Signed: March 29, 2010

SO ORDERED

NANCY V. ALQUIST
U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Baltimore Division)

In re:	*	
Maureen P. Roberson,	*	Case No. 08-12415 NVA (Chapter 13)
Debtor	*	
* * * * * * *		
	*	
Maureen P. Roberson,	*	Adversary Proc. No. 08-0557 NVA
Plaintiff		
v.	*	
Ford Motor Credit Company LLC,	*	
	*	
Defendant.	*	
* * * * * * * * * * * * *		

MEMORANDUM ORDER DENYING
MOTION [doc. 24] TO STAY PROCEEDINGS PENDING ARBITRATION

The Court has before it a motion to stay adversary proceedings in this bankruptcy case pending arbitration. As discussed herein, the Court denies the motion on two grounds. First, the movant waived its arbitration rights by the delay of its demand. Second, even if there were not waiver, the Court would deny the motion by virtue of the nature of the core bankruptcy issues

presented. In the interest of completeness, the Court will address both grounds.

The debtor in this case, Maureen Roberson (Ms. Roberson or the "Debtor") filed a chapter 13 petition on February 21, 2008. According to Ms. Roberson, she filed her petition because Ford Motor Credit Company, LLC ("Ford" or the "Defendant") wrongfully repossessed her car in the wake of her prior chapter 7 case and she wanted to redress that wrong. Ford, on the other hand, has argued throughout this chapter 13 case and during the pendency of this adversary proceeding, that its repossession of Ms. Roberson's vehicle was lawful because Ms. Roberson failed to take steps in her previous chapter 7 case to reaffirm the debt owing to Ford. Accordingly, Ford claims, under Maryland state law and the contract between the parties, Ford was permitted to repossess Ms. Roberson's vehicle based on the *ipso facto* clause in the retail installment contract, *i.e.*, based on nothing more than the fact that Ms. Roberson filed for bankruptcy protection.

In order to fully vet these potentially precedential issues, Ms. Roberson instituted the captioned adversary proceeding in this Court. The matter proceeded to hearing before this Court. After a full-day hearing, this Court determined that some of the core issues in this adversary proceeding turn on important and undecided issues of Maryland state law. This Court found that it would be appropriate to employ the procedure for Certification of Question to the Maryland Court of Appeals, and a date was set for the submission. As part of that procedure, the Court requested that the Debtor and Ford prepare a joint statement of facts to submit to the Court of Appeals. Ms. Roberson timely submitted a statement of facts. Ford filed instead a Motion [doc. 24] to Stay Proceedings Pending Arbitration (the "Motion to Arbitrate"). Ford had never before raised any issue about arbitration or made a demand to arbitrate. The Debtor filed an Opposition [doc. 26] (the "Opposition") to the Motion to Arbitrate.

In its Motion to Arbitrate, Ford argues that all of the claims that Ms. Roberson has against Ford arise from the July 11, 2004 Maryland Simple Interest Vehicle Retail Installment Contract (the "Vehicle Contract") between the parties. Ford points out that the Vehicle Contract contains an arbitration clause wherein the parties agreed "to have any claim related to this contract decided by arbitration." Specifically, the arbitration clause states, in relevant part, as follows:

ARBITRATION

> Arbitration is a method of resolving any claim, dispute, or controversy (collectively, a "Claim") without filing a lawsuit in court. Either you or Creditor ("us" or "we") (each, a "Party") may choose at any time, including after a lawsuit is filed, to have any Claim related to this contract decided by arbitration. Such Claims include but are not limited to the following: 1) Claims in contract, tort, regulatory or otherwise; 2) Claims regarding the interpretation, scope or validity of this clause, or arbitrability of any issue; 3) Claims between you and us, our employees, agents, successors, assigns, subsidiaries, or affiliates; 4) Claims arising out of or relating to your application for credit, this contract, or any resulting transaction or relationship, including that with the dealer, or any such relationship with third parties who do not sign this contract.

Vehicle Contract at p. 2 [exhibit 1 to doc. 24].

Based on this arbitration clause in the Vehicle Contract, Ford seeks to stay the prosecution of this adversary proceeding, including the certification of questions, pending arbitration. Ford claims that its contractual right to arbitrate is protected pursuant to 9 U.S.C. §2.

In her Opposition, the Debtor alleges that (I) because the Debtor has made core claims against the Defendant, subjecting this case to arbitration would frustrate the purpose of bankruptcy protection and diminish the Bankruptcy Court's authority, and (ii) Ford waived its right to arbitration by litigating this matter and by failing to assert timely its right to arbitrate.

It appears to be undisputed that Ms. Roberson bought a 2005 Ford Focus and financed it

through Ford. Subsequently, Ms. Roberson filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on October 22, 2007. The vehicle was scheduled as an asset and Ford was scheduled as a secured creditor. Ms. Roberson did not, however, reaffirm the debt to Ford. Ms. Roberson received a discharge in her chapter 7 case on January 30, 2008. It also appears to be undisputed that at all times before, during and after her chapter 7 case, Ms. Roberson was current on her payments to Ford and, at all relevant times, she kept the vehicle properly insured and titled. Nonetheless, on February 19, 2008, about three weeks after Ms. Roberson received her chapter 7 discharge, Ford repossessed Ms. Roberson's vehicle on the basis that she had breached the *ipso facto* clause in the purchase/financing contract between the parties by virtue of having filed for bankruptcy protection.

Two days after the repossession of her vehicle, on February 21, 2008, Ms. Roberson filed the instant chapter 13 case. Ms. Roberson alleges that her sole motivation in filing this case is to redress her rights *vis a vis* Ford and to attempt to obtain her vehicle from Ford based on what she asserts was a wrongful taking under Maryland law. On July 14, 2008, Ms. Roberson filed the instant adversary proceeding against Ford. The complaint initiating this adversary proceeding contains six counts against Ford, summarized as follows: (I) violation of the discharge injunction pursuant to 11 U.S.C. § 524 by repossessing the vehicle, (II) violation of the federal Fair Debt Collection Practices Act by, *inter alia*, misrepresenting the imminence of pending legal action and making other false and misleading misrepresentations, attempting to collect amounts not allowed by law; and engaging in harassing, oppressive or abusive conduct, (III) violation of the Maryland Consumer Protection Act by engaging in unfair or deceptive loan practices by making representations that the acceptance of post-filing loan payments would allow the Debtor to retain

the vehicle following the closure of her chapter 7 case, (IV) violation of the Maryland Debt Collection Act by threatening to enforce a right which Ford knew did not exist, (V) Breach of Contract based on Ford's wrongful repossession of the vehicle in reliance on the *ipso facto* clause, (VI) trespass and conversion based on the repossession of the car that was a wrongful act inconsistent with the Debtor's right of ownership. On November 24, 2008, Ms. Roberson amended her complaint. The amendment did not add or delete any counts against Ford. It was filed to make clear that the chapter 13 Trustee in this matter had declined to participate and that the Court has excused him as a party from this action. The amended Complaint also alleges that Ford waived any application of the *ipso facto* clause by its acceptance of payments after the Debtor's bankruptcy filing.

Ford has not yet filed an answer to the complaint. Ford timely filed a motion to dismiss counts I and II of the Complaint.

Based on the state-based nature of the underlying legal issue in this case, *i.e.*, whether the repossession of a vehicle based on the *ipso facto* clause is permissible under Maryland law when there has been no other default under the applicable contract, this Court determined, after hearing argument at a lengthy hearing, to certify the question of law to the Maryland Court of Appeals pursuant to the procedure outlined in Md. Cts & Jud. Proc. § 12-603. As stated above, the Court was preparing to certify the question to the Maryland Court of Appeals, when Ford filed its Motion to Arbitrate, raising its arbitration demand for the first time.

It is with this procedural posture as backdrop that the Court considers the Motion to Arbitrate.

Preservation and Protection of a Party's Right to Arbitrate

Section 3 of the Federal Arbitration Act[1] states that:

§ 3. Stay of proceedings where issue therein referable to arbitration

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Ford filed the Motion to Arbitrate on March 3, 2009. Ms. Roberson filed the complaint initiating this adversary proceeding on July 14, 2008. As stated, the Motion to Arbitrate was the first time that Ford asserted arbitration rights.

The Bankruptcy Code vs. the Federal Arbitration Act

One of the primary goals of the bankruptcy system is the centralization of disputes related to a single debtor within a single forum. Under the Federal Arbitration Act (the "FAA"), courts are directed to enforce mandatary arbitration clauses contained in commercial contracts. The FAA directs that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *See* § 2 of the FAA. This mandatory enforcement cannot be overridden absent strong congressional intent. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). *See also, Societe*

[1] The Federal Arbitration Act is set forth at 9 U.S.C. §§ 1 - 307 (2000).

Nacionale Algerienne v. Distrigas Corp., 80 B.R. 606, 610 (D. Mass. 1987) (recognizing that bankruptcy policy "exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach.").

It is well-settled that in order to overcome the strong federal policy in favor of arbitration, the burden is on the party opposing arbitration to show that arbitration is not warranted. *McMahon, supra* at 227.

The Three-Pronged Inquiry

Notwithstanding the federal policy favoring arbitration, the Bankruptcy Code contains a counter-imperative to centralize all disputes. The Supreme Court, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), fashioned a three-pronged test to determine whether a mandate to arbitrate may be overridden in the context of a competing statutory scheme. The *McMahon* Court addressed the arbitrability of claims arising under section 10(b) of the Securities Exchange Act as well as the Racketeer Influenced and Corrupt Organization Act. Id. at 220. With respect to these claims, issues were raised as to whether there was a strong federal policy that these federal statutory claims be litigated in federal court instead of being subject to arbitration. The *McMahon* Court first noted that the policy in favor of arbitration is not diminished because the outcome of the subject matter is based on federal statutes. *Id*. at 226. Instead, the mandate to arbitrate may only be overridden where there is conflicting congressional instruction within other statutes. *Id*. A showing of conflicting congressional construction may be ascertained by (1) an examination of the text of the statute in controversy, (2) a review of the legislative history of the statute or (3) finding "an inherent conflict between arbitration and the statute's underlying purpose." *Id*. at 227. In *McMahon*, the Court was not able to find that there was conflicting

congressional intent and accordingly determined that both of the claims at issue were arbitrable.

McMahon was not a bankruptcy case and while it provides guidance with respect to arbitration, it does not give specific guidance with respect to the arbitration issue in the bankruptcy context. For some courts, the determinative question in the bankruptcy context is whether the action pending in the bankruptcy court is core or non-core. These courts address themselves to the "inherent conflict" prong of the *McMahon* analysis and whether there is an inherent conflict between bankruptcy law and arbitration. *Hays & Co v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 885 F. 2d 1149 (3d Cir. 1989). If the action pending in the bankruptcy court is a non-core proceeding, these courts have decided that a bankruptcy court has little discretion and arbitration must go forward. *Id.* [2] See also, *In re Merrill*, 343 B.R. 1 (Bankr. D. Me. 2006); *In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1066 (5th Cir. 1997) (opining that in a non-core proceeding, bankruptcy courts have discretion to determine whether arbitration is appropriate).[3]

The Fourth Circuit declined to enforce mandatory arbitration in a core proceeding, but did not deny arbitration solely on the basis of the core/non-core distinction. *In re White Mountain Mining Co.*, 403 F.3d 164 (4th Cir. 2005). In *White Mountain*, a chapter 11 case, the Fourth Circuit recognized the "strong federal policy in favor of arbitration." *Id*. at 168. The *White Mountain* Court applied the three-pronged analysis set forth in *McMahon*, *supra*, to determine whether Congress intended to limit or prohibit waiver of a judicial forum for a particular claim or whether

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[2] In a later decision of the Third Circuit, the court determined that the core/non-core distinction had no bearing on whether a claim is subject to mandatory arbitration. *In re Mintze*, 434 F.3d 222, 223 (3d Cir. 2006).

[3] The Court believes that at least some of the counts are core pursuant to 28 U.S.C. section 157 (a) (2) because they allege substantive rights provided by the Bankruptcy Code. *In re Wood*, 825 F.2d 97 (5th Cir. 1987).

there is an inherent conflict between arbitration and a statute's underlying purpose. *Id.*

In *White Mountain,* the court recognized that there is a split as to whether core claims can be arbitrated by non-bankruptcy tribunals, but did not finally resolve the issue, stating, "[w]e need not decide today whether the statutory text itself demonstrates congressional intent to override arbitration for core claims because this case may be decided under [an alternate analysis]." *Id*. at 169.

The *White Mountain* Court then turned to whether there is inherent conflict between arbitration and the underlying purpose of the bankruptcy laws. The purpose of the bankruptcy laws "is to modify the rights of debtors and creditors." *Id*. at 169 (internal citation omitted). The Fourth Circuit found that "arbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights 'contingent upon an arbitrator's ruling' rather than the ruling of the bankruptcy judge assigned to hear the debtor's case." *Id*. at 169 - 70 *citing Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act*, 117 Harv. L.Rev. 2296, 2307 (2004). (The arbitration agreement in *White Mountain* compelled arbitration in London, but foreign location was not a factor in the Fourth Circuit's determination.) *See also, In re Lucas*, 312 B.R. 559 (Bankr. D.Md. 2004) (court refused to enforce arbitration agreement that would have required debtor to arbitrate negligence, unauthorized practice of law and stay violation claims against petition preparer because claims were core and arbitration of them would have frustrated bankruptcy policy); *In re Startec Global Communications Corp*., 300 B.R. 244 (D. Md. 2003) (bankruptcy court properly exercised its discretion in declining to compel arbitration in core proceeding).

The Fourth Circuit found that centralized decision making is important in any bankruptcy

case, but takes on increased significance in a chapter 11 case because the "fundamental purpose" of a chapter 11 case is the rehabilitation of the debtor, and the prevention of liquidation. *Id*. at 171. In *White Mountain*, the Fourth Circuit agreed with the bankruptcy court's findings that arbitration would substantially interfere with the debtor's efforts to reorganize. Specifically, the court agreed that enforcing an arbitration clause would create inefficiencies in the debtor's ability to reorganize, and that an ancillary arbitration proceeding would create difficulties in the debtor's ability to attract financing. *Id.* at 170.

The instant case is an individual reorganization case under chapter 13. The centralization of disputes does not play an insignificant role in this case.[4] The central issue in this case is whether Ms. Roberson's rights under bankruptcy law (i.e. the discharge injunction resulting from her earlier chapter 7 case) were violated when her vehicle was thereafter repossessed and whether with the car and any damages restored to her, she can effectuate a successful reorganization under chapter 13.[5] The causes of action in this case are made no less justiciable by this Court simply because discrete issues of law may be ruled upon by the Maryland Court of Appeals before ultimate resolution of the complaint in this Court.[6] Many bankruptcy rights are defined by state law. *See In re Moffet*, 356 F.3d 518 (4th Cir. 2004) ("[W]hile federal law defines in broad fashion

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[4]The Court in *In re Brown*, 354 B.R. 591 (D.R.I. 2006) expressly recognized that chapter 11 is not the only chapter in which the centralization of the debtor's disputes is a paramount concern. The Brown Court stated, in commenting on the Fourth Circuit's *White Mountain* decision, "it is not inherently clear why centralization of Chapter 11 proceedings is any more, or less critical than other bankruptcy proceedings." *Id*. at 596.

[5] The Court does not determine whether this adversary proceeding is a core matter. Based on the ruling in *White Mountain*, this Court need not make this finding at this juncture.

[6] Arbitration, on the other hand, would place determination of the entire dispute before another tribunal.

which property interests are included within the bankruptcy estate, state law determines the nature and extent of a debtor's rights." *Citing Butner v. United States*, 440 U.S. 48 (1979); *See also In re Price*, 562 F.3d 618, 623 (4th Cir. 2009) ("[W]hen determining the substance of property rights and security interests in bankruptcy, the basic federal rule is that state law governs.") (internal citations omitted); ling; *In re Paul*, 399 B.R. 81, 104 (Bankr. D. Mass. 2008) (adopting view of *In re Nat'l Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997) that where cause of action is not derived from pre-petition contractual or legal rights, but is based on federal rights, a bankruptcy court retains discretion to deny arbitration and remarking that this analysis has been adopted by the Second, Third, Fifth and Eleventh Circuits).

Accordingly, based on the facts and procedural posture in this matter as set forth above, and in reliance on the Fourth Circuit's *White Mountain* decision, this Court denies the Motion to Arbitrate.

Ford's Waiver of Arbitration

The Court also finds that Ford has waived any arbitration rights it may have had.

The law does not favor findings of waiver of arbitration rights, and the burden is on the party seeking to avoid arbitration to show that the adverse party waived its right to arbitrate. *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 496 (5th Cir. 1986). Moreover, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *In re Fleming Companies, Inc.*, 325 B.R. 687, 690 (Bankr. D. Del. 2005) *citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

Clearly, however, a contractual right to arbitrate can be waived. For the majority of courts, the determinative issue is whether prejudice will inure to the party opposing arbitration *See Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 925 (3rd Cir. 1992) ("[P]rejudice is the touchstone for determining whether the right to arbitrate has been waived.").[7] *In re Fleming*, 325 B.R. 687 (Bankr. D. Del. 2005) (granting debtor's motion to compel arbitration in an action in which the debtor was the plaintiff based on lack of prejudice because the motion to compel arbitration was filed less than two months after initial the complaint was filed and because extensive discovery was not ongoing).

In this case, Ford has waived its right to demand arbitration. Ford did not raise its right to arbitrate until after it had participated in a hearing about whether issues of law would be certified to the Maryland Court of Appeals, and until after this Court had ruled that it would certify certain questions in this case to the Maryland Court of Appeals. Moreover, Ford said nothing whatsoever about arbitration rights at all until almost eight months after the adversary proceeding against it had been instituted in this Court, and more than a year after the chapter 13 case was filed. Ford has been active in this case since its inception. It knew the purpose of this chapter 13 case was to deal with Ford's repossession. The first paper Ford filed in this case was filed on February 29, 2008. Ford filed an Opposition to Ms. Roberson's Emergency Motion for the Return of her vehicle. Ford's paper was filed a mere eight days after this case was commenced. There is no reason that Ford could not have raised its right to arbitrate that dispute then, and it should have Ford has been active in the Debtor's main case, and as a defendant in her adversary

[7] A minority of courts require that the party against whom waiver is sought intended forum selection. *See , e.g., Grumhaus v. Comerica Sec., Inc.*, 223 F.3d 648 (7th Cir. 2000).

proceeding. Ford actively has participated while Ms. Roberson twice sought to withdraw the reference of this case by the United States District Court. During all of these proceedings in which the very issue of venue for determination of this dispute was being played out, Ford did not raise, argue or assert any rights under its arbitration clause. It was not until after this Court had determined that it would certify a question to the State Court - - after a full day of argument in which Ford participated but did not assert arbitration rights - - that Ford finally asserted its arbitration rights.

The Fourth Circuit has stated that a party "will default its right to arbitration if it 'so substantially utilizes the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 343 (4th Cir. 2009). In *Forrester*, the Fourth Circuit found that arbitration was waived where the party seeking arbitration failed to raise it in its answer, and litigated pre-trial motions for 18 months prior to the assertion of arbitration rights. As in *Forrester*, Ms. Roberson has been prejudiced by having to litigate pre-trial motions. She has expended substantial energies and resources in participating in these proceedings, all in good faith. She would be prejudiced by a finding now that she has wasted these energies and resources and should have started out in an arbitration setting a year ago. If Ford wanted to enforce its right to arbitrate, it should have done so when it received Ms. Roberson's emergency motion for the return of her vehicle - - a motion that she filed four days after her bankruptcy case was commenced. Having failed to take any action to enforce its rights until months after this case was commenced, and until it received what it may have perceived as an adverse ruling when this Court decided it would certify particular questions to the Maryland Court of Appeals, the Court cannot now allow Ford's efforts to arbitrate this dispute.

Accordingly, upon consideration of the foregoing, it is, by the United States Bankruptcy Court for the District of Maryland, hereby:

ORDERED that Motion Stay Proceedings Pending Arbitration is hereby denied; and it is further

ORDERED that Ford Motor Credit shall submit its Statement of Facts in Aid of Certification of Question within ten days of the entry of this order.

cc: Michael J. Klima, Jr., Esquire
Brett Weiss, Esquire
Andrew G. Wilson, Esquire
Gerard R. Vetter, Esquire

END OF ORDER