

Arbitration  
Automatic stay  
Contempt of court  
9 U.S.C. §§ 2-4  
11 U.S.C. §§ 105, 362

Stephanie Banks, Case No. 14-35264-rld13

02/26/2016 RLD

Unpub. (2016 WL 1242195)

Chapter 13 debtor Stephanie Banks brought a motion to hold creditors Rapid Cash Payday Loans and Ad Astra Recovery Services, Inc. (collectively "Respondents") in contempt of court for alleged violations of the automatic stay. The Respondents moved to compel arbitration and for a protective order ("Arbitration Motions") on the basis of a prepetition agreement signed by Ms. Banks.

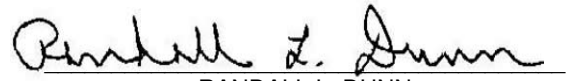
After oral argument and briefing by the parties, including supplemental memoranda addressing the impact of the District Court's recent decision in Campos v. Bluestem Brands, Inc., 2016 WL 297429 (D. Or. Jan. 22, 2016), the court took the matter under advisement.

The court determined first that the Respondents had not waived their right to compel arbitration, because they had not engaged in protracted litigation before filing their Arbitration Motions, and the court did not find there would be unfair prejudice to Ms. Banks in compelling arbitration.

Citing the Ninth Circuit's decision in Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 671 F.3d 1011 (9th Cir. 2012), and the District Court's Campos decision, the court concluded that compelling arbitration would not conflict with the purposes of the Bankruptcy Code. Because Ms. Banks' chapter 13 plan had been confirmed and estate property revested in her personally, and because Ms. Banks' potential recovery from any contempt sanction would not be necessary to fund the plan, the court concluded that the outcome of the contempt proceeding would have no direct impact in the chapter 13 case.

P16-1(20)

Below is an Opinion of the Court.

  
RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case  
STEPHANIE BANKS, ) No. 14-35264-rld13  
Debtor. ) MEMORANDUM OPINION

On January 25, 2016, I heard argument ("Hearing") on the joint motions of Ad Astra Recovery Services, Inc. ("Ad Astra") and Rapid Cash Payday Loans ("Rapid Cash") to compel arbitration and stay proceedings and for a protective order (collectively, "Arbitration Motions"), opposed ("Opposition") by the Debtor ("Ms. Banks"). (Ad Astra and Rapid Cash are referred to collectively as "Respondents.") Following argument, I gave the parties until February 2, 2016, to file supplemental memoranda as to the impact of the recent District Court opinion in Campos v. Bluestem Brands, Inc., 2016 WL 297429 (D. Or. Jan. 22, 2016) (hereinafter, the "Campos decision"). Both sides availed themselves of the opportunity, and I took the matter under advisement on February 3, 2016.

I have reviewed my notes from the Hearing and relevant documents from the main case docket relating to this contested matter,

1 including Ms. Banks' motion for an order to show cause for contempt  
2 against the Respondents ("Contempt Motion"), the response ("Response")  
3 filed by the Respondents, the Arbitration Motions, the Opposition,  
4 Respondents' reply ("Reply") to the Opposition, and the Respondents' and  
5 Ms. Banks' supplemental briefs re the Campos decision. See Federal Rule  
6 of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006).  
7 In addition, I have reviewed relevant legal authorities, both as cited to  
8 me by the parties and as located through my own research.

9           Based on that review, this Memorandum Opinion states the  
10 court's findings of fact and conclusions of law under Civil Rule 52(a),  
11 applicable with respect to this contested matter under Rules 7052 and  
12 9014.<sup>1</sup>

#### 13                           I. FACTUAL BACKGROUND

14           The facts material to resolution of the Arbitration Motions are  
15 limited and essentially undisputed.

16           Ms. Banks filed her chapter 13 petition on September 16, 2014.  
17 She filed her proposed chapter 13 plan ("Plan") the following day. In  
18 her schedules, Ms. Banks listed both Ad Astra and Rapid Cash as general  
19 unsecured creditors on Schedule F, and they received notice of her  
20 bankruptcy filing. The Plan was confirmed by order entered on December  
21 4, 2014. Copies of the confirmation order were sent to Ad Astra and  
22 Rapid Cash on December 6, 2014. The Plan estimated a 0% recovery for  
23

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24           <sup>1</sup> Unless otherwise indicated, all chapter and section references are  
25 to the federal Bankruptcy Code, 11 U.S.C. §§ 101-1532; all "Rule"  
26 references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-  
9037; and all "Civil Rule" references are to the Federal Rules of Civil  
Procedure, Civil Rules 1-86.

1 general unsecured creditors. Pursuant to § 1327(b), when the Plan was  
2 confirmed, all property of Ms. Banks' bankruptcy estate reverted in her  
3 individually, and the estate terminated.

4 On September 17, 2015, Ms. Banks filed the Contempt Motion. In  
5 the Contempt Motion, Ms. Banks alleged as to Rapid Cash:

6 At the time that Debtor's Chapter 13 bankruptcy plan  
7 was confirmed Rapid Cash was reporting the pre-  
8 petition debt on Debtor's credit report. At some time  
9 after Debtor filed for Chapter 13 bankruptcy  
10 protection Rapid Cash disregarded Debtor's automatic  
11 stay and either sent Debtor's pre-petition debt to  
12 collections or sold Debtor's pre-petition debt to Ad  
13 Astra.

14 Memorandum in Support of Debtor's Motion for Order of Contempt, at 2. As  
15 to Ad Astra, Ms. Banks alleged that Ad Astra sent Ms. Banks a single  
16 collection notice ("Collection Notice") on August 17, 2015, seeking  
17 collection of a prepetition debt in the amount of \$40,317.00. Id. at 3.  
18 On September 18, 2015, the court issued an Order to Show Cause,  
19 scheduling a preliminary hearing on the Contempt Motion for October 28,  
20 2015, at 9:00 AM by telephone.

21 In the Response, Rapid Cash admitted that Ms. Banks' account  
22 was placed with Ad Astra for collection but asserted that such placement  
23 occurred prepetition rather than postpetition. Rapid Cash further  
24 asserted that it did not send any correspondence or otherwise communicate  
25 with Ms. Banks after her bankruptcy filing. Ad Astra admitted that the  
26 Collection Notice was sent but asserted that its sending of the  
Collection Notice was the result of "human error."

The debtor's file was then scrubbed again and, within  
a matter of days, moved back into proper bankruptcy  
status. No other collection attempts were made.

1 Response, at 3 (emphasis in original). At the Order to Show Cause  
2 hearing, Judge Brown reassigned the case to me, and the parties were  
3 informed that a further hearing would be scheduled the following January.

4 On December 10, 2015, the Arbitration Motions were filed. In  
5 the Arbitration Motions, the Respondents moved to compel arbitration of  
6 the Contempt Motion pursuant to the Federal Arbitration Act ("FAA"), 9  
7 U.S.C. §§ 2-4. In support, the Respondents relied on the Payday Loan  
8 Agreement & Disclosure Statement ("Agreement") signed by Ms. Banks on  
9 August 6, 2013, in advance of her bankruptcy filing. The Agreement  
10 included the following relevant provisions with respect to arbitration of  
11 disputes between the parties, among other provisions:

12 The Pre-Dispute Resolution Procedure, Arbitration  
13 Provision and Jury Trial Waiver set forth below govern  
14 "Claims" you assert against us or any "related party"  
of ours and "Claims" we or any related party assert  
against you.

15 For purposes of this Agreement, our "related parties"  
16 include all parent companies, subsidiaries and  
affiliates of ours (including Ad Astra Recovery  
17 Services, Inc.), and our and their employees,  
directors, officers, shareholders, governors, managers  
and members.

18 The term "Claim" means any claim, dispute or  
19 controversy between you and us (or our related  
parties) that arises from or relates in any way to  
20 this Agreement or any services you request or we  
provide under this Agreement ("Services"); any of our  
21 marketing, advertising, solicitations and conduct  
relating to your request for Services; our collection  
22 of any amounts you owe; or our disclosure of or  
failure to protect any information about you. "Claim"  
23 is to be given the broadest possible meaning and  
includes claims of every kind and nature, including  
24 but not limited to, initial claims, counterclaims,  
cross-claims and third-party claims, and claims based  
25 on any constitution, statute, regulation, ordinance,  
common law rule (including rules relating to  
26 contracts, negligence, fraud or other intentional

1 wrongs) and equity. It includes disputes that seek  
2 relief of any type, including damages and/or  
3 injunctive, declaratory or other equitable relief.  
4 . . . . However, any dispute or argument that  
5 concerns the validity or enforceability of the  
6 Agreement as a whole is for the arbitrator, not a  
7 court, to decide.  
8 . . . .

9 **2. Arbitration Election.** . . . If a lawsuit is filed,  
10 the Defending Party may elect to demand arbitration  
11 under this Arbitration Provision of some or all of the  
12 Claims asserted in the lawsuit. To avoid piece meal  
13 Proceedings to the extent possible, the Complaining  
14 Party must assert in a single lawsuit or arbitration  
15 all of the Claims of which the Complaining Party is  
16 aware and the Defending Party must demand arbitration  
17 with respect to all or none of the Complaining Party's  
18 Claims.

19 **3. Non-Waiver.** Even if all parties have elected to  
20 litigate a Claim in court, . . . nothing in that  
21 litigation shall constitute a waiver of any rights  
22 under this Arbitration Provision. . . .

23 **4. Location and Costs.** The arbitrator may decide  
24 that an in-person hearing is unnecessary and that he  
25 or she can resolve the Claim based on the papers  
26 submitted by the parties and/or through a telephone  
hearing. However, any arbitration hearing that you  
attend will take place in a location that is  
reasonably convenient for you. We will consider any  
good faith request you make for us to pay the  
administrator's or arbitrator's filing,  
administrative, hearing and/or other fees if you  
cannot obtain a waiver of such fees from the  
administrator and we will not seek or accept  
reimbursement of any such fees we agree to pay. We  
will also pay any fees or expenses we are required by  
law to pay or that we must pay in order for this  
Arbitration Provision to be enforced. We will pay the  
reasonable fees and costs you incur for your  
attorneys, experts and witnesses if you are the  
prevailing party or if we are required to pay such  
amounts by applicable law or by the administrator's  
rules. The arbitrator shall not limit the attorneys'  
fees and costs to which you are entitled because your  
Claim is for a small amount. Notwithstanding any  
language in this Arbitration Provision to the  
contrary, if the arbitrator finds that any Claim or  
defense is frivolous or asserted for an improper

1 purpose (as measured by the standards set forth in  
2 [Civil Rule] 11(b)), then the arbitrator may award  
3 attorneys' and other fees related to such Claim or  
4 defense to the injured party so long as such power  
5 does not impair the enforceability of this Arbitration  
6 Provision.

7 . . . .

8 **9. Governing Law.** This Arbitration Provision is made  
9 pursuant to a transaction involving interstate  
10 commerce and shall be governed by the FAA, and not  
11 Federal or state rules of civil procedure or evidence  
12 or any state laws that pertain specifically to  
13 arbitration, provided that the law of Kansas, where we  
14 are headquartered, shall be applicable to the extent  
15 that any state law is relevant in determining the  
16 enforceability of the Arbitration provision under  
17 Section 2 of the FAA. . . .

18 The Respondents argued that the arbitration provisions of the  
19 Agreement were enforceable as 1) such arbitration provisions are  
20 enforceable and favored under federal law, and 2) enforcement of the  
21 arbitration provisions of the Agreement would not conflict with any  
22 fundamental objective(s) of the Bankruptcy Code.<sup>2</sup>

23 In her Opposition, Ms. Banks admitted that she had agreed to  
24 the arbitration provisions in the Agreement. However, Ms. Banks raised  
25 two arguments in the Opposition as to why the Arbitration Motions should  
26 be denied. First, she argued that although the Respondents knew or  
should have known of the arbitration provisions in the Agreement, they  
filed the "thoroughly researched" Response to the Contempt Motion. Ms.  
Banks would be prejudiced if she had to start over arbitrating her  
dispute with the Respondents, not least because she does not have

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<sup>2</sup> The Agreement includes a provision allowing Ms. Banks to reject  
its arbitration provisions, but the right to reject had to be exercised  
within thirty days after the date of the Agreement, which apparently did  
not occur. Ms. Banks does not argue that she rejected the arbitration  
provisions of the Agreement.

1 financial resources to pay arbitration fees and costs, and she has not  
2 been able to find counsel who are willing to represent her in arbitration  
3 proceedings with the Respondents. Accordingly, any rights of the  
4 Respondents to arbitrate disputes under the Agreement should be treated  
5 as waived. Ms. Banks further argued that the automatic stay is such a  
6 fundamental protection for debtors under the Bankruptcy Code that the  
7 court should exercise its discretion under Ninth Circuit authority to  
8 deny the Arbitration Motions.

9 In their Reply, the Respondents argued that determinations as  
10 to whether the right to arbitrate has been waived are procedural and  
11 should be reserved for the arbitrator. Further, even if the court  
12 properly could decide the issue, Ms. Banks had not met the high burden to  
13 establish that the Respondents had waived the right to arbitration under  
14 the Agreement. In addition, the Respondents argued that there was no  
15 conflict between arbitrating the parties' dispute as provided for in the  
16 Agreement and the goals of the Bankruptcy Code.

17 As noted above, the parties argued their respective positions  
18 at the Hearing, and I gave them an opportunity to submit supplemental  
19 memoranda discussing the impact of the Campos decision in relation to the  
20 Arbitration Motions before me. In their supplemental brief, the  
21 Respondents argued from the Campos decision that there is "no indication  
22 that Congress intended to bar arbitration or permit § 362(k) claims to go  
23 forward only in limited forums." Campos, 2016 WL 297429, at \*10. In its  
24 essence, Respondents' argument is that even though resolving alleged  
25 violations of the automatic stay is within the core jurisdiction of this  
26 court, there is no fundamental conflict between arbitration under the FAA



1 and analyzing and deciding automatic stay violation claims under the  
2 Bankruptcy Code. In the circumstances of this case, arbitrating Ms.  
3 Banks' stay violation claims would not violate any fundamental bankruptcy  
4 principle.

5 In her supplemental brief, Ms. Banks argued that her case is  
6 distinguishable from Campos because she "cannot afford the fees and costs  
7 of arbitration because all of her disposable income is committed to her  
8 chapter 13 plan." Debtor's Supplemental Brief, Docket No. 46, at 4.  
9 Accordingly, arbitration does not provide Ms. Banks with an economically  
10 viable forum to prosecute her stay violation claims. In addition, Ms.  
11 Banks pointed out that the Campos chapter 7 bankruptcy case was a closed  
12 "no-asset" case, with no estate administration allowed for, whereas Ms.  
13 Banks' chapter 13 case is open, and she continues to perform under the  
14 confirmed Plan. Ms. Banks argued that compelling arbitration of her  
15 stay violations claims against the Respondents would jeopardize her  
16 ability to complete her Plan successfully. Id. at 6-7. Finally, Ms.  
17 Banks argued that her individual stay violation claims against the  
18 Respondents were "integral" to her case, as opposed to the class action  
19 claims encompassing many bankruptcy debtors asserted in Campos,  
20 reiterating that the court should exercise its discretion to deny the  
21 Arbitration Motions and allow Ms. Banks to continue to prosecute the  
22 Contempt Motion in court. Id. at 7.

23 As noted above, upon receipt of the parties' supplemental  
24 briefs, I took the Arbitration Motions under advisement.

## 25 II. JURISDICTION

26 I have jurisdiction to decide the Arbitration Motions under 28

1 U.S.C. §§ 1334, 157(b)(1) and 157(b)(2)(O).

2 III. DISCUSSION

3 1. Waiver. By its terms, the arbitration provisions of the Agreement  
4 are governed by the FAA, and there is a general presumption that "the FAA  
5 supplies the rules for arbitration." Sovak v. Chugai Pharmaceutical Co.,  
6 280 F.3d 1266, 1270 (9th Cir. 2002). Specifically, "waiver of the right  
7 to compel arbitration is a rule for arbitration, such that the FAA  
8 controls." Id.

9 "Waiver of a contractual right to arbitration is not favored."  
10 Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir. 1986).  
11 The FAA "establishes that, as a matter of federal law, any doubts  
12 concerning the scope of arbitrable issues should be resolved in favor of  
13 arbitration, whether the problem at hand is the construction of the  
14 contract language itself or an allegation of **waiver**, delay, or a like  
15 defense to arbitrability." Moses H. Cone Mem. Hosp. v. Mercury Const.  
16 Corp., 460 U.S. 1, 24-25 (1983).

17 The Ninth Circuit applies a three-factor test to analyze  
18 whether contractual arbitration rights have been waived: "A party seeking  
19 to prove waiver of a right to arbitration must demonstrate: (1) knowledge  
20 of an existing right to compel arbitration; (2) acts inconsistent with  
21 that existing right; and (3) prejudice to the party opposing arbitration  
22 resulting from such inconsistent acts." Fisher v. A.G. Becker Paribas  
23 Inc., 791 F.2d at 694 (citations omitted). See Sovak v. Chugai  
24 Pharmaceutical Co., 280 F.3d at 1270, citing Britten v. Co-op Banking  
25 Group, 916 F.2d 1405, 1412 (9th Cir. 1990). The party arguing waiver  
26 bears a "heavy burden of proof" to establish these elements. Sovak v.

1 Chugai Pharmaceutical Co., 280 F.3d at 270 (citations omitted).

2 Ms. Banks argues, without contradiction, that the Respondents  
3 knew or should have known of the existence of the arbitration provisions  
4 of the Agreement when they first responded to the Contempt Motion. She  
5 then argues that in light of the substantive Response filed and the  
6 commencement of discovery prior to the filing of the Arbitration Motions,  
7 she would be unfairly prejudiced if she were to be compelled to start  
8 litigating her stay violation claims over in a new arbitration  
9 proceeding. I note in this case that the Arbitration Motions were filed  
10 48 days, less than two months, after the Respondents filed their initial  
11 Response to the Contempt Motion, and Ms. Banks does not assert that any  
12 substantial costs have been generated in propounding or responding to  
13 discovery to date. Ms. Banks further asserts prejudice from her lack of  
14 funds to pay up front costs or fees for arbitration, even if such costs  
15 or fees were to be reimbursed later, and her inability to find counsel  
16 willing to represent her in arbitration.

17 In Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691 (9th Cir.  
18 1986), the Ninth Circuit faced a situation where parties litigated  
19 alleged federal securities law violation claims for a period of years  
20 before a decision of the Supreme Court determined that such claims were  
21 arbitrable. The plaintiffs argued that the defendant's belated assertion  
22 of a right to arbitration was "prejudicial because [plaintiffs] expended  
23 time, money, and effort on responding to pretrial motions and in  
24 preparing for trial and conducted extensive discovery of the arbitrable  
25 claims." Id. at 697. The Ninth Circuit held that,

26 the possibility that there may be some duplicative

1 proceedings is not prejudicial to the [plaintiffs].  
2 The [FAA] requires district courts to compel  
3 arbitration even where the result would be the  
possibly inefficient maintenance of separate  
proceedings in different forums.

4 Id. (citation omitted). See Moses H. Cone Mem. Hosp. v. Mercury Const.  
5 Corp., 460 U.S. at 20 (“the relevant federal law **requires** piecemeal  
6 resolution when necessary to give effect to an arbitration agreement”)  
7 (emphasis in original). In this case, it is not clear that any real  
8 prejudice results for an ensuing arbitration from Respondents tipping  
9 their hands as to their substantive defenses to Ms. Banks’ claims in the  
10 Response and the parties commencing discovery that could be relevant both  
11 in arbitration and in court.

12 A party does waive its right to arbitration “when it engages in  
13 protracted litigation that prejudices the opposing party.” PPG Indus.,  
14 Inc. v. Webster Auto Parts Inc., 128 F.3d 103, 107 (2d Cir. 1997)  
15 (citations omitted). However, generally, “courts do ‘not find prejudice  
16 where the party opposing arbitration shows only that it incurred court  
17 costs and legal expenses because merely participating in litigation, by  
18 itself, does not result in a waiver.’” Riso, Inc. v. Witt Co., 2014 WL  
19 3371731, at \*10 (D. Or. July 9, 2014), quoting Biernacki v. Serv. Corp.  
20 Int’l, 533 F. App’x 741, 742 (9th Cir. 2013). In Riso, Inc. v. Witt Co.,  
21 the Oregon District Court found no waiver of arbitration rights despite  
22 the plaintiff’s having incurred approximately \$50,000 in allegedly  
23 unnecessary local counsel fees in court proceedings before the defendant  
24 asserted its right to arbitration. 2014 WL 3371731, at \*10. This case  
25 does not concern any “protracted litigation” before the Arbitration  
26 Motions were filed.

1           As to Ms. Banks' arguments that she would be prejudiced because  
2 she is committing all of her disposable income to required payments under  
3 the Plan and has no money available to pay arbitration fees and costs,  
4 and cannot find counsel willing to undertake her representation in  
5 arbitration, the Agreement specifically provides for arbitration  
6 arrangements to accommodate the needs of claimants such as Ms. Banks with  
7 limited resources: "The arbitrator may decide that an in-person hearing  
8 is unnecessary and that he or she can resolve the Claim based on the  
9 papers submitted by the parties and/or through a telephone hearing. . . .  
10 [A]ny arbitration hearing that you attend will take place in a location  
11 that is reasonably convenient for you." The Agreement contemplates that  
12 any arbitration fees may be waived, or paid by the Respondents without  
13 any reimbursement obligation from Ms. Banks. The Agreement further  
14 provides for an award of attorneys' fees and costs to Ms. Banks if she is  
15 the prevailing party in the arbitration, where the "arbitrator shall not  
16 limit the attorneys' fees and costs to which you are entitled because  
17 your Claim is for a small amount." Attorneys' fees could only be awarded  
18 against Ms. Banks if her stay violation claims were determined to be  
19 frivolous or asserted for an improper purpose under Civil Rule 11(b)  
20 standards.

21           Accordingly, the arbitration provisions of the Agreement by  
22 their terms represent a credible effort to accommodate the prosecution of  
23 small claims by parties with or without counsel. Without a more  
24 substantial showing that compelling arbitration in this case would  
25 deprive Ms. Banks of the right to pursue her claims against the  
26 Respondents, I cannot find the unfair prejudice necessary to support

1 waiver.<sup>3</sup>

2           Based on the foregoing analysis under Ninth Circuit standards,  
3 I conclude that the Respondents have not waived their rights under the  
4 Agreement to move to compel arbitration of Ms. Banks' stay violation  
5 claims.

6 2. Arbitration of Stay Violation Claims.    The FAA provides that an  
7 arbitration provision in a written agreement "shall be valid, irrevocable  
8 and enforceable, save upon grounds as exist at law or in equity for the  
9 revocation of any contract," and a court is required to stay a proceeding  
10 if it is satisfied that the matter in issue is referable to arbitration  
11 under the terms of such an agreement.    FAA, 9 U.S.C. §§ 2-3.    The FAA was  
12 intended to "revers[e] centuries of judicial hostility to arbitration  
13 agreements."    Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974).  
14 Accordingly, it establishes "a liberal policy favoring arbitration  
15 agreements."    Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S.  
16 at 24.    In fact, a court's duty to "rigorously enforce" arbitration  
17 covenants extends to claims based on statutory rights.    Shearson/Am.  
18 Express Inc. v. McMahon, 482 U.S. 220, 226 (1987) ("This duty to enforce  
19 arbitration agreements is not diminished when a party bound by an  
20

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21           <sup>3</sup> The Supreme Court has not been hospitable to arguments that  
22 requiring arbitration under the FAA would effectively deprive small  
23 claimants of the right to prosecute their claims.    "[T]he FAA's command  
24 to enforce arbitration agreements trumps any interest in ensuring the  
25 prosecution of low-value claims."    American Express Co. v. Italian Colors  
26 Restaurant, 133 S. Ct. 2304, 2312 n.5 (2013).    The dissent in the  
American Express case characterized its "nutshell version" of the  
majority opinion's effect arguably to insulate American Express Co. from  
antitrust law challenges as follows: "Too darn bad."    Id. at 2313.

1 agreement raises a claim founded on statutory rights.”).

2           The leading Ninth Circuit decision analyzing the interface  
3 between the FAA and the Bankruptcy Code is Continental Ins. Co. v. Thorpe  
4 Insulation Co. (In re Thorpe Insulation Co.), 671 F.3d 1011 (9th Cir.  
5 2012). In the Thorpe decision, the Ninth Circuit concluded that  
6 “[n]either the text nor the legislative history of the Bankruptcy Code  
7 reflects a congressional intent to preclude arbitration in the bankruptcy  
8 setting.” Id. at 1020 (citations omitted). However, with respect to  
9 issues within the “core” jurisdiction of the bankruptcy courts, such as  
10 the stay violation claims in this case, the Ninth Circuit held that  
11 bankruptcy courts have discretion not to send a matter to arbitration if  
12 arbitrating the matter would conflict with a fundamental purpose of the  
13 bankruptcy statutes. “We join our sister circuits in holding that, even  
14 in a core proceeding, the McMahon standard must be met - that is, a  
15 bankruptcy court has discretion to decline to enforce an otherwise  
16 applicable arbitration provision **only if arbitration would conflict with**  
17 **the underlying purposes of the Bankruptcy Code.**” Id. at 1021 (citations  
18 omitted and emphasis added). And that discretion must be exercised in  
19 the fact-dependent context of the particular matter before the bankruptcy  
20 court. See, e.g., MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d  
21 Cir. 2006) (“This determination requires a particularized inquiry into  
22 the nature of the claim and the facts of the specific bankruptcy.”); New  
23 Cingular Servs. v. Burkart (In re Wire Comm Wireless, Inc.), 2008 WL  
24 4279407, at \*9 (E.D. Cal. Sept. 16, 2008) (“[T]he bankruptcy judge here  
25 had to evaluate the nature of the underlying claims and their effect upon  
26 the bankruptcy proceedings before determining whether he had the

1 discretion to deny arbitration.”).

2 In Thorpe, Continental Insurance Company (“Continental”) had  
3 filed a proof of claim and was litigating its breach of contract claim  
4 against Thorpe Insulation Company (“Thorpe”) in Thorpe’s chapter 11  
5 proceedings. Specifically, Continental sought absolution from providing  
6 insurance coverage for certain claims relating to asbestos injuries in  
7 light of Thorpe’s entry into a prepetition Settlement Agreement with  
8 Continental providing for a mutual release of claims. Thorpe was seeking  
9 confirmation of a reorganization plan that would provide for payment of  
10 asbestos injury claims through a § 524(g) trust. The bankruptcy court,  
11 affirmed on appeal by the district court, denied Continental’s motion to  
12 compel arbitration. On further appeal, the Ninth Circuit concluded that  
13 “resolution of Continental’s claim was a core proceeding.” Id. at 1021.  
14 It further held that the bankruptcy court did not abuse its discretion in  
15 denying Continental’s motion to compel arbitration as “adjudication of  
16 Continental’s claim in any forum other than a bankruptcy court would  
17 conflict with ‘fundamental bankruptcy policy.’” Id. at 1022.

18 The purpose of § 524(g) is to consolidate a debtor’s  
19 asbestos-related assets and liabilities into a single  
20 trust for the benefit of asbestos claimants. See H.R.  
21 Rep. 103-835, at 46-48. Congress intended that the  
22 trust/injunction mechanism be “available for use by  
23 any asbestos company facing . . . overwhelming  
24 liability.” See id. at 48. Congress tasked  
25 bankruptcy courts with ensuring that § 524(g)’s “high  
26 standards” are met and gave them authority to  
implement and supervise this unique procedure. See  
id. at 47. A claim based on a debtor’s efforts to  
seek for itself and third parties the protections of  
§ 524(g) implicates and tests the efficacy of the  
provision’s underlying policies. Because Congress  
intended that the bankruptcy court oversee all aspects  
of a § 524(g) reorganization, only the bankruptcy  
court should decide whether the debtor’s conduct in



1 the bankruptcy gives rise to a claim for breach of  
2 contract. Arbitration in this case would conflict  
with congressional intent.

3 Id. The Ninth Circuit reinforced its holding by recognizing that "the  
4 purposes of the Bankruptcy Code include '[c]entralization of disputes  
5 concerning a debtor's legal obligations' and 'protect[ing] creditors and  
6 reorganizing debtors from piecemeal litigation.'" Id., quoting Phillips  
7 et al. v. Congelton, L.L.C. et al. (In re White Mountain Mining Co.,  
8 L.L.C.), 403 F.3d 164, 170 (4th Cir. 2005). "Arbitration of a creditor's  
9 claim against a debtor, even if conducted expeditiously, prevents the  
10 coordinated resolution of debtor-creditor rights and can delay the  
11 confirmation of a plan of reorganization." Thorpe, 671 F.3d at 1023.

12 Applying the teachings of Thorpe with respect to motions to  
13 compel arbitration of claims for violation of the automatic stay, I note  
14 that courts have not followed a uniform path in their decisions. Compare  
15 MBNA Am. Bank, N.A. v. Hill, 436 F.3d at 109 (reversing the bankruptcy  
16 court's decision not to send a stay violation claim to arbitration and  
17 holding that "arbitration of [Hill's] claim would not seriously  
18 jeopardize the objectives of the Bankruptcy Code [among other reasons]  
19 because . . . Hills' estate has now been fully administered and her debts  
20 have been discharged, so she no longer requires protection of the  
21 automatic stay and resolution of the claim would have no effect on her  
22 bankruptcy estate"); with Merrill v. MBNA Am. Bank, N.A. (In re Merrill),  
23 343 B.R. 1, 9 (Bankr. D. Me. 2006) (Motion to compel arbitration denied  
24 where estate administration was not complete, and the automatic stay was  
25 "the foundation of debtor protection to be provided through the offices  
26 of the specialized bankruptcy court."); and Cavanaugh v. Conseco Fin.

1 Serv. Corp. (In re Cavanaugh), 271 B.R. 414, 426 (Bankr. D. Mass. 2001)  
2 ("Arbitration is not a proper forum for adjudication of a dispute over  
3 whether the Defendants violated the fundamental protection of the  
4 automatic stay. Enforcement of the arbitration clause under these  
5 circumstances would be an abrogation of this Court's obligation to  
6 construe and enforce the injunction issuing under its authority and to  
7 determine the parties' rights and obligations under bankruptcy law.").

8 With that background in mind, I turn to analysis of the impact  
9 of the Campos decision. At the outset, I note that there were major  
10 issues to be resolved in the Campos case that are not concerned in Ms.  
11 Banks' case, namely, in Campos, the District Court had to decide based on  
12 evidence presented whether an arbitration agreement even existed. In  
13 addition, the Campos case was filed as a class action, and the subject  
14 arbitration provision included a class action waiver. Neither of those  
15 issues is relevant to the decision in Ms. Banks' case. Nevertheless, the  
16 District Court's legal analysis in Campos is relevant to some of the  
17 questions I face.

18 As in Ms. Banks' case, Campos concerned alleged stay violation  
19 claims. As noted by the District Court in Campos,

20 Congress authorized litigation of automatic stay  
21 claims in district courts as well as in the bankruptcy  
22 court presiding over the debtor's bankruptcy estate,  
23 28 U.S.C. § 1334(b). With no indication that Congress  
intended to bar arbitration or permit § 362(k) claims<sup>4</sup>

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24 <sup>4</sup> Section 362(k) provides:

25 (k) (1) Except as provided in paragraph 2, an individual injured by  
26 any willful violation of a stay provided by this section shall recover  
actual damages, including costs and attorneys' fees, and, in appropriate  
(continued...)

1 to go forward only in limited forums, the text and  
2 legislative history of § 362(k) do not conflict with  
the FAA.

3 Campos, 2016 WL 297429, at \*10.

4 Consistent with Thorpe, the District Court recognized that  
5 "courts may decline to compel arbitration of core proceedings where  
6 arbitration conflicts with the Bankruptcy Code's purposes." Id. Ms.  
7 Campos argued that compelling arbitration of her stay violation claim  
8 presented a basic conflict with an underlying purpose of the Bankruptcy  
9 Code because individual arbitration was not an economically viable means  
10 to vindicate her rights. Id. at \*11. In rejecting her argument, the  
11 District Court noted that "the Supreme Court has specifically rejected  
12 the argument that an arbitration agreement that includes a class-action  
13 waiver is unenforceable when a class action is the only economically  
14 feasible means for enforcing statutory rights," citing American Express  
15 Co. v. Italian Colors Restaurant, 133 S. Ct. at 2311 n.4. The District  
16 Court went on to hold that the "economic realities of individually  
17 arbitrating M. Campos's claim for violations of § 362(k) do not create an  
18 inherent conflict with the Bankruptcy Code." Campos, 2016 WL 297429, at  
19 \*11.

20 Because Ms. Campos had received her chapter 7 discharge and  
21 administration of her bankruptcy estate was complete, the District Court

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23 <sup>4</sup>(...continued)  
24 circumstances, may recover punitive damages.

25 (2) If such violation is based on an action taken by an entity in  
the good faith belief that subsection (h) applies to the debtor, the  
26 recovery under paragraph (1) of this subsection against such entity shall  
be limited to actual damages.

1 found that “[h]er claim is not ‘inextricably intertwined’ with her  
2 bankruptcy any longer; arbitration will not prevent the coordinated  
3 resolution of her rights or delay any plan of reorganization.” Id.<sup>5</sup>

4 In Campos, the District Court ultimately found that the parties  
5 had formed a valid arbitration agreement, and granting the defendants’  
6 motion to compel arbitration would not conflict with any underlying  
7 purpose of the Bankruptcy Code. Id. at \*12.

8 The particular factual record before me differs from Campos in  
9 that Ms. Banks filed for relief in chapter 13, and postconfirmation, Ms.  
10 Banks is continuing to perform her Plan obligations. She has not  
11 received a discharge, and her case remains open. However, when her Plan  
12 was confirmed, all estate property revested in Ms. Banks personally (see  
13 § 1327(b)), and her bankruptcy estate ceased to exist. Accordingly,  
14 there is no on-going estate administration in her bankruptcy case. The  
15 Contempt Motion is the only active matter being litigated in Ms. Banks’  
16 bankruptcy case. She is making her Plan payments from her current  
17 disposable income and is not counting on any recovery from prosecution of  
18 the Contempt Motion to fund her Plan. In fact, she never has represented  
19 that she would contribute any recovery from prosecution of the Contempt  
20 Motion to make Plan payments. I do not mean to discount or disregard the  
21 adverse effects supporting a damages award that Ms. Banks may be able to  
22 establish from the Respondents’ alleged stay violations. Consider the  
23 potential traumatic effects from receipt of even a single unexpected bill

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24  
25 <sup>5</sup> Citing the Second Circuit’s Hill decision, the District Court  
26 further found that “the fact that Ms. Campos brought her claim as a  
putative class action demonstrates that her claim is not integral to her  
individual bankruptcy proceeding.” Id.

1 for \$40,317.00, as admittedly, Ms. Banks received.

2 But ultimately, what is at stake in this case are Ms. Banks'  
3 personal claims for damages and an award of attorneys' fees and costs for  
4 what appears to have been an inadvertent and not repeated postpetition  
5 sending and receipt of a billing statement. Resolution of those claims  
6 will have no direct impact on performance of her chapter 13 Plan or  
7 estate administration in her bankruptcy case. The arbitration provisions  
8 of the Agreement, by their terms, provide accommodations for claimants of  
9 limited means, such as Ms. Banks, to pursue individual claims in  
10 arbitration in a cost effective manner, even pro se, and no evidence has  
11 been presented to establish that those accommodations are illusory. In  
12 these specific circumstances, I conclude that granting the Arbitration  
13 Motions will not conflict with any fundamental purpose of the Bankruptcy  
14 Code, and I will grant the Arbitration Motions.

15 IV. CONCLUSION

16 For the foregoing reasons, the Arbitration Motions will be  
17 granted. Counsel for the Respondents should submit an order consistent  
18 with this Memorandum Opinion within ten days following the date of its  
19 entry on the docket.  
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