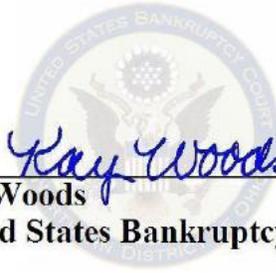


IT IS SO ORDERED.

Dated: August 3, 2012  
09:31:00 AM



*Kay Woods*  
 Kay Woods  
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

AARON I. COLEMAN,  
Debtor.

CASE NUMBER 11-41523

\* \* \* \* \*

AARON I. COLEMAN,  
Plaintiff,

ADVERSARY NUMBER 12-4034

v.

GREEN TREE SERVICING, LLC,  
Defendant.

HONORABLE KAY WOODS

\*\*\*\*\*  
 MEMORANDUM OPINION REGARDING (i) MOTION TO STAY  
 ADVERSARY COMPLAINT AND COMPEL ARBITRATION;  
 AND (ii) MOTION FOR JUDGMENT ON THE PLEADINGS  
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Before the Court is Motion of Green Tree Servicing LLC to Stay Adversary Complaint and Compel Arbitration ("Motion to Compel

Arbitration") (Doc. # 9) filed by Defendant Green Tree Servicing LLC ("Green Tree") on June 20, 2012.<sup>1</sup> On July 16, 2012, Debtor/Plaintiff Aaron I. Coleman ("Debtor") filed Memo in Opposition to Defendant's Motion to Stay Adversary Complaint and Compel Arbitration ("Memo in Opposition") (Doc. # 14).<sup>2</sup> On that same date, the Debtor filed Motion for Partial Judgment on the Pleadings Under FRCP 12(c) and FRBP 7012 (Doc. # 12) and Memorandum in Support thereof (Doc. # 13) (collectively, "Motion for Judgment on the Pleadings"). Green Tree did not respond to the Motion for Judgment on the Pleadings.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general orders of reference (General Orders No. 84 and 2012-7) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. Count Six of the Complaint is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) and (K).<sup>3</sup> The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

For the reasons that follow, the Court will (i) grant the Motion for Judgment on the Pleadings; and (ii) deny the Motion to Compel Arbitration, in part, and grant it, in part.

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<sup>1</sup>The Motion to Compel Arbitration was not noticed for hearing and no party has requested a hearing. The Court originally scheduled the Motion for hearing on August 2, 2012, but later struck the hearing.

<sup>2</sup>The Court set July 16, 2012, as the last date to respond to the Motion to Compel Arbitration. (See Doc. # 10.)

<sup>3</sup>Each Count of the Complaint is defined *infra* at 5-6.

## I. BACKGROUND

On May 19, 2011 ("Petition Date"), the Debtor filed a voluntary petition pursuant to chapter 13 of Title 11 of the United States Code, which was denominated Case No. 11-41523 ("Main Case").<sup>4</sup> On that same day, he filed his Chapter 13 Plan (Main Case, Doc. # 2). In the Chapter 13 Plan, the Debtor lists (i) "none" for "Secured Claims - Residence/Real Property"; and (ii) Green Tree under "Secured Claims - Other" in the secured amount of \$40,000.00 with an interest rate of 5.25% and an unsecured amount of \$36,201.77. (Ch. 13 Plan, Arts. 2 E, 2 F.)

On May 24, 2011, Green Tree filed a proof of claim, which was denominated Claim No. 1, as a secured claim in the amount of \$84,447.11 with interest at the rate of 8.75%. Security for the claim is listed as "real estate" and "1997 32 x 76 Commodore Ser#: CV31521AB." (Claim No. 1 at 1.)

On July 7, 2011, Green Tree filed Objection to Confirmation (Main Case, Doc. # 14), which objected to confirmation of the Debtor's Chapter 13 Plan for two reasons, as follows: (i) Green Tree objected to the Debtor's attempt to cram down the value of Green Tree's security interest to \$40,000.00 and further objected to the Debtor's valuation of such security interest; and (ii) Green Tree objected to the Debtor's proposed interest rate of 5.25% on the secured portion of Green Tree's claim.

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<sup>4</sup>All docket references are to this adversary proceeding unless the Main Case is indicated.

The Court held a hearing on the Objection to Confirmation on September 15, 2011. Gary Rosati, Esq. appeared at the hearing on behalf of the Debtor, but no one appeared on behalf of Green Tree. The issue before the Court was whether Claim No. 1 could be crammed down, as proposed in the Chapter 13 Plan. Claim No. 1 could not be crammed down if such claim was "secured only by a security interest in real property that is the debtor's principal residence," as set forth in 11 U.S.C. § 1322(b)(2). 11 U.S.C. § 1322(b)(2) (West 2012). If Claim No. 1 was secured only by real property serving as the Debtor's principal residence, modification of Green Tree's rights would be prohibited and the cram down proposed by the Plan would not be permissible. On the other hand, if the manufactured home, which was listed as security for Claim No. 1, was personal property, cram down would be permissible and the Objection to Confirmation would be overruled. As a consequence, the Court asked counsel for the Debtor to brief whether the manufactured home was real or personal property in this situation.

Thereafter, on September 22, 2011, the Debtor filed Response to Objection to Confirmation of Plan (Main Case, Doc. # 24), which explained that the manufactured home met the definition of personal property in Ohio Revised Code § 5701.02(B)(2) because (i) it was not affixed to a permanent foundation; and (ii) the certificate of title had not been inactivated by the clerk of courts for the common pleas court that issued it. Under Ohio law, both of these conditions must be met to transform a manufactured home into

realty.

On September 26, 2011, the Court issued Order Overruling Objection of Green Tree Servicing LLC to Confirmation ("Order Overruling Confirmation Objection") (Main Case, Doc. # 25), which overruled both prongs of the Objection to Confirmation. The Court held that (i) section 1322(b)(2) did not prohibit the Debtor from cramming down Green Tree's claim because, although such claim was secured by the debtor's residence, the residence was comprised of both real property and personal property in the form of a manufactured home; and (ii) the interest rate of 5.25% proposed in the Debtor's Chapter 13 Plan was consistent with *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

The Debtor's Chapter 13 Plan has not yet been confirmed because it is deemed not feasible based upon the claims, as filed. As set forth above, Green Tree has filed a secured claim in the amount of \$84,447.11, but the Plan provides for a secured claim in the amount of \$40,000.00. Thus, the secured amount of Claim No. 1 needs to be resolved so this Court can determine if the Debtor's Chapter 13 Plan can be confirmed.

On March 14, 2012, the Debtor filed Complaint (To Object to Proof of Claim and to Determine the Extent, Validity, and Priority of Lien Under § 506) ("Complaint") (Doc. # 2). The Complaint contains six counts, as follows: (i) Count One: Fair Debt Collection Practices Act ("FDCPA"); (ii) Count Two: Ohio Consumer Sales Practices Act ("OCSPA"); (iii) Count Three: fraudulent

misrepresentation; (iv) Count Four: breach of the covenant of good faith and fair dealing; (v) Count Five: invasion of privacy by intrusion upon seclusion; and (vi) Count Six: validity/priority/extent of liens. The facts set forth in the Complaint all deal with pre-petition conduct.

On March 23, 2012, Green Tree filed Answer of Green Tree Servicing, LLC ("Answer") (Doc. # 8), which contains a First Defense that generally denies or denies for lack of knowledge most of the allegations in paragraphs 1 through 42 of the Complaint. Green Tree fails to address, either specifically or through a general denial, the allegations in paragraphs 43 through 69 of the Complaint (the last paragraph of Count One and the totality of Counts Two through Six). As a result of Green Tree's admission of the allegations in paragraphs 43 through 69, the Debtor filed the Motion for Judgment on the Pleadings with respect to Counts Two through Six of the Complaint.

The Answer also contains nine other defenses, as follows: (i) Second Defense: failure to state a claim upon which relief can be granted; (ii) Third Defense: statute of limitations; (iii) Fourth Defense: not a core proceeding and no jurisdiction of this Court; (iv) Fifth Defense: improper venue; (v) Sixth Defense: res judicata and collateral estoppel; (vi) Seventh Defense: laches; (vii) Eighth Defense: waiver; (viii) Ninth Defense: unclean hands; and (ix) Tenth Defense: complaint is subject to the arbitration provision of the Security Agreement and/or Note.

Apparently in support of the Tenth Defense, Green Tree filed the Motion to Compel Arbitration. Green Tree relies on paragraph 16 of the Manufactured Home Retail Installment Contract and Security Agreement ("Installment Contract"), which is attached to both Claim No. 1 and the Motion to Compel. The Installment Contract is dated February 20, 1997, between (i) Midwest Brokering, Inc., as seller; (ii) Green Tree, as seller's assignee;<sup>5</sup> and (iii) the Debtor, as buyer. The Installment Contract provides for a security interest in "the goods or property being purchased" and "real property located at Ron Lane, Youngstown, OH 44505." (Installment Contract at 1.) The property being purchased is described as a "1997 Commodore Brookwood Serial Number CV31521AB 32 x 76." (*Id.* at 2.) Paragraph 16 of the Installment Contract is titled "Arbitration" ("Arbitration Clause"), which provides as follows:<sup>6</sup>

16. Arbitration: All disputes, claims or controversies arising from or relating to this Contract or the parties thereto shall be resolved by binding arbitration by one arbitrator selected by you with my consent. This agreement is made pursuant to a transaction in interstate commerce and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right to litigate disputes in court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT

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<sup>5</sup>The assignee is listed as "Green Tree Financial Servicing Corporation." (Installment Contract at 1.)

<sup>6</sup>Pursuant to paragraph 1 of the Installment Contract, "Definitions", references to "you" mean the seller and references to "my" mean the Debtor.

THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY YOU (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law and all other laws including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this Contract. The parties agree that the arbitrator shall have all powers provided by law, the Contract and the agreement of the parties. These powers shall include all legal and equitable remedies including, but not limited to, money damages, declaratory relief and injunctive relief. Notwithstanding anything hereunto the contrary, you retain an option to use judicial (filing a lawsuit) or non-judicial relief to enforce a security agreement relating to the Manufactured Home secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the Manufactured Home. The institution and maintenance of a lawsuit to foreclose upon any collateral, to obtain a monetary judgment or to enforce the security agreement shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Contract, including the filing of a counterclaim in a suit brought by you pursuant to this provision.

(*Id.* at 3.)

## II. LEGAL ANALYSIS

### A. Motion for Judgment on the Pleadings

As a result of Green Tree's failure to address the allegations in paragraphs 43 through 69 of the Complaint, the Debtor filed the Motion for Judgment on the Pleadings, in which the Debtor argues:

The Defendant failed to deny material allegations of Counts two through six of the Plaintiff's complaint. Pursuant to FRCP 8, these allegations are admitted and as pled, state a claim for relief under each count. In addition, the Defendant failed to plead any viable affirmative defenses which would defeat plaintiff's claims. Therefore, judgment on the pleadings for plaintiff is appropriate.

(Memo. in Support at 4.)

The effect of Green Tree's failure to address the allegations in paragraphs 43 through 69 is that Green Tree has admitted all of the allegations of those paragraphs. Federal Rule of Civil Procedure 8(b)(6), which is incorporated into this proceeding by Federal Rule of Bankruptcy Procedure 7008(a), provides as follows:

(b) Defenses; Admissions and Denials.

(1) In General. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) Denials – Responding to the Substance. A denial must fairly respond to the substance of the allegation.

\* \* \*

(6) Effect of Failing to Deny. An allegation – other than one relating to the amount of damages – is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

FED. R. CIV. P. 8(b) (West 2012) (emphasis added).

Federal Rule of Civil Procedure 12(c), which is incorporated into this proceeding by Federal Rule of Bankruptcy Procedure 7012(b), states, "After the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c) (West 2012). A court should grant judgment on the pleadings "when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582

(6th Cir. 2007). In determining if a material issue of fact exists, the Court must construe the complaint in the light most favorable to the non-moving party and accept as true the facts pled by that party. *Estill County Bd. of Educ. v. Zurich Ins. Co.*, 84 F. App'x 516, 518 (6th Cir. 2003) (unpublished). "Conclusions of law alleged by the non-moving party, however, are not accepted as true." *EWI, Inc. v. Volvo GM Heavy Truck Corp. (In re EWI, Inc.)*, Adv. No. 96-6119, 1997 Bankr. LEXIS 2119, \*4 (Bankr. N.D. Ohio Dec. 5, 1997) (citation omitted).

Because Counts Two through Six have been admitted, the Court finds that the Motion for Judgment on the Pleadings is well taken and will grant it.<sup>7</sup> Accordingly, the Court will enter judgment for the Debtor with respect to liability on Counts Two through Six.

#### **B. Motion to Compel Arbitration**

As stated above, the Debtor is entitled to judgment on the pleadings regarding Counts Two through Six. Because Green Tree has admitted the allegations in paragraphs 43 through 69, there is no further dispute that can or may be resolved by an arbitrator relating to liability. The only open issue concerning Counts Two through Five is the amount of damages to which the Debtor is entitled. Indeed, based on Green Tree's admission of paragraph 43,

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<sup>7</sup>It is difficult to determine if Green Tree was merely negligent in failing to respond to paragraphs 43 through 69 because, in all other respects, Green Tree's Answer appears to be very thorough. The Answer sets forth ten numbered defenses and does not appear to be missing pages or to be a partial filing. However, nothing in Green Tree's Second through Tenth Defenses, which are boiler plate legal conclusions, provides a factual defense or denial of paragraphs 43 through 69. Moreover, Green Tree has not responded to the Motion for Judgment on the Pleadings or moved for leave to amend its Answer.

it appears that the issue of damages is also the only open issue regarding Count One. As a consequence, the Court will address the Motion to Compel Arbitration with respect to only those portions of the Complaint that remain unresolved.

**1. Jurisdiction of the Bankruptcy Court**

Green Tree asserts in its Fourth Defense that the Complaint does not state a cause of action that constitutes a core proceeding and that this Court lacks jurisdiction to hear the Complaint. Green Tree is correct only to the extent that not all of the alleged causes of action constitute core proceedings. However, for the reasons set forth below, this Court has jurisdiction over all of the alleged causes of action.

First, Count Six of the Complaint constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(B) and (K).<sup>8</sup> Count Six encompasses the Debtor's objection to Claim No. 1 and is a

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<sup>8</sup>28 U.S.C. § 157(b) states, in pertinent part:

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to -

\* \* \*

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 . . . ;

\* \* \*

(K) determinations of the validity, extent, or priority of liens[.]

28 U.S.C. § 157(b) (West 2012).

proceeding to determine the validity, extent or priority of Green Tree's lien. The matters alleged in Count Six fall squarely within the jurisdiction of this Court and constitute core proceedings.

Second, because the conduct alleged in the Complaint occurred prior to the Petition Date, all of the causes of action alleged are property of the Debtor's bankruptcy estate pursuant to 11 U.S.C. § 541(a). As a consequence, this Court has "related to" jurisdiction over Counts One through Five pursuant to 28 U.S.C. § 157(a), which provides, "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a) (West 2012). The District Court for the Northern District of Ohio has referred all such matters to the bankruptcy courts of this district. (See General Orders No. 84 and 2012-7.)

Thus, there is no question regarding jurisdiction (or venue) of the Complaint before this Court. The only question is whether the causes of action in the Complaint fall within the purview of the Arbitration Clause.

## **2. Federal Arbitration Act**

Green Tree relies on Ohio law in support of its Motion to Compel Arbitration. The Arbitration Clause, however, states that the transaction involves interstate commerce and "shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1."

(Installment Contract at 3.) Green Tree asserts that the Ohio Supreme Court has determined that the "federal standard found in *Fazio v. Lehman Bros., Inc.* (C.A.6, 2002), 340 F.3d 386, was proper for determining whether an action is within an arbitration agreement." (Mot. to Compel at 4 (citing *Acad. of Med. v. Aetna Health, Inc.*, 108 Ohio St. 3d 185, 190 (Ohio 2006)).) In support of its argument that the causes of action in the Complaint are arbitrable, Green Tree argues:

This case would not be before the Court but for the fact that Plaintiff entered into a Note with Green Tree Financial Servicing Corp. on February 20, 1997, for the purchase of the real estate and a 1997 Commodore manufactured home. But for the Note, Green Tree would not have asserted a foreclosure action against Plaintiff and Plaintiff would not have claims against Green Tree.

(*Id.* at 5 (emphasis added).) Although Green Tree is correct, it is equally true that "but for" the Debtor filing bankruptcy, the issue of bifurcation of Green Tree's secured interest in the manufactured home and the real estate could not be considered.

Under § 2 of the Federal Arbitration Act ("FAA"), a written agreement to arbitrate disputes that arise out of a contract involving transactions in interstate commerce "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 (West 2012). The standard for reviewing the applicability of an arbitration clause is found in *Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000).

When considering a motion to stay proceedings and compel arbitration under the [Federal Arbitration] Act,

a court has four tasks: first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.

*Id.* at 714 (citation omitted). This Court will undertake the four tasks, enumerated above, in connection with the Counts set forth in the Complaint.

First, Green Tree and the Debtor did, indeed, agree to arbitrate, as set forth in the Arbitration Clause in the Installment Contract. Nothing in the Debtor's Memo in Opposition denies the agreement to arbitrate.

The second task for the Court is to determine the scope of the Arbitration Clause. The Arbitration Clause provides that "[a]ll disputes, claims or controversies arising from or relating to [the Installment Contract] or the parties thereto shall be resolved by binding arbitration." (Installment Contract at 3.) The Arbitration Clause further states, "The parties agree and understand that all disputes arising under case law, statutory law and all other laws including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this Contract." (*Id.*)

The Debtor's Complaint alleges violations of certain statutory rights such as (i) the FDCPA in Count One; and (ii) the OCSPA in Count Two. The Complaint also alleges violations of certain common

law rights, including (i) fraudulent misrepresentation in Count Three; (ii) breach of the covenant of good faith and fair dealing in Count Four; and (iii) invasion of privacy by intrusion upon seclusion in Count Five. Counts One through Five are based upon Green Tree's conduct in relation to the Installment Contract and, thus, arise from or relate to the Installment Contract. As a consequence, Counts One through Five are within the scope of the Arbitration Clause.

The fact that Counts One through Five are based on violations of statutory and common law rights does not negate the requirement to arbitrate those Counts. In *Stout*, the plaintiffs pursued claims for fraud and violations of the OCSPA and the Truth in Lending Act ("TILA"), all of which related to vehicle purchase and finance agreements that contained arbitration clauses. The Sixth Circuit Court of Appeals compelled arbitration despite the nature of the plaintiffs' claims and stated:

A district court's duty to enforce an arbitration agreement under the FAA is not diminished when a party bound by the agreement raises claims arising from statutory rights. See *Shearson/American Express v. McMahon*, 482 U.S. 220, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987) (RICO); *Dorsey v. H.C.P. Sales, Inc.*, 46 F. Supp. 2d 804, 808 n.5 (N.D.Ill. 1999) (TILA); *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007 (M.D.Ala. 1997) (TILA).

*Stout v. J.D. Byrider*, 228 F.3d at 715. The statutory and common law violations in *Stout* are similar to the alleged violations in Counts One through Five. As a result, the Court finds that Counts

One through Five are not excluded from the FAA.<sup>9</sup>

In contrast, however, Count Six deals with the Debtor's objection to Claim No. 1, bifurcation of such claim into secured and unsecured components and partial avoidance of Green Tree's lien as a consequence of the allowance of Claim No. 1. Count Six requires a determination of the amount and priority of Claim No. 1 in the Debtor's bankruptcy estate.

Assuming, *arguendo*, that Count Six does "relate to" the Installment Contract, the next task for the Court is to consider whether Congress intended this cause of action to be nonarbitrable. Bankruptcy is a matter of national concern, as acknowledged by the Founding Fathers in Article I of the Constitution. "The matters of national concern are enumerated in the Constitution: war, taxes, patents, and copyrights, uniform rules of naturalization and bankruptcy, types of commerce, and so on. See generally Art. I, § 8." *United States v. Lopez*, 514 U.S. 549, 596 (1995) (Kennedy, J., concurring) (emphasis added). Does the requirement for a uniform rule of bankruptcy require that resolution of claims asserted against the bankruptcy estate not be subject to arbitration?

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<sup>9</sup>Arbitration of these disputes does not mean that the Debtor loses any substantive rights relating to such alleged violations.

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

*Soler Chrysler-Plymouth, Inc. v. Mitsubishi Motors Corp.*, 473 U.S. 614, 628 (1985).

In *Ackerman v. Eber (In re Eber)*, Case No. 10-56772, 2012 U.S. App. LEXIS 13915 (9th Cir. July 9, 2012), the Ninth Circuit Court of Appeals stated, "This Circuit and sister circuits applying the [*Shearson/Am. Express Inc. v. McMahon*], 482 U.S. 220 (1987)] factors to the Bankruptcy Code have found no evidence in the text of the Bankruptcy Code or in the legislative history suggesting that Congress intended to create an exception to the FAA in the Bankruptcy Code." *Id.* at \*14 (citations omitted). The Ninth Circuit cites to cases in the Eleventh and Third Circuits to support its statement concerning "sister circuits."

As noted by the Bankruptcy Court for the Western District of Kentucky, "The Sixth Circuit has not addressed the precise issue of arbitration in the context of a bankruptcy case." *In re Transp. Assocs., Inc.*, 263 B.R. 531, 535 (Bankr. W.D. Ky. 2001). As a consequence, Judge David Stosberg adopted the analysis of the Fifth Circuit Court of Appeals in *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056 (5th Cir. 1997), which held that there was not an inherent conflict between the Bankruptcy Code and the FAA.

Cognizant of the Supreme Court's admonition that, in the absence of an inherent conflict with the purpose of another federal statute, the Federal Arbitration Act mandates enforcement of contractual arbitration provisions, we refuse to find such an inherent conflict based solely on the jurisdictional nature of a bankruptcy proceeding. Rather, as did the Third Circuit in *Hays [& Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.]*, 885 F.2d 1149 (3d Cir. 1989), we believe that nonenforcement of an otherwise applicable arbitration provision turns on the underlying nature of the proceeding, i.e., whether the proceeding derives

exclusively from the provisions of the Bankruptcy Code and, if so, whether arbitration of the proceeding would conflict with the purposes of the Code.

*Transp. Assocs.*, 263 B.R. at 535 (quoting *Nat'l Gypsum*, 118 F.3d at 1067) (emphasis added). The *Transport* court analyzed the trustee's objection to a proof of claim filed by the debtor's insurance company and found that the objection concerned contract interpretation and accounting principles. The court stated, "Although procedurally these question [sic] arise by virtue of the 'claims allowance process,' the arbitration of this contractual dispute does not directly conflict with the Bankruptcy Code." *Id.* As a consequence, the court required the trustee, in accordance with the arbitration clause in the debtor's insurance policy, to submit his objection to the proof of claim to arbitration because doing so would not conflict with any underlying purpose of the Bankruptcy Code. The court did not, however, require the trustee to submit to arbitration his equitable subordination claims against the insurer.

In contrast to the claim objection in the *Transport* case, the Debtor's objection to Claim No. 1 does not involve contract interpretation and/or accounting. Instead, Count Six requests the Court to bifurcate Claim No. 1 into secured and unsecured portions and to partially avoid Green Tree's lien. The Debtor does not dispute the total amount owing to Green Tree. Count Six begins with the fact that Green Tree is owed \$84,447.11, as set forth in Claim No. 1. The Debtor's objection focuses on how much of Claim

No. 1 is secured and how much is a general unsecured claim. Green Tree previously sought this Court's judgment concerning whether the Debtor could bifurcate Green Tree's claim based on § 1322(b)(2). This Court overruled Green Tree's Objection to Confirmation and held that Green Tree's claim could be bifurcated into secured and unsecured components, as proposed in the Debtor's Chapter 13 Plan. The Court ruled that the treatment of Green Tree's Claim No. 1 in the Debtor's Plan was not prohibited by § 1322(b)(2), which allows a debtor to modify the rights of a holder of a secured claim "other than a claim secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2) (West 2012). Green Tree did not appeal or ask for reconsideration of the Order Overruling Confirmation Objection. Count Six must be determined by the Bankruptcy Code, consistent with this Court's prior Order Overruling Confirmation Objection. As a consequence, arbitration of Count Six would conflict with the purposes of the Bankruptcy Code.

Similarly, in the *Eber* case, referenced above, the Ninth Circuit Court of Appeals affirmed denial of a motion to compel arbitration by an insurance company for claims of alleged breach of contract, fraud and breach of fiduciary duty. The plaintiffs in *Eber* had filed an adversary proceeding to determine the dischargeability of a debt under 11 U.S.C. § 523(a)(2), (4) and (6), however, they asserted that an arbitrator should determine liability and the amount of damages. The bankruptcy court found

that the plaintiffs actually wanted the arbitrator to make findings of fact that, if made, would collaterally estop the bankruptcy court from determining the dischargeability issue. The Ninth Circuit Court of Appeals noted that the bankruptcy court has exclusive jurisdiction to determine dischargeability of debts under § 523(a)(2), (4) and (6). Despite finding no blanket exception to arbitration in the FAA for Bankruptcy Code issues, the Ninth Circuit agreed that "allowing an arbitrator to decide issues that are so closely intertwined with dischargeability would 'conflict with the underlying purposes of the Bankruptcy Code.'" *Eber*, 2012 U.S. App. LEXIS 13915 at \*\*18-19.

Determination of the issue in Count Six is central to confirmation of the Debtor's Chapter 13 Plan. Green Tree is already bound by this Court's Order Overruling Confirmation Objection. Count Six is inherently intertwined with confirmation of the Debtor's Plan and allowance of claims against the bankruptcy estate. Count Six is exactly the kind of claim that is excepted from the FAA. As a consequence, this Court will deny arbitration of Count Six.

The second component of the Motion to Compel Arbitration is Green Tree's request to stay the pending adversary proceeding. In opposing this request, the Debtor argues:

Application of [the *EWI, Inc. v. Volvo GM Heavy Truck Corp. (In re EWI, Inc.)*, Adv. No. 96-6119, 1997 Bankr. LEXIS 2119 (Bankr. N.D. Ohio Dec. 5, 1997)] factors in this proceeding plainly favor [sic] keeping this adversary proceeding in the bankruptcy court. The convenience of the bankruptcy court has been demonstrated

throughout these proceedings and nothing has been offered by Green Tree to contest that conclusion. As this adversary proceeding is precisely the type of claim to be heard in bankruptcy court, seeking to remove any or all of the parts of the adversary proceeding will unnecessarily create piecemeal litigation that can be avoided by retaining this matter in the bankruptcy court. Further, it is indisputable that the bankruptcy court first obtained jurisdiction over these matters as there is no arbitration proceeding in existence at all at this time. It is also plain that the bankruptcy court has already assumed jurisdiction over property, pursuant to 11 U.S.C. §541. The source of law for the decision of the section 506 claim is directly from the bankruptcy code. Lastly the bankruptcy court is the court specifically designed and designated to protect the rights of a debtor seeking bankruptcy protection on [sic] the Federal Bankruptcy Court.

(Memo in Opp. at 3-4.) The Debtor's arguments apply specifically to Count Six, which this Court holds is not subject to arbitration. The Court agrees that compelling arbitration of Counts One through Five is not efficient or convenient, especially given the limited scope remaining on these counts for an arbitrator to determine. As set forth above, Green Tree has already admitted liability on these Counts. The only question for an arbitrator is the amount of damages relating to each Count. Despite the absence of efficiency, however, this Court finds that the parties agreed to arbitrate the kind of claims encompassed in Counts One through Five and that such claims are subject to arbitration under the FAA. As set forth above, applying the first three factors from *Stout*, the Court finds that (i) the parties agreed to arbitrate; (ii) Counts One through Five fall within the scope of the Arbitration Clause; and (iii) there is no inherent conflict between the FAA and the causes of action asserted in Counts One through Five.

Finally, since the Court has concluded that some (Counts One through Five), but not all (Count Six), of the causes of action are subject to arbitration, this Court must determine whether to stay the remainder of the proceeding pending arbitration. Because Green Tree has admitted all allegations in Count Six, there is nothing left for this Court – or any tribunal – to determine regarding Count Six. As a consequence, Claim No. 1 will be allowed as a secured claim to the extent of \$40,000.00 at the rate of 5.25% interest and a general unsecured claim for the remainder, *i.e.*, \$44,447.11. Moreover, Green Tree's lien will be avoided to the extent it exceeds \$40,000.00.

With respect to Counts Two through Five, the Court will stay this adversary proceeding and compel arbitration to determine *only* the amount of damages arising from such causes of action since liability has been admitted by Green Tree. Count One presents somewhat of a puzzle, because Green Tree has admitted paragraph 43, which states that the Debtor was harmed by Green Tree's violations of the FDCPA and is entitled to statutory damages, actual damages and attorneys' fees and costs pursuant to 15 U.S.C. § 1692k(a). However, Green Tree denies the allegations in paragraphs 41 and 42 of the Complaint. Since Green Tree has admitted that the Debtor is entitled to the damages set forth in paragraph 43, the Court will also compel arbitration on only damages in Count One.

### **III. CONCLUSION**

Counts One through Five fall within the purview of the

Arbitration Clause. However, because Green Tree has already admitted the allegations of Counts Two through Six in their entirety and the damages paragraph of Count One, the only portion of the Complaint that can be sent to arbitration is the amount of damages owing to the Debtor as a result of Green Tree's admission of liability for Counts One through Five. Although it appears to defeat the purposes of speed and efficiency that underlie the FAA, the Court will stay this adversary proceeding and compel arbitration of the amount of damages only regarding Counts One, Two, Three, Four and Five. Doing so will not adversely affect or hinder the continued administration of the Debtor's chapter 13 case. An arbitrator will be limited to determining the amount of damages owed by Green Tree to the Debtor.

Because Count Six requires this Court to make determinations regarding the bifurcation of Green Tree's proof of claim and (partial) avoidance of Green Tree's lien consistent with the Order Overruling Confirmation Objection, arbitration of Count Six would conflict with the provisions of the Bankruptcy Code. Moreover, based on the admissions of Green Tree, there is nothing further to be determined in Count Six. Accordingly, Claim No. 1 will be allowed as a secured claim in the amount of \$40,000.00 with interest at the rate of 5.25% and a general unsecured claim of \$44,447.11. The mortgage lien of Green Tree will be avoided to the

extent it exceeds the amount of its secured claim, *i.e.*,  
\$40,000.00.

An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: August 3, 2012  
09:31:00 AM

  
*Kay Woods*  
\_\_\_\_\_  
Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

AARON I. COLEMAN,  
  
Debtor.

CASE NUMBER 11-41523

\* \* \* \* \*

AARON I. COLEMAN,  
  
Plaintiff,

ADVERSARY NUMBER 12-4034

v.

GREEN TREE SERVICING, LLC,  
  
Defendant.

HONORABLE KAY WOODS

\*\*\*\*\*  
ORDER (i) GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS; AND  
(ii) GRANTING, IN PART, AND DENYING, IN PART,  
MOTION TO STAY ADVERSARY COMPLAINT AND COMPEL ARBITRATION  
\*\*\*\*\*

Before the Court is Motion of Green Tree Servicing LLC to Stay  
Adversary Complaint and Compel Arbitration ("Motion to Compel

Arbitration") (Doc. # 9) filed by Defendant Green Tree Servicing LLC ("Green Tree") on June 20, 2012. On July 16, 2012, Debtor/Plaintiff Aaron I. Coleman ("Debtor") filed Memo in Opposition to Defendant's Motion to Stay Adversary Complaint and Compel Arbitration (Doc. # 14). On that same date, the Debtor filed Motion for Partial Judgment on the Pleadings Under FRCP 12(c) and FRBP 7012 (Doc. # 12) and Memorandum in Support thereof (Doc. # 13) (collectively, "Motion for Judgment on the Pleadings"). Green Tree did not respond to the Motion for Judgment on the Pleadings.

For the reasons set forth in this Court's Memorandum Opinion Regarding (i) Motion to Stay Adversary Complaint and Compel Arbitration; and (ii) Motion for Judgment on the Pleadings entered on this date, the Court hereby:

1. Finds that this Court has related to jurisdiction over Counts One through Five;
2. Finds that Count Six is a core proceeding over which this Court has jurisdiction;
3. Finds that Green Tree has admitted the allegations in paragraphs 43 through 69 of the Complaint;
4. Grants the Motion for Judgment on the Pleadings;
5. Enters judgment for the Debtor with respect to liability on Counts Two through Six;
6. Finds that Counts One through Five are within the scope of the Arbitration Clause;

7. Grants the Motion to Compel Arbitration with respect to Counts One through Five, as limited herein;
8. Refers Counts One through Five to arbitration, consistent with the Arbitration Clause, to determine the amount of damages only;
9. Stays the instant adversary proceeding with respect to Counts One through Five;
10. Finds that arbitration of Count Six is inconsistent with the Bankruptcy Code;
11. Denies the Motion to Compel Arbitration with respect to Count Six;
12. Allows Claim No. 1 as a secured claim in the amount of \$40,000.00 at the rate of 5.25% interest and a general unsecured claim in the amount of \$44,447.11; and
13. Avoids Green Tree's lien to the extent it exceeds \$40,000.00.

# # #