filing of bankruptcies, except for those that have been: (1) reaffirmed by the debtor in a reaffirmation agreement; or (2) successfully challenged as non-dischargeable by one of the creditors in a related adversary proceeding. Plaintiff Anderson and the Class Members are persons for whom the debts at issue herein have been discharged through bankruptcy.

19. Prior to July 2011, Plaintiff Anderson incurred a debt with Defendants.

20. Sometime after July, 2011, the debt became delinquent and in May, 2012 "Credit One Bank," with the address of P.O. Box 98872, Las Vegas, Nevada 89193-8872, filed credit information with the credit reporting companies noting that the debt was delinquent.

21. Thereafter, Defendants reported the debt as "charged off."

22. On January 31, 2014, Plaintiff Anderson filed a voluntary petition for relief under Chapter 7 of Title 11 of the U.S. Code.

23. On or about May 6, 2014, this Court entered an Order discharging Plaintiff's debts including the debts owed to Defendants.

24. On May 8, 2014, this Court notified Defendants of the discharge of Plaintiff's debt to Defendants.

25. On or about August 23, 2014, Plaintiff Anderson obtained his Trans Union and Equifax credit reports, which showed the words "charged off" next to the discharged account at issue in the current status of the credit reports. The credit reports showed no indication that the account had been "included in bankruptcy." The account in question was not subject to a reaffirmation agreement with Defendants or an adversary proceeding brought by Defendants.

26. From September 22, 2014 until today, Defendants have rejected Plaintiff Anderson's demand that his credit report be updated to remove the erroneous "charge off" on his discharged debt.

27. Defendants were placed on notice of the inaccuracy of the credit report and of Plaintiff Anderson's demand that Defendants delete the erroneous "charge off" on the discharged debt on his credit report when Plaintiff called Defendants and requested that they remove the "charge off" on September 22, 2014. Even after the notice, Defendants took no action to correct Plaintiff Anderson's credit information.

28. The erroneous "charge off" remains on the Plaintiff Anderson's credit reports.

29. At some point in time, currently unknown, Defendants assigned Plaintiff Anderson's debt to a third party.

30. Upon information and belief, Defendants agree to act as agent for the third party in the collection of such debt. As agent, Defendants forward to the third party all amounts collected by Defendants on debts sold to the third party.

31. Defendants also have a direct financial interest in the collection of Plaintiff Anderson's discharged debt. Upon information and belief, Defendants keep a percentage of all the amounts collected by Defendants on debts sold to the third party that are collected by Defendants.

32. In addition, Defendants have another direct financial interest in the collection of Plaintiff Anderson's discharged debt because third party purchasers are willing to pay more for Defendants' discharged debt portfolio because they know they can collect on discharged debts.

33. Plaintiff Anderson's credit reports list the subject debt only in the name of "Credit One Bank," not in the name of any third party. No third party debt buyer is listed anywhere on Plaintiff Anderson's credit reports.

34. Upon information and belief, the credit reporting agencies will not permit the third parties to make any change in a tradeline listing Defendants as the creditor.

35. Thus, Defendants are aware that only they can effect a change in Plaintiff Anderson's tradeline to correctly reflect that the debt has been discharged in bankruptcy. Yet, they continue their policy of not up-

dating credit reports and have refused Plaintiff Anderson's request to do so.

36. Defendants' refusal to correct the tradeline referring to this discharged debt has an adverse effect on Plaintiff Anderson because he is being denied his fresh start provided by the bankruptcy discharge and he is aware that his ability to obtain credit, housing, students loans or employment is adversely affected by the erroneous credit information.

THE CLASS INCLUDING THE PLAINTIFF

37. Plaintiff repeats and realleges the allegations in Paragraphs 1 - 36 as if fully set forth herein.

38. Defendants are creditors regularly engaged in the business of extending credit to Plaintiff and other members of the Class.

39. In the ordinary course of business, Defendants' debtors who are enduring financial hardship fall behind on their payments on Defendants' credit accounts. Prior to the filing of any personal bankruptcies, Defendants, their collection agencies or delinquent debt companies that purchase Defendants' debt, act to collect these past due debts by threatening in dunning letters to place a "charge off" or other similar "past due" notations on the debtors' credit reports. Said letters threaten to ruin the debtors' credit unless they pay the past due debt. Defendants, their debt collectors and delinquent debt companies that purchase Defendants' debt also act to collect these past due debts by promising in dunning letters to remove the "charge off" or other "past due" notations on the debtors' credit reports to show that the past due debts have been paid if the debts are paid.

40. In the ordinary course of business, Defendants issue reports to credit reporting agencies as to the current status of debts incurred by individuals whom Defendants have extended credit. They are also entities which regularly and, in the ordinary course of business, furnish information to one or more credit reporting agencies about their transactions and experiences with consumers.

DEFENDANTS HAVE KNOWLEDGE OF THE DISCHARGE OF PLAINTIFF'S DEBT AND THAT OF OTHER CLASS MEMBERS

41. Defendants have knowledge of when their past due debts and delinquent accounts are discharged because they receive a discharge notice from the U.S. Bankruptcy Court. Defendants received such notice of the discharge of Plaintiff's debts to Defendants.

42. Since 2004, upon information and belief, Defendants have had knowledge of the fact that a very large number of discharged debtors have notified them of legal claims including lawsuits alleging that the Defendants have a willful policy of not updating sold accounts and certain other accounts to remove the charge off or other negative information from their credit reports in violation of the discharge injunction.

43. Upon information and belief, Defendants, and the responsible individuals who were or are in authority to change the Defendants' policy for credit reporting policies, were (1) aware of the knowledge alleged in the foregoing paragraphs and in the other paragraphs of this complaint; and (2) willfully decided to not update the credit reports of the Plaintiff and the other class members for the purpose of obtaining a monetary bene-

fit for Defendants or Defendants third party purchasers of delinquent debt.

DEFENDANTS KNOW THAT REPORTING ON PLAINTIFF'S DEBT AND THAT OF OTHER CLASS MEMBERS IS ERRONEOUS

44. Defendants know that credit reporting agencies continue to report Plaintiff's discharged debt and those of other Class Members as "charged off." Defendants are aware of this fact because they regularly report to the credit reporting agencies and have access to this data, and can learn at any time the status of a tradeline that reports one or more of the Defendants as the creditor. They also know because Plaintiff Anderson told Defendants that his report was erroneous.

45. Defendants also know that, without correction by Defendants, the tradeline will not be changed because it is not the practice of credit reporting agencies to make such changes if the debt has been transferred by the original creditor.

46. Further, upon information and belief, Defendants have specific knowledge that the information in the credit reports will not be changed unless they do so because they have agreements with the purchasers of delinquent debt that the purchasers of such debt will not change credit lines that list any of Defendants as the creditor.

47. Defendants also continue to engage in regular transactions with debtors whose debt has been sold to third-party purchasers because Defendants forward to such purchasers payments they received on sold debts. Defendants know that a significant amount of payments will be made to them, rather than the third-party purchasers, because the tradelines remain in the name of

"Credit One Bank". The name of the third party debt purchasers generally does not even appear on the credit reports just as no debt purchaser appears on the Plaintiff's credit reports in this case.

48. Upon information and belief, the credit reporting agencies will not permit third party debt purchasers to make any change in any tradelines for accounts listed by the original creditors. In this case, the original creditor on the tradeline is "Credit One Bank." Thus, Defendants have knowledge that the credit information that they have placed on Plaintiff's and other Class Members' credit reports is and continues to be inaccurate.

DEFENDANTS HAVE THE ABILITY TO CORRECT THEIR REPORTING ON THE STATUS OF PLAINTIFF'S ACCOUNT AFTER THEY RECEIVED NOTICE OF A BANKRUPTCY DISCHARGE

49. Defendants have the ability to correct or delete the credit information that indicates that Plaintiff's subject debt is still "charged off." Banks and other lending institutions such as Defendants have the ability to delete or correct erroneous tradelines, even when those debts have been transferred to third parties.

50. Many banks and other creditors routinely delete or correct tradelines to reflect discharges in bankruptcy, even when those debts have been transferred. Defendants know they have the ability to correct these tradelines but have continued to not update their credit reports and refused the requests of the Plaintiff and all other Class Members who have asked them to do so.

DEFENDANTS' CONDUCT IS WILLFUL

51. Despite the fact that Defendants have received notice of the discharge of Plaintiff's and each Class Member's debt to Defendants, Defendants have a deliberate policy of not notifying credit reporting agencies that debts formerly owing to Defendants are no longer "charged off" or currently still due and owing because they have been discharged in bankruptcy. As result of Defendants' policy of not updating the accounts at issue with the credit reporting agencies, debts that have been discharged in bankruptcy are listed on Class Members' credit reports as "past due" and/or "charged off." These notations clearly indicate to potential creditors, employers, or other third parties that a Class Member still owes a debt and that debt may be subject to collection. These notations adversely affect Plaintiff's and every Class Member's ability to obtain credit or employment and have the inherent coercive effect of inducing Plaintiff and all other Class Members to make payment on the debt.

52. Defendants have willfully continued the policy of not updating the Plaintiff's credit reports and the credit reports for all members of the prospective class until the present day.

53. On information and belief, other large credit card issuers update their sold accounts to reflect that the credit account was discharged in virtually every case.

54. Many debtors whose debts have been discharged in bankruptcy have advised Defendants of their failure to update the information on their credit reports to show that their debts have been discharged to bankruptcy. These debtors have requested that De-

fendants remove the past due notations from their credit reports. Defendants have refused to do so.

55. Defendants have a deliberate policy of refusing the debtors' requests to remove "charge offs" and other similar "past due" notations from Defendants' debts that were sold prior to the filing of the bankruptcy from the debtors' credit reports. As a result, the credit reports of these individuals and of all Class Members incorrectly show their indebtedness to Defendants to be collectible.

56. Even in response to notices from Class Members that information contained in their credit reports was inaccurate, Defendants have refused to correct erroneous credit information. In fact, Defendants have advised former debtors that, unless they pay the discharged debt, the credit reports must reflect that the debt was "charged off" or similar language for seven (7) years. This policy of refusing all requests by discharged debtors who ask that that Defendants remove charge offs from their credit reports independently establishes that Defendants are willfully acting to collect discharged debts by not updating credit reports.

57. Upon information and belief, Defendants have also received requests from time to time from the credit reporting agencies that Defendants verify that the debt owed by Plaintiff and Class Members were discharged in bankruptcy to which Defendants have responded that the debts were still due and owing, despite Defendants' knowledge that such debts have in fact been discharged in bankruptcy.

58. Defendants know that the existence of such inaccurate information in the Class Members' credit reports would damage the Class Members' credit ratings, including that of Plaintiff, and their ability to obtain

new credit, a lease, a mortgage or employment, all of which may be essential to reestablishing their life after going through bankruptcy.

59. Defendants have chosen not to advise the credit reporting agencies of the fact that Plaintiff's and other Class Members' debts have been discharged because Defendants continue to receive payment or a monetary benefit either directly or indirectly on discharged debts. This policy has been applied to Plaintiff, even though Defendants know that only they can correct the erroneous credit information relating to Plaintiff. This results from the fact that Class Members, including Plaintiff, in order to obtain favorable credit or credit at all, often feel it necessary to pay off the debt despite its discharge in order to remove the inaccurate information from their credit reports.

60. This belief is intentionally reinforced by Defendants themselves when Class Members contact Defendants asking them to correct the erroneous credit information. Thus, upon information and belief, when a Class Member needs to rent a car, obtain employment or rent an apartment, or other similar transactions, and they are advised by Defendants that Defendants will not remove the erroneous information unless they pay the debt, Class Members often pay that debt despite the fact that it has been discharged in bankruptcy. Thus, Defendants know that they are obtaining repayment on debts that have been discharged in bankruptcy.

61. Class Members often believe that they must pay the debt in order to remove it from the credit reports because they are often advised prior to bankruptcy by Defendants and collection agencies that, if their debt is marked as charged off, it will dramatically affect

their credit rating and will severely impact their ability to receive credit in the future.

62. The Plaintiff is in possession of collection letters mailed by Defendants to class members—prior to the bankruptcy filing—stating that "charge offs" will ruin their ability to obtain credit and conversely promising to remove the "charge off' if they pay the delinquent debt in full. Consequently, Defendants are fully aware that their deliberate failure to update a discharged debtor's discharged account coerces the debtor to pay said account.

63. Defendants have adopted a pattern and practice of failing and refusing to update credit information with regard to debts discharged in bankruptcy because they sell those debts and profit by the sale. Defendants know that if the credit information is not updated many Class Members will feel compelled to pay off the debt even though it is discharged in bankruptcy. The purchasers of Defendants' delinquent debt are aware of the foregoing facts. Thus, purchasers of Defendants' debt know, and are willing to pay more for the fact that, purchasers will be able to collect portions of Defendants' sold debt despite the discharge of that debt in bankruptcy.

64. Acting as agent for the third-party purchasers to whom Defendants have sold the debts, Defendants forward to such purchasers payments received from former debtors who feel compelled to pay off discharged debts as the only means of correcting the erroneous credit information that Defendants refuse to correct and upon information and belief, Defendants keep a percentage of amounts received on discharged debts.

65. Defendants therefore have a clear economic incentive to violate the discharge injunction of § 524(a)(2).

66. In addition, Defendants are on notice that this Court and others have found that Defendants' conduct is likely in violation of § 524(a)(2). *See McKenzie-Gilyard v. HSBC Bank Nevada, N.A.*, 388 B.R. 474 (Bankr. E.D.N.Y. 2007); *Torres v. Chase Bank USA, N.A.*, 367 B.R. 478 (Bankr. S.D.N.Y. 2007); *In Re Russell*, 378 B.R. 735 (Bankr. E.D.N.Y. 2007). Despite this notice, Defendants have willfully, recklessly or negligently failed to correct their practice of failing to update credit information of Class Members including Plaintiff to show that debts have been discharged in bankruptcy.

67. Defendants' actions constitute a violation of 11 U.S.C. § 524(a)(2), which provides that a discharge in bankruptcy operates as an injunction against the commencement or continuation of an action, the employment or process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor.

68. Defendants' conduct is in bad faith, is vexatious and oppressive and is done with full knowledge that it is in violation of the law.

69. Defendants' persistent refusal to provide updated credit information to the credit reporting agencies that Plaintiff's and Class Members' past due debts to Defendants are no longer "charged off" or "past due" because they have been discharged in bankruptcy is knowing and willful and constitutes a contempt of the statutory injunction of § 524(a)(2).

THIS ACTION SHOULD BE
MAINTAINED AS A CLASS ACTION

70. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 - 69 as if fully set forth herein.

71. Plaintiff seeks to maintain this action as a class action representing a class consisting of the following:

> All individuals who, after May 3, 2007, have had a consumer credit report relating to them prepared by any of the credit reporting agencies in which one or more of their Tradeline accounts or debts with Defendants was not reported as discharged despite the fact that such debts had been discharged as a result of their bankruptcy under Chapter 7 of the Bankruptcy Code.

72. Assertainability / Numerosity: This Class is ascertainable in that it is comprised of individuals who can be identified by reference to purely objective criteria contained in the records of Defendants and the various credit reporting agencies. On information and belief, there are many thousands of members of the Class, and therefore would be impractical to bring all or even a substantial portion of such persons before this Court as individual plaintiff.

73. Typicality: The claims of the named Plaintiff is typical of the claims of each member of the Class they seek to represent because: (1) they all had debts owed to Defendants that were discharged in Chapter 7 bankruptcy; (2) they have all been injured by Defendants' refusal to remove the notation "charged off" or "past due/charged off" or similar notations despite the fact that the debts have been discharged in bankruptcy; and (3) each of their claims is based upon the same legal theory, *i.e.*, that Defendants have violated the injunction contained in § 524(a)(2).

74. Adequacy of Representation: Plaintiff is an adequate representative of the Class he seeks to represent because: (a) they are willing and able to represent the proposed class and have every incentive to pursue

this action to a successful conclusion; (b) their interests are not in any way antagonistic to those of the other Class Members; and (c) they are represented by counsel experienced in litigating significant bankruptcy issues, including the issues specifically raised in this action, and who has represented literally hundreds of individuals who have experienced similar failures by Defendants and other institutions to comply with the injunction of § 524(a)(2).

75. Commonality: There are several questions of law and fact common to all members of the Class. The primary question of law and fact that is common to all members of the class is whether Defendants, in failing and/or refusing to update and correct the credit reports of Class Members, have acted knowingly and willfully in violation of § 524(a)(2).

76. Propriety of Class Certification Under Fed. R. Civ. P. 23(b)(2) and Bankruptcy Rule 7023: Class certification of all of Plaintiff's claims is appropriate under Fed. R. Civ. P. 23(b)(2) and Bankruptcy Rule 7023 because Defendants have acted and/or refused to act on grounds generally applicable to the entire class, thereby making declaratory and final injunctive relief appropriate. Such generally applicable grounds consist of Defendants' conduct in failing and refusing to update and correct the current reports of Class Members to properly designate that the Class Members' debts have been discharged in bankruptcy pursuant to the order of this and similar courts.

77. Propriety of Class Certification Under Fed. R. Civ. P. 23(b)(3) and Rule 7023: Class certification of the Plaintiff's claims for willful failure to update or correct the credit reports of Class Members in violation of § 524(a)(2), is appropriate under Fed. R. Civ. P. 23(b)(3)

and Bankruptcy Rule 7023. The common question of law and fact relating to Plaintiff's claims predominate over any questions affecting only individual Members of the Class. Moreover, the class action vehicle is superior to other available methods for the fair and efficient adjudication of these claims. For the overwhelming majority of Members of the Class, the amount of any potential recovery is too small to justify the cost of prosecuting each claim individually.

78. Moreover, Defendants' violation of the injunction of § 524(a)(2) is widespread and literally nationwide. Further, requiring each Class Member to pursue his or her claim individually would entail needless duplication of effort, would waste the resources of both the parties and the Court, and would risk inconsistent adjudications.

FIRST CAUSE OF ACTION

Failure to Abide By the Injunction Contained In § 524(a)(2) (On Behalf of Plaintiff and All Class Members)

79. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 - 78 as if fully set forth herein.

80. By knowingly and willfully failing to update the credit reports of Class Members to signify the debts owing to Defendants have been discharged in bankruptcy Defendants have violated § 524(a)(2) and are in contempt of this Court.

81. Both pursuant to its inherent authority and pursuant to § 105 of the Bankruptcy Code, this Court may award appropriate declaratory and injunctive relief and award compensatory and punitive damages, attorney's fees and costs for Defendants' violation of § 524(a)(2).

WHEREFORE, Plaintiff respectfully prays:

1. That the practices of Defendants be declared to be in violation of the rights of Plaintiff and Class Members under the Bankruptcy Code and a contempt of the statutory injunction set forth in § 524(a)(2).

2. That a permanent injunction be entered requiring Defendants to immediately correct and update the credit reporting records of all Class Members by removing any negative notations such as "charge off", "past due", "late" or any other notations that indicate that the discharged accounts have a current status of being still due and owing and update all such records on a permanent basis.

3. That the Court enter an Order certifying all the claims of the Class alleged herein pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3) and Bankruptcy Rule 7023 for willful violation of the injunction set forth in § 524(a)(2).

4. That this Court order that Defendants be held in contempt of court for their willful violation of the injunction set forth in § 524(a)(2), and that they be assessed damages, fines, penalties and punitive damages in amounts to be determined by the Court.

5. That Defendants be ordered to disgorge and pay to the individual Class Members all funds received by Defendants or by any purchasers of Defendants' debt on debts that were discharged in bankruptcy or were the subject of a bankruptcy proceeding before such payment was made by the Class Members.

6. That this Court award Plaintiff and the Class the costs of this action together with reasonable attorney's fees as the Court may determine.

7. That the Plaintiff and Class Members be awarded such other and further relief as may be found appropriate and as the Court may deem just and equitable.

DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 28, Plaintiff hereby demand a trial by jury on all issues so triable if this Court determines that any issue in this matter is appropriate for a jury trial.

Date: January 30, 2015 By: */s/ Adam R. Shaw*

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APPENDIX G

RELEVANT STATUTORY PROVISIONS

9 U.S.C. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default.

Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

11 U.S.C. § 105

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

> **(1)** shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and
>
> **(2)** unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that

the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C. § 524

§ 524. Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of

the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) 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; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

* * *