UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

KATHLEEN A. HILL — CASE NO. 01-66027

Debtor — Chapter 7

KATHLEEN A. HILL

Plaintiff

vs. — ADV. PRO. NO. 02-80029

MBNA AMERICA BANK, N.A.

Defendant

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Hon. Stephen D. Gerling, Chief .S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently before the Court is the motion, filed on April 12, 2002, by MBNA America Bank, N.A. ("MBNA") to dismiss or stay the adversary proceeding of Kathleen A. Hill ("Debtor") in favor of arbitration. The adversary proceeding, commenced by Debtor on February 7, 2002, purports to be a class action and asserts a claim for violation of § 362(h) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") and a claim for unjust enrichment. Opposition to MBNA's motion was filed by Debtor on May 30, 2002. Oral argument was heard during the Court's regular motion term in Syracuse, New York on July 2, 2002. At the close of oral argument, the Court afforded the parties the opportunity to file supplemental memoranda of law by July 19, 2002. The Court indicated that the matter would be taken under submission for decision at that time.

On July 15, 2002, however, Debtor filed a motion to strike the Supplemental Declaration of Deborah L. Fisher ("Fisher"), returnable August 6, 2002.[1] MBNA filed opposition on August 1, 2002. The Court deemed the resolution of Debtor's motion to strike as a necessary predicate to its determination of the submitted matter. Consequently, a determination regarding the submitted matter was suspended pending the August 6, 2002 hearing. At the hearing held on August 6, 2002, Debtor indicated to the Court that she was withdrawing her motion, and a letter confirming the withdrawal was filed with the Court on August 12, 2002. At that time, the Court proceeded with this Memorandum-Decision and Order regarding MBNA's motion to dismiss or

[1]Fisher is a Senior Vice President at MBNA. Debtor argued that the Declaration ought to be stricken as it was based on inadmissible hearsay.

stay the adversary proceeding in favor of arbitration.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to determine whether it should abstain from addressing the issues presented in this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (2)(O).

FACTS

Debtor filed her petition for relief pursuant to chapter 7 of the Code on October 9, 2001. She commenced this adversary proceeding on February 7, 2002. According to the Complaint, Debtor asserts that MBNA withdrew funds from Debtor's bank account postpetition despite having received notice of Debtor's chapter 7 filing. *See* Debtor's Complaint, filed February 7, 2002, at ¶¶ 10-21. Debtor also alleged, upon information and belief, that MBNA has engaged in identical conduct with respect to other "debtors in the bankruptcy system." *See id.* at ¶ 23. On behalf of herself and others similarly situated, Debtor purportedly commenced a class action based on Code § 362(h) and the equitable theory of unjust enrichment. *See id.* at ¶¶ 32- 37.

Without interposing an answer, MBNA filed the instant motion on April 12, 2002, to dismiss or stay the adversary proceeding in favor of arbitration. MBNA asserted that Debtor's account agreement contains an arbitration provision, and, therefore, Debtor's allegations of improper withdrawals by MBNA ought to be addressed in the arbitration forum. According to

the Supplemental Declaration of Fisher, filed June 25, 2002, Debtor is the holder of an open-ended credit account with MBNA. *See* Supplemental Fisher Declaration, at ¶ 5. Debtor's account agreement contains a provision allowing MBNA to amend the agreement's terms in accordance with the laws of the State of Delaware. *See id.* at Exhibit A. Fisher asserts that, from time to time, MBNA has amended the account agreements of its account holders either by notices mailed with the account statements or by separately mailed notices. *See id.* at ¶ 6. In December 1999, according to Fisher, Debtor was included in a class of account holders which received notice that MBNA was amending their account agreements to include a mandatory arbitration provision.[2] *See id.* at ¶ 8. In accordance with its regular office procedures, MBNA utilized a third-party mail service to effectuate the mailing to the account holders. *See id.* at ¶¶ 8-9. Some of the notices were returned by the post office as undeliverable; however, Debtor's notice of amendment was not among those returned. *See id.* at ¶ 10. Fisher asserts that the arbitration provision permitted Debtor to opt out of the arbitration agreement by providing MBNA written notification by January 25, 2000. *See id.* at ¶ 12. According to Fisher, no notification was received from Debtor to exercise her opt-out right. *See id.* at ¶ 14.

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[2]The arbitration agreement provided as follows:

> Any claim or dispute ("Claim") by either you or us as against the other, or against the employees, agents or assigns of the other, arising from or relating in any way to this Account Agreement or any prior Account Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether for money damages, penalties or declaratory or equitable relief), including Claims regarding the applicability of this Arbitration Section or the validity of the entire Account Agreement or any prior Account Agreement, shall be resolved by binding arbitration.

See Fisher's Supplemental Declaration, at Exhibit B.

ARGUMENTS

MBNA argues that Debtor is bound to the arbitration agreement, and her complaint, which is based on MBNA's allegedly improper withdrawal of funds, is more appropriately addressed in the arbitration forum than in this Bankruptcy Court. According to MBNA, both Congress and the United States Supreme Court have expressed their support in favor of the enforcement of arbitration agreements. In particular MBNA notes Congress's passage of the Federal Arbitration Act ("FAA") and the Supreme Court's repeated enforcement of that statutory enactment. Notably, MBNA cites several instances where disputes have arisen under federal statutes, creating a conflict between the federal district court and arbitration as the appropriate forum for resolution. In circumstances where parties have previously entered an agreement to arbitrate, courts have often found arbitration to be the proper forum for dispute resolution. According to MBNA, disputes related to the Code should be treated no differently than other federal statutes. Because the Supreme Court has expressed its preference of the enforcement of arbitration agreements where other federal statutes are involved, this Court should likewise abstain in favor of arbitration where § 362(h) of the Code is at issue.

Moreover, MBNA argues that the unjust enrichment claim is an even more obvious fit for arbitration. The unjust enrichment claim is based on state law and, therefore, unlike the Code § 362(h) claim, it does not implicate a conflict between the Code and the FAA. Therefore, MBNA argues, arbitration should be given even greater preference with respect to the unjust enrichment claim. In the event that the Court decides that the Code § 362(h) claim is not fit for arbitration but the unjust enrichment claim is, MBNA requests that the Court stay the adversary

proceeding, pending the resolution of the unjust enrichment claim in arbitration.[3]

In response Debtor makes several preliminary arguments regarding the validity of the arbitration agreement. First, Debtor denies having received the mailing from MBNA in which she was allegedly notified of the arbitration agreement, and she argues that MBNA has not effectively proven that the notice was sent to her. Second, Debtor argues that the arbitration agreement is unconscionable. It is procedurally unconscionable, according to Debtor, because Debtor did not have a "meaningful choice" in deciding whether to enter the contract. Likewise, it is substantively unconscionable because the agreement is "unreasonably favorable" to MBNA. Even if the Court determines the arbitration agreement to be valid, however, Debtor argues that it is not enforceable in the context of a Code § 362(h) claim. According to Debtor, bankruptcy courts have broad discretion to decline enforcement of arbitration provisions. Controversies that arise only under the Code, such as causes of action pursuant to Code § 362(h), are exactly the kind of matters in which the bankruptcy court should decline to abstain in favor of arbitration. Because the claim pursuant to Code § 362(h) is a core matter within the context of bankruptcy law, Debtor argues that this Court, rather than arbitration, is the best equipped and most appropriate forum to render a determination. Moreover, Debtor asserts that the unjust enrichment claim would not exist in the absence of MBNA's stay violation and, therefore, it is wholly derivative of the Code § 362(h) claim. Consequently, Debtor argues that the unjust enrichment claim is core as well and ought to be addressed in this Court. At oral argument on July 2, 2002, counsel for Debtor stated that if the Court finds that the unjust enrichment claim is arbitrable but

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[3]One critical effect of the resolution of this matter by arbitration, rather than by this Court, is that Debtor would be unable to proceed with a class action in arbitration.

retains jurisdiction over the claim pursuant to Code § 362(h), Debtor would withdraw the unjust enrichment claim, as she has no interest in litigating the unjust enrichment claim separately.

DISCUSSION

The Court will first address the issue of whether Debtor's claim pursuant to Code § 362(h) is arbitrable. While several courts have addressed situations involving conflicts between the Code and the FAA, very few have analyzed the issue of whether a debtor's action for redress pursuant to Code § 362(h) falls within the ambit of a pre-petition arbitration agreement.

The two most frequently cited decisions addressing the friction between the Code and the FAA are *Insurance Co. of North America v. NGC Settlement Trust & Asbestos Claims Management Corp. (In re National Gypsum Co.)*, 118 F.3d 1056 (5th Cir. 1997) and *In re U.S. Lines, Inc.*, 197 F.3d 631 (2d Cir. 1999). *National Gypsum* involved allegations by the debtor's settlement trust of a creditor's post-confirmation collection efforts in violation of Code § 524(a).[4] *See National Gypsum*, 118 F.3d at 1059. The debtor's settlement trust filed an adversary proceeding/declaratory judgment complaint against the creditor. *See id.* at 1060. In lieu of an answer, the creditor filed a motion seeking abstention by the bankruptcy court in favor of arbitration pursuant to the arbitration provision contained in the previously entered contract between the debtor and creditor. *See id.* The bankruptcy court found that it had core jurisdiction and denied the motion. *See id.* It noted the absence of ongoing arbitration proceedings and

[4]The debtor's chapter 11 reorganization plan required the establishment of a qualified settlement trust under section 468B of the Internal Revenue Code, which became the sole shareholder of the reorganized debtor.

concluded that the bankruptcy court was the most efficient forum to determine the issue raised in the complaint. *See id.* at 1060-61.

On appeal the Fifth Circuit focused on language indicating the U.S. Supreme Court's position regarding deference to the FAA:

> The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history' or from an inherent conflict between arbitration and the statute's underlying purposes.

Id. at 1065 (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987)). Noting the requirement that, in the absence of an inherent conflict between the FAA and another statute, the FAA mandates enforcement of arbitration agreements, the *National Gypsum* decision concluded that the core nature of a bankruptcy proceeding did not necessarily create the kind of "inherent conflict" contemplated by the Supreme Court. *See id.* at 1067. Rather than focusing on whether the issue was core or non-core, the *National Gypsum* decision reasoned that "the 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." *Id.* The Fifth Circuit held that the complaint at issue in *National Gypsum* concerned matters central to the debtor's confirmed reorganization plan and implicated contractual issues "in only the most peripheral manner (if at all)." *Id.* Because the complaint in

National Gypsum asked only for the enforcement of rights pursuant to the Code and did not ask for a determination regarding the pre-petition contract between the debtor and creditor, the Fifth Circuit concluded that arbitration under the circumstances would be "inconsistent with the Bankruptcy Code." *Id.* at 1071.

The conflict between the FAA and the Code was subsequently addressed by the Second Circuit in *U.S. Lines*, 197 F.3d at 635-43. In *U.S. Lines* the debtors' reorganization trust sought a declaratory judgment from the bankruptcy court to establish the trust's rights pursuant to various insurance contracts. *See U.S. Lines*, 197 F.3d at 634. Concluding that the issue regarding the insurance contracts was core, the Second Circuit turned to the question of whether it was the type of core bankruptcy proceeding fit for arbitration.[5] The analysis began by noting that "[n]ot all core bankruptcy proceedings are premised on provisions of the Code that inherently conflict with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code." *Id.* (quoting *National Gypsum*, 118 F.3d at 1067) (internal quotations omitted). According to the *U.S. Lines* decision, the exercise of discretion over whether core proceedings are arbitrable requires the bankruptcy court to

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[5]Relying on general principals established by the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Second Circuit developed a two-part analysis for determining whether a contract proceeding is "core." *See U.S. Lines*, 197 F.3d 637. The first inquiry is whether the contract is antecedent to the reorganization petition. *See id.* Second, the court must assess the degree to which the proceeding is independent of the reorganization. *See id.* The second part of the analysis depends on the "nature of the proceeding." *See id.* "Proceedings can be core by virtue of their nature if either 1) the type of proceeding is unique to or uniquely affected by the bankruptcy proceedings . . . or 2) the proceedings directly affect a core bankruptcy function . . . ." *Id.* (citations omitted). Under this analysis, the Second Circuit found that the impact of the insurance contracts on other core bankruptcy functions rendered the issue regarding the contracts to be core, regardless of the fact that they were pre-petition contracts. *See id.* at 638.

determine "whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause." *Id.* at 640 (quoting *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1161 (3d Cir. 1989). The "arbitration clause should be enforced 'unless [doing so] would seriously jeopardize the objectives of the Code.'" *Id.* (quoting *Hayes*, 885 F.2d at 1161). The Second Circuit concluded that declaratory judgment proceedings regarding the insurance contracts were integral to the bankruptcy court's ability to preserve and distribute the debtors' trust's assets. *See id.* at 641. That conclusion, in conjunction with the preference in favor of handling mass tort actions in bankruptcy court, resulted in the affirmation of the bankruptcy court's decision to refuse deferral of the proceedings to arbitration.[6] *See id.*

Since the appellate-level decisions were rendered in *Gypsum* and *U.S. Lines*, lower courts have attempted to apply the newly developed standards under their respective circumstances. For example, the U.S. Bankruptcy Court for the Southern District of Alabama held that an adversary proceeding alleging violations of Code §§ 362 and 524 was not arbitrable in *In re Grant*, 281 B.R. 721, 725 (Bankr. S.D. Ala. 2000). The *Grant* decision concluded that an action pertaining to a violation of the automatic stay or discharge order lies between the concepts of core and non-core proceedings because it directly affects not only the debtor and creditor but it also impacts "the effect and weight of court orders in general which affects all creditors." *Id.*. *Grant* concluded that "[a]llowing arbitrators to resolve a contempt matter would present a conflict with

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[6]Shortly after *U.S. Lines* was decided, the Second Circuit reinforced that decision in *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 165-66 (2d Cir. 2000). In *Crysen*, the Second Circuit held that "bankruptcy courts generally *do not* have discretion to *decline* to stay *non-core* proceedings in favor of arbitration, and they certainly have authority to grant such a stay." *Crysen*, 226 F.3d at 166 (emphasis supplied in original).

the Code because it would allow an arbitrator to decide whether or how to enforce a federal injunction under §§ 362 and 524." *Id*. (citing *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987)). The *Grant* decision further stated that "[a]llowing arbitration of alleged violations of court authority would leave nonjudicial third parties to punish abuse of the judicial system." *Id.* Consequently, the motion to compel arbitration was denied. *See id.* at 726.

A creditor's motion to compel arbitration was likewise denied in *In re Cavenaugh*, 271 B.R. 414 (Bankr. D. Mass. 2001). Among the various allegations in the adversary proceeding commenced by the debtors as a class action in *Cavenaugh*, were violations of the automatic stay and the chapter 13 order of discharge by a creditor seeking to collect attorneys' fees. *See Cavenaugh*, 271 B.R. at 417-17. The Bankruptcy Court for the District of Massachusetts applied the test for arbitrability found in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). *See Cavenaugh*, 271 B.R. at 421. "In determining whether statutory claims may be arbitrated, we first ask whether the parties agreed to submit their claims to arbitration, and then ask whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* (quoting *Randolph*, 531 U.S. at 90). Applying this test, the *Cavenaugh* decision first concluded that the parties had not necessarily agreed to submit claims regarding attorneys' fees to arbitration. *See id.* at 422. Proceeding to the second inquiry of the *Randolph* test, the *Cavenaugh* decision noted the difference between Congress's power over bankruptcy, which is directly derived from Article I, § 8 of the Constitution, and Congress's power over regulation of securities sales and consumer lending practices, which is derived from the commerce clause. *See id.* at 424. Viewing the automatic stay as an injunction issuing from the authority of the bankruptcy court, *Cavenaugh* also stated that the stay is "the single most

important protection afforded to debtors by the Bankruptcy Code." *Id.* Relying on the *National Gypsum* analysis, *Cavenaugh* concluded that the stay violation proceedings arose under title 11 rather than pursuant to the pre-petition contract. *See id.* According to the court, there was no evidence, nor could there be, that the debtor had agreed to arbitrate disputes arising under title 11, as opposed to disputes, claims or controversies arising from or relating to the contract. *See id.* at 426. Consequently, the *Cavenaugh* decision held this to be the kind of situation where Congress intended to preclude a waiver of judicial remedies in favor of the statutory rights at issue, and the motion to compel arbitration was denied. *See id.*

In contrast to the *Cavenaugh* decision, the Eastern District of California analyzed a motion to compel arbitration of an adversary proceeding involving allegations of Code §§ 362 and 524 and found the matter to be arbitrable. *See Bigelow v. Green Tree Financial Servicing Corp.*, 2000 WL 33596476 (E.D. Ca. 2000). *Bigelow* involved the commencement of an adversary proceeding by a chapter 7 debtor two years after her bankruptcy case was final. *See Bigelow*, 2000 WL 33596476, at *6. Upon reviewing applicable case law, the *Bigelow* court concluded that it was unclear under the circumstances whether the debtor's claims were core or non-core, but such a determination was found to be unnecessary. *See id.* "The description of a matter as a core proceeding simply means that the bankruptcy court has the jurisdiction to make a full adjudication." *Id.* "However, merely because the court has the authority to render a decision does not mean that it should do so." *Id.* (citation omitted). The critical issue was determined to be whether the debtor's claims had an inherent conflict with the purposes of the Code. *See id.* The *Bigelow* decision concluded that, since the complaint was filed two years after the bankruptcy became final, arbitration of the issues involved in the adversary proceeding would

have no adverse impact on the underlying purpose of the Code because the claims addressed neither liquidation of the estate nor the priority of creditors' claims. *See id.*

In 2001, two decisions were rendered in the Southern District of New York which reversed bankruptcy court decisions denying motions to compel arbitration. *See In re The Singer Co. N.V.*, 2001 WL 984678 (S.D.N.Y. 2001); *In re Winimo Realty Corp.*, 270 B.R. 99 (S.D.N.Y. 2001). *Singer* involved an adversary proceeding commenced by the debtor seeking recision of a pre-petition contract and a return of the monies paid thereunder. *See Singer*, 2000 WL 984678, at *1. Relying on the standards set forth by both *National Gypsum* and *U.S. Lines*, the District Court for the Southern District of New York concluded that the debtor's adversary proceeding centered on pre-petition contract rights, obligations and conduct. *See id.* at *6. The matter was found to be a core proceeding only because it was effectively a counterclaim to the claim asserted by the creditor against the debtor's estate. *See id.* The rationale of the *Singer* decision proceeded as follows:

> Because the issues underlying the Adversary Proceeding –the parties' rights under the [contract] and whether the creditor performed its obligations under the [contract]–do not arise from rights conferred or obligations imposed by the Bankruptcy Code, they do not, standing alone, present an inherent conflict between Code policy and the FAA's endorsement of the arbitral forum. . . . The resolution of the issues raised in the Adversary Proceeding will not affect the allocation of the assets among creditors, nor is it essential to the debtor's ability to reorganize.

Id. For the above reasons, the *Singer* decision concluded that the matter at issue did not present an inherent conflict between the Code and the FAA, and, therefore, the bankruptcy court lacked jurisdiction to deny the motion to compel arbitration of the contract and performance issues raised. *See id.* at *7.

Similarly, *Winimo* involved a dispute related to a pre-petition agreement among the debtor, the City of Albany and an agency of the City of Albany in which the parties agreed that the debtor would make payments to the Comptroller of the City if Albany in lieu of taxes. *See Winimo*, 270 B.R. at 113. After filing its bankruptcy petition, the debtor commenced an adversary proceeding seeking a declaratory judgment regarding the enforceability of the agreement at issue and an accounting of all payments made pursuant thereto. *See id.* at 114. The agency for the City of Albany moved for an order compelling arbitration of the issue involving the breach of contract allegations. *See id.* 115. On appeal, the District Court for the Southern District of New York analyzed applicable caselaw and applied the *U.S. Lines* test to determine whether a proceeding is "core."[7] *See id.* at 121. Upon determining the proceedings to be "core," *Winimo* turned to the issue regarding the bankruptcy court's discretion to deny arbitration of a core proceeding. *See id.* at 122-23. Quoting directly from *Singer*, the *Winimo* decision concluded that the bankruptcy court was incorrect in determining that it had discretion to deny arbitration. *See id.* at 124. The issues involved in the adversary proceeding did "not arise from rights conferred or obligations imposed by the Bankruptcy Code." *Id.* at 124 (quoting *Singer*, 2001 WL 984678, at *6). In its analysis, the *Winimo* decision reviewed each of the causes of action set forth in the complaint and concluded that "[n]one of [the] claims was created by the Bankruptcy Code; they [were] simply contractual claims derivative of pre-bankruptcy agreements." *Id.*

In 2002, the conflict between the Code and the FAA again arose before the Bankruptcy

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[7]For an explanation of the *U.S. Lines* test to determine whether proceedings are "core," see *supra* note 5.

Court for the Southern District of New York. *See In re Hagerstown Fiber Ltd. Partnership*, 277 B.R. 181 (Bankr. S.D.N.Y. 2002). In *Hagerstown*, the chapter 7 trustee commenced an adversary proceeding to assert the estate's claims against multiple parties arising in connection with the construction and operation of a waste paper treatment facility. *See id.* at 187-88. Each of the causes of action was based on pre-petition contracts and the parties' respective rights and obligations thereunder. *See id.* at 188. One of the defendants moved to compel arbitration. *See id.* The *Hagerstown* analysis began by characterizing the arbitration clause of the prepetition contract. *See id.* at 204-05. The arbitration provision included "any dispute or matter that 'arises . . . under this Agreement.'" *Id.* at 204. This was characterized as a narrow clause and, consequently, no presumption of arbitrability was raised. *See id.* at 204-05. The decision approached the issue of arbitrability related to each cause of action by determining whether the cause if action is the kind that falls within the ambit of the arbitration clause language. *See id.* at 205-12. The claims determined to be arbitrable were the breach of contract claim and the tort claim of fraud. *See id.* at 205, 210. The causes of action determined to be inappropriate for arbitration were the fraudulent conveyance claims, the turnover claim and the claim for knowing participation in a breach of fiduciary duty.[8] *See id.* at 206-212. Regarding the fraudulent conveyance claims pursuant to Code § 544(b), the *Hagerstown* decision relied on the fact that the cause of action for fraudulent transfers puts the chapter 7 trustee in the creditors' shoes and allows him to assert claims that only the creditors could assert outside the context of bankruptcy;

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[8]The denial of arbitration for the claim alleging knowing participation in breach of fiduciary duty was found to be not arbitrable because it did not fall within the language set forth in the arbitration clause. *See Hagerstown*, 277 B.R. at 211-12. Because the denial of arbitration was not specifically related to a conflict with the Code, the analysis will not be discussed herein.

the debtor would not have a right to recover its own fraudulent conveyances outside the context of bankruptcy. *See id.* at 207. Because the fraudulent conveyance claims were "inherited" from the creditors, who were never parties to the arbitration agreement, the bankruptcy court could not defer them to arbitration. *See id.* at 207-08. Likewise, the *Hagerstown* decision held that the cause of action requesting turnover of estate property was not arbitrable because it was not a cause of action derived from the debtor. *See id.* at 209. Rather, the turnover claim "is a creature of bankruptcy law, and only the trustee can bring it." *Id.* Moreover, *Hagerstown* held that, even if the turnover claim fell within the language of the arbitration clause, arbitration should not be compelled under the circumstances because it would conflict with important policies of the Code. *See id.*

Read together, the caselaw cited above provides no clear guideline for determining whether Debtor's cause of action pursuant to Code § 362(h) should be decided in arbitration. Because the applicable caselaw indicates that a bankruptcy court has very little discretion to deny arbitration of a non-core matter, the first issue in an analysis is whether the proceedings are core or non-core. *See Crysen*, 226 F.3d at 166 ("[t]he unmistakable implication is that bankruptcy courts generally *do not* have discretion to *decline* to stay *non-core* proceedings in favor of arbitration, and they certainly have the authority to grant such a stay"). A claim pursuant to 362(h) of the Code falls within the definition of a "core" proceeding. *See In re AP Industries, Inc.*, 117 B.R. 789, 802 (Bankr. S.D.N.Y. 1990) (stating that "[t]he appropriateness of imposing sanctions is a core matter within the meaning of 28 U.S.C. § 157(b)(1) and (2)"); *In re Spookyworld, Inc.*, 266 B.R. 1, 11 (Bankr. D. Mass. 2001) ("[w]hile § 157(b)(2)(G) relates only to 'motions to terminate, annul or modify the automatic stay,' it is obvious that motions to

'enforce' the automatic stay should enjoy the same status").

However, a claim does not present an inherent conflict with the FAA simply by virtue of its core-proceeding status pursuant to bankruptcy law. *See National Gypsum*, 118 F.3d at 1067 ("[c]ognizant 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, *McMahon*, 482 U.S. at 226-27, 107 S.Ct. at 2337-38, we refuse to find such an inherent conflict based solely on the jurisdictional nature of a bankruptcy proceeding"). More importantly the focus of the analysis should be the underlying nature of the proceeding. *See id.* In particular, the courts focus on whether the cause of action is derived exclusively from the Code or whether the action is based on a pre-petition contract. *See id.* Another consideration is whether the action is derived from the debtor or whether it is a creature of the Code for the benefit of the creditors. *See Hays*, 885 F.2d at 1155. Overall, the bankruptcy courts must look to whether arbitration of a particular matter would "seriously jeopardize the objectives of the Code." *U.S. Lines*, 179 F.3d at 640.

Code § 362(h) presents a conundrum in the context of a conflict between the jurisdiction of bankruptcy courts and arbitral fora. A cause of action based on Code § 362(h) is derived from the rights of a debtor and the recovery inures to the benefit of the debtor, rather than the creditor estate. Such a situation is indicative of one fit for arbitration. In contrast, however, an action pursuant to Code § 362(h) is strictly a product of the Bankruptcy Code, rather than a form of relief related to a pre-petition contract. A debtor would have no right outside the context of bankruptcy to pursue relief such as that provided for by Code § 362(h) because no violation of the automatic stay exists outside of bankruptcy. This factor weighs heavily in favor of a finding

that the action may only be heard by the bankruptcy court. *See Gandy v. Gandy (In re Gandy),* 299 F.3d 489, 495 (5th Cir. 2002)(noting that "'at least where the cause of action at issue is not derivative from the debtor's pre-petition legal or equitable rights but rather is derived entirely from federal rights conferred by the Bankruptcy Code,' a bankruptcy court retains 'significant discretion' to refuse to stay the adversary proceeding and compel arbitration." (quoting *National Gypsum*, 118 F.3d at 1069).)

Regarding the issue of whether arbitration would seriously jeopardize the objectives of the Code, courts have found varying reasons for denying arbitration due to an inherent conflict with the Code. For example, *National Gypsum* found that an action for violation of Code § 524(a) was integral to the debtor's reorganization process and, consequently, arbitration would interfere with the objectives of the Code. *See National Gypsum*, 118 F.3d at 1071. *U.S. Lines* held that proceedings to determine parties' rights pursuant to insurance agreements were integral to the court's ability to preserve and equitably distribute the reorganized trust's assets, and, therefore, arbitration would interfere with the integral function of reorganization. *See U.S. Lines*, 197 F.3d at 641. In contrast, no conflict is found when the basis of the claim is a determination of pre-petition contract rights. *See Singer*, 2001 WL 984678, at *5-6; *Winimo*, 270 B.R. at 124-25. In *Bigelow*, the District Court for the Eastern District of California concluded an action pursuant to Code §362(h) to be arbitrable. *See Bigelow*, 2000 WL 33596476, at *6. Significantly, however, that matter involved a complaint which was filed two years after the debtor's bankruptcy was final. *See id.* It would have been logical to conclude that there would be no adverse effect on the objective of the Bankruptcy Code because two years after the bankruptcy case has been completed, there was no longer any need to protect and enforce the

debtor's rights to the automatic stay.

In contrast to *Bigelow*, the matter *sub judice* involves a chapter 7 case that was filed only four months before the adversary proceeding was commenced. There has been no discharge thus far, and there has been relatively little activity in the case. It appears that Debtor continues to require the protection of the automatic stay, and enforcement of her rights to the automatic stay continues to be applicable to her as a primary objective of the Code. Moreover, the cause of action is derived specifically from the Code, and, therefore, could not exist outside the context of bankruptcy. It follows that the bankruptcy court is the most appropriate forum to adjudicate the matter. *See National Gypsum*, 118 F.3d at 1068 ("[t]here can be little dispute that where a core proceeding involves adjudication of federal bankruptcy rights wholly divorced from inherited contractual claims, the importance of the federal bankruptcy forum provided by the Code is at its zenith"). One final consideration weighing in favor of denying arbitration is that Code § 362(a) is equivalent to an injunctive order of the bankruptcy court. *See id.* at 1064 (citing 4 *Collier on Bankruptcy* ¶ 524.02[2], at 524-14). This Court, rather than arbitration, is the proper forum for determining the weight and extent of its orders and authority.

As explained herein above, Debtor's action for recovery pursuant to Code § 362(h) falls within the jurisdiction of this Court and is an inappropriate matter to be deferred to arbitration. The Court likewise retains jurisdiction over the unjust enrichment claim. Both causes of action are based on the same facts and allege the same wrong. The unjust enrichment claim requires no factual determinations beyond those required to render a determination regarding the Code § 362(h) claim; it merely requests an additional form of relief. The Court concludes that the resolution of both causes of action it this forum would facilitate the goal of judicial economy

while ensuring against the possibility of Debtor's duplicative recovery.[9] *See Gandy*, 299 F.3d at 499.

Based on the foregoing, MBNA's motion to dismiss or stay Debtor's adversary proceeding in favor of arbitration is denied in its entirety.

Dated at Utica, New York

this 26th day of September 2002

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[9]Based on the determination that this Court is the appropriate forum for resolution of both causes of action pled by Debtor, the Court will not engage in an analysis of the arbitration agreement's validity and Debtor's argument that the agreement is unconscionable.