No. 19-60749

In the

United States Court of Appeals for the Fifth Circuit

ALYSSON MILLS, IN HER CAPACITY AS RECEIVER FOR ARTHUR LAMAR ADAMS AND MADISON TIMBER PROPERTIES, L.L.C.,

Plaintiff—Appellee,

v.

BUTLER SNOW, L.L.P.; BUTLER SNOW ADVISORY SERVICES, L.L.C.; MATT THORNTON,

Defendants—Appellants.

On Appeal from the United States District Court
for the Southern District of Mississippi
Case No. 3:18-cv-866

JOINT BRIEF OF ALL APPELLANTS

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Alysson Mills, in her Capacity as Receiver for Arthur Lamar Adams and Madison Timber Properties, L.L.C., Plaintiff-Appellee.

2. Brent Bennett Barriere, Kristen Diane Amond, Fishman & Haygood LLP, counsel for Plaintiff-Appellee.

3. Lili Evans Bass, Brown Bass & Jeter PLLC, counsel for Plaintiff-Appellee.

4. Butler Snow Advisory Services, L.L.C., Defendant-Appellant.

5. Matt Thornton, Defendant-Appellant.

6. Butler Snow LLP, Defendant-Appellant.

7. Edward Morgan Blackmon, Jr., Bradford Jerome Blackmon, Blackmon & Blackmon PLLC, counsel for Defendant-Appellants Butler Snow Advisory Services, L.L.C. and Matt Thornton.

8. Alan Walter Perry, W. Wayne Drinkwater, John Alexander Purvis, Simon Turner Bailey, Michael C. Williams, Bradley Arant Boult Cummings LLP, counsel for Defendant-Appellant Butler Snow LLP.

9. Hon. Judge Carlton Reeves, United States District Court for the Southern District of Mississippi.

/s/Alan W. Perry
Attorney of Record for Butler Snow LLP

STATEMENT REGARDING ORAL ARGUMENT

The Appellants request oral argument and suggest that argument may help demonstrate that the trial court erred by failing to harmonize the provisions of the engagement contract so as to give effect to the entire agreement of the parties, as required by Mississippi law. In addition, argument may be helpful to show the lack of any legal support for the creation of any exception to the Federal Arbitration Act that would allow invalidation of the arbitration provision at issue.

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this interlocutory appeal of an order denying an arbitration motion under 9 U.S.C. § 16. *Lizalde v. Vista Quality Markets*, 746 F.3d 222, 225 (5th Cir. 2014).

Alysson Mills, as Receiver for Arthur Lamar Adams and Madison Timber Properties, LLC, sued Butler Snow LLP, Butler Snow Advisory Services, LLC, and Matt Thornton—collectively, the "Butler Snow Parties"—and others. The Receiver asserted jurisdiction under 15 U.S.C. § 77v(a), 15 U.S.C. § 78aa, 28 U.S.C. § 1692, and 28 U.S.C. § 754.

The Butler Snow Parties moved to compel arbitration and to dismiss or stay trial court proceedings pending arbitration. On September 12, 2019, the District Court denied the Butler Snow Parties' motion, but stayed proceedings pending an appeal. The Butler Snow Parties appealed the order denying arbitration on October 4, 2019.

STATEMENT OF THE ISSUES

This appeal presents a single issue: whether this case must be arbitrated.

The District Court denied arbitration, finding that the relevant contract's arbitration provision conflicts irreconcilably with a forum selection provision in the same contract.

The District Court erred. Mississippi law requires a court to harmonize apparently-conflicting contractual provisions, if possible, to give effect to the parties' entire agreement; the arbitration and forum selection provisions here can readily be harmonized to give effect to both.

Having denied arbitration based on its determination that the two provisions could not be harmonized, the District Court declined to reach the other issues which the Receiver had raised: a textual argument that the arbitration provision cannot be enforced because "special terms control boilerplate provisions," and arguments that the Receiver had effectively rejected the arbitration provision and "whether any federal statute or policy renders the claims nonarbitrable."

If this Court agrees that the provisions can be harmonized, the Court should finally resolve arbitrability by ruling on these two other issues, fully briefed in the District Court, which the District Court chose not to decide. These remaining issues are purely legal and subject to *de novo* review. One appeal is enough to decide that this dispute is arbitrable. Dealing now with all arbitration objections is consistent with the purposes of the Federal Arbitration Act: to ensure that the "arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404 (1967).

STATEMENT OF THE CASE

Lamar Adams and related entities referred to as "Madison Timber" operated a Ponzi scheme for many years until its discovery, and the resulting appointment of the Receiver, in 2018. The Receiver has filed several lawsuits against various defendants, including this case.

A. The Complaint's factual allegations are disputed and, in any event, irrelevant to the arbitration motion.

In the District Court, both the Receiver and the Butler Snow Parties agreed that the arbitration motion turned on the parties' Engagement Contract and that the factual allegations in the Complaint were irrelevant to resolve the arbitration motion. ROA.148-149, 172.

Nonetheless, the District Court devoted six pages of its Opinion to a paraphrase of the Receiver's allegations and in some places drew inferences and conclusions that go beyond the allegations of the Complaint itself. ROA.556-562.[1]

The District Court's purpose in including that lengthy discussion is unclear. Unlike a motion to dismiss under Rule 12(b)(6), the factual allegations in a

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[1] For example, the District Court's suggesting that an investor was viewed by these Defendants as a "potential mark" and that a Defendant was "engaged in obfuscation" goes even beyond the language of the Complaint. The District Court's phrasing connotes an inference or conclusion that these Defendants were knowing participants in the Ponzi scheme.

complaint are not accepted as true for purposes of an arbitration motion.[2] No weight should be given to those allegations or the District Court's paraphrase in resolving whether this case must be arbitrated.

B. The facts relating to the parties' agreement to arbitrate.

The circumstances that led to the execution of the Engagement Contract are as follows:

1. Butler Snow LLP.

Lamar Adams engaged the law firm Butler Snow LLP to draft a private placement memorandum in 2009 for securities to be offered pursuant to Rule 506 of Regulation D, which provides for exemptions of certain securities from the registration requirements of the Securities Act of 1933, and then to update that memorandum in 2012. The memoranda described investment structures different from those utilized in the Ponzi scheme. In any event, no investors participated in the offerings described in the memoranda, and Adams ultimately chose not to

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[2] *See Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992) (Party objecting to arbitration "must produce at least some evidence to substantiate his factual allegations.") (citing *T & R Enters. v. Continental Grain Co.*, 613 F.2d 1272, 1278 (5th Cir.1980)); *Guidotti v. Legal Helpers Debt Resolution, LLC,* 716 F.3d 764, 774-76 (3d Cir. 2013)("[R]estricted inquiry into factual issues" required to determine arbitrability.) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)); *Tinder v. Pinkerton Security*, 305 F.3d 728, 735 (7th Cir. 2002) (party seeking to avoid arbitration must identify specific evidence in the record demonstrating material factual dispute for trial).

pursue such offerings. ROA.21, 27. Butler Snow received a total of less than $30,000 for preparing the two documents and work related thereto, most of which related to the work performed in 2009.

A few years later, beginning in 2015 and continuing through 2018, Butler Snow represented a real estate development entity for property in Lafayette County, Mississippi, in which Adams owned a minority interest. Butler Snow provided legal services related to environmental permitting and other regulatory matters. The development was not a Ponzi scheme and the Receiver recently acquired the entire ownership of the project.

2. Butler Snow Advisory Services, LLC, and Matt Thornton.

Butler Snow Advisory Services, LLC ("BSAS"), a separate legal entity, is a subsidiary of the Butler Snow law firm. Employees of BSAS do not practice law and usually are not lawyers. They advise small and mid-sized companies on various business matters. Matt Thornton, a non-lawyer, has acted as BSAS's President since 2011.

Madison Timber Company and Adams engaged BSAS in August 2012 through an Engagement Contract which contains an arbitration provision. The engagement ended in December 2013, several years before the Ponzi scheme was discovered in 2018. To place the involvement of these parties in perspective, the District Court noted that the Ponzi scheme involved hundreds-of-millions of

dollars over its life, and the Complaint stated that during the one-year period prior to its 2018 discovery the scheme took in nearly $165 million. ROA.17. BSAS received approximately $100,000 in total fees related to its entire 17-month engagement, of which approximately $60,000 represented the monthly retainer fee and the remaining $40,000 represented fees paid with respect to particular transactions.

C. Execution of the arbitration agreement.

The engagement of BSAS in August 2012 was memorialized in an Engagement Contract comprised of an Engagement Letter and attached Standard Terms and Conditions. The Standard Terms and Conditions are specifically incorporated by reference into the Letter. Indeed, the parties defined the "Engagement Contract" to include both documents:

> This Engagement Letter and the Standard Terms and Conditions attached hereto constitute the engagement contract (the "Engagement Contract") pursuant to which . . . Services . . . will be provided . . . .[3]

The last portion of the Engagement Letter—just above Adams' signature—notes in bold type that BSAS was retained on the terms in the Engagement Letter itself and the attached Standard Terms and Conditions:

[3] ROA.140.

> We agree to engage Butler Snow Advisory Services, LLC upon the terms set forth herein **and the attached Standard Terms and Conditions.**[4]

The Standard Terms and Conditions included a detailed arbitration provision. While the detailed nature of that provision clearly demonstrates the parties' clear intent to arbitrate disputes, we focus here on the following pertinent portion:

> In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this engagement or any other agreement between you [Adams and Madison Timber Company] and [BSAS] and any of its affiliates, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act.[5]

D. It was undisputed in the District Court that the claims asserted by the Receiver fall within the scope of the arbitration provision and that the provision, if effective, applies to all of these parties.

The Complaint alleges that the defendants—including the Butler Snow Parties —"contributed to Madison Timber's success over time, and therefore to the Receivership Estate's liabilities today" and that the Defendants were "a proximate cause of the debts of the Receivership Estate" which are stated to be more than $85 million.[6] ROA.13, 44. This claim is based on alleged failures to properly perform

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[4] ROA.142.

[5] ROA.145.

[6] While not directly related to whether this case should be arbitrated, it should be noted that, in light of the holding in *Latitude Solutions, Inc. v. DeJoria*, 922 F.3d

the duties BSAS allegedly owed to Madison Timber under the Engagement Contract. ROA.23-24, 28.

In the District Court the Receiver did not deny that the claims fell within the scope of the arbitration provision—arguing instead that the provision was invalid or unenforceable. Similarly, the Receiver did not deny that all three of the Butler Snow Parties are entitled to enforce the arbitration agreement, if any are so entitled.[7] Similarly, in the District Court the Receiver did not challenge the assertion that she asserts these claims as a result of standing in the shoes of Arthur Lamar Adams and Madison Timber.[8] Thus, there is no dispute that this case falls within the scope of the arbitration provision if that provision is deemed effective.

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690 (5th Cir. 2019), *cert. denied* 2019 WL 6107784, the Receiver lacks standing to assert any claim that these defendants created or contributed to the liabilities of the receivership—a contention that forms the basis for almost all of the claims at issue in this case.

In addition, the Receiver lacks standing to assert claims of the investors-creditors of those entities. *See, e.g., Janvey v. Democratic Senatorial Campaign Comm., Inc.,* 712 F.3d 185, 190 (5th Cir. 2013)*; SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 841 (5th Cir. 2019).

[7] In the District Court, these parties explained that Butler Snow is entitled to invoke the agreement because the Complaint pleads single business enterprise and alter ego theories, Butler Snow is a corporate parent, and the agreement expressly applies to affiliates. Thornton can invoke the agreement because he is an officer/agent for BSAS, and the agreement expressly applies to officers/agents. Also, the intertwined claims doctrine applies to both Butler Snow and Thornton. ROA.153-154.

[8] The Engagement Contract specifies that "you" and "your" as used throughout the agreement referred to "Madison Timber Company, Inc. and/or A. Lamar

E. Proceedings in the District Court.

When the Received filed this lawsuit, the Butler Snow Parties moved to dismiss or stay the litigation against them pending arbitration.

The Receiver's primary contention in the District Court was that the arbitration provision conflicted with the forum selection provision contained in the same Engagement Contract. The District Court accepted the Receiver's argument on that point, holding that "the forum selection clause and the arbitration provision conflict," and therefore the Engagement Contract "must be read favorably to the non-drafting party"—*i.e.*, the Receiver. ROA.570. Based on that determination, the District Court denied the Butler Snow Parties' arbitration motion. This appeal from the Order timely followed.

SUMMARY OF THE ARGUMENT

Mississippi law requires that the arbitration provision and the forum selection provision be harmonized, if possible, to give effect to the entire agreement. Interpreting the "exclusive jurisdiction" language in the forum selection provision in light of the parties' clear intent to arbitrate to disputes and in accord with the meaning of "jurisdiction" found in *Black's Law Dictionary* provides an interpretation that harmonizes with the arbitration provision.

Adams." ROA.143. Throughout the Complaint, the Receiver expressly deals with Madison Timber Company and Madison Timber Properties as a single entity; every allegation made regarding "Madison Timber" applies to both. ROA.13.

Mississippi law requires that, if a provision that can be read to have two contradictory meanings, a court should apply that interpretation of the provision which is consistent with the remainder of the agreement. As *Waltman v. Engineering Plus, Inc.,* 264 So. 3d 758, 761 (Miss. 2019) (quoting hornbook law) summarized the applicable Mississippi rule: "No contract provision should be construed as being in conflict with another unless no other reasonable interpretation or construction is possible."

If the Court finds that the forum selection provision can be harmonized with the arbitration provision, this Court should reject the additional objections to arbitration that that were mentioned but not resolved by the District Court's Opinion (ROA.57-571):

- The Receiver's argument that "special terms control boilerplate provisions" should be rejected because the two provisions can be harmonized.
- The various arguments advanced by the Receiver that arbitration agreements are not effective in a receivership setting should be rejected as unsupported by any applicable authority, as more completely described below.

ARGUMENT

This Court reviews *de novo* a district court's denial of a motion to compel arbitration. *JP Morgan Chase & Co. v. Conegie ex rel. Lee*, 492 F.3d 596, 598 (5th Cir. 2007).

The Engagement Contract is found in the record excerpts and at ROA.140-147. While the full text of the detailed arbitration provision is relevant to show that the parties clearly intended to arbitrate disputes, we provide for convenience the most pertinent portions of the two relevant provisions side-by-side:

Arbitration	**Forum Selection**
In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this engagement or any other agreement between you [Adams and Madison Timber Company] and [BSAS] and any of its affiliates, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act.	**Governing Law and Jurisdiction.** This Engagement Contract shall be governed by and interpreted in accordance with the laws of Mississippi. The state and federal courts in Mississippi shall have exclusive jurisdiction in relation to any claim, dispute or difference concerning this Engagement Contract and any matter arising from it. The parties hereto irrevocably waive any right they may have to object to any action being brought in that Court, to claim that the action has been brought to an inconvenient forum or to claim that that Court does not have jurisdiction.

I. MISSISSIPPI LAW REQUIRES THAT THE ARBITRATION PROVISION BE ENFORCED IF IT CAN BE HARMONIZED WITH THE FORUM SELECTION PROVISION.

A. The two provisions are parts of one contract.

The validity of an arbitration provision is a state law question. *Graves v. BP Am., Inc*., 568 F.3d 221, 222 (5th Cir. 2009). Under Mississippi law, the provisions of the Engagement Letter itself and the attached Standard Terms and Conditions, are, in the eyes of the law, "one contract." *Gilchrist Tractor Co. v. Stribling*, 192 So. 2d 409, 417 (Miss. 1966). As evidenced by the statement immediately above the signature line on the Engagement Letter, BSAS was engaged "upon the terms set forth" in the Engagement Letter and "the attached Standard Terms and Conditions." ROA.142. The parties defined the term "Engagement Contract" to include both the Letter and the attached Conditions. ROA.140. Thus, the Letter and the attached Conditions are in the eyes of the law "one contract."

B. Mississippi law requires that a court interpret provisions of a contract in a harmonious way, if possible, that will give effect to all provisions and not render any of the provisions meaningless.

Mississippi strongly adheres to the rule that a court should, if possible, interpret and harmonize the provisions of a contract so that all provisions of an agreement are given effect. This rule was summarized in *Roberts v. Roberts*, 381 So. 2d 1333, 1335 (Miss. 1980):

> [A] contract must be considered as a whole, and from such examination the intent of the parties must be gathered. Such construction should be given the agreement, if possible, as will render all its clauses harmonious, so as to carry into effect the actual purpose and intent of the parties as derived therefrom.

This basic principle of Mississippi law—to give effect to all provisions and not render any meaningless has been often restated, as in *Wilson Industries, Inc. v. Newton County Bank*, 245 So. 2d 27, 30 (Miss. 1975):

> A construction must be placed upon each of the documents or agreements 'simultaneously' entered into which will be consistent with what must be regarded as the overall or dominant purpose of the parties. **A construction will not be adopted, if it can be reasonably avoided, which will charge the parties with having bound themselves to provisions which are mutually repugnant, senseless, ineffective, meaningless or incapable of being carried out in the overall context of the transaction consistently with all of the other provisions of all of the several contract documents.** (Emphasis added.)

The principle underlying this rule was explained by the Mississippi Supreme Court nearly 150 years ago in *Goosey v. Goosey*, 48 Miss. 210, 217 (Miss. 1873):

> In the construction of written instruments the cardinal rule first to be applied is to give to the words their ordinary and grammatical meaning, and then to gather from the entire instrument the intent of the parties. The whole contract must be considered, in determining the meaning of its separate parts, so that, if practicable, harmony and congruity may be attained. **The parties make the entire contract, and must be supposed to have the same general purpose and object in view in all its parts; if, therefore, some of the stipulations are more obscure than others, if one part is seemingly inconsistent with another, the main purpose and object may be so clear and distinct as to afford light upon those parts which are less so.** (Emphasis added.)

In *Rubel v. Rubel*, 75 So. 2d 59, 65 (Miss. 1954), the principle and the reason for its existence were restated as follows:

> The primary rule in the construction of contracts is that the court must, if possible, ascertain and give effect to the mutual intention of the parties, so far as that may be done without contravention of legal principles. . . . **[T]he intention of the parties must be collected from the whole agreement, and every word therein must be given effect, if possible, and be made to operate according to the intention of the parties.** It is also well settled that the words of a contract should be given a reasonable construction, where that is possible, rather than an unreasonable one; and the court should likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other. (Emphasis added; internal marks and citations omitted.)

Finally, and more recently, *Epperson v SOUTHBank*, 93 So. 3d 10, 18 (Miss. 2012) states that contracts must be interpreted as a whole, and cautions that particular words do not control but that instead courts must examine entire instruments:

> **This case does not turn on any one of these phrases in the contract; the entire contract must be interpreted as a whole. "Particular words should not control; rather, the entire instrument should be examined."** This Court now reviews the entire contract, **without applying the canons of construction or considering parol evidence,** to determine whether the contract is ambiguous. (Emphasis added; internal citation omitted.)

C. Mississippi law requires that, if there are two contradictory interpretations of a provision, the court should give effect to that interpretation which is consistent with the parties' intent as shown by the remainder of the agreement.

To carry out the basic principle of giving effect to the entire agreement without rendering any portion of the agreement meaningless or superfluous, Mississippi law provides a process to address apparently-contradictory provisions of an agreement. That process was made clear in *Pursue Energy Corp. v Perkins*, 558 So. 2d 349, 352-53 (Miss. 1990), a much-cited summary of the Mississippi legal principles relating to contract interpretation. That discussion included a statement emphasizing the importance of enforcing all provisions, if possible:

> **In cases in which an instrument is not so clear (*e.g.,* different provisions of the instrument seem inconsistent or contradictory), the court will, if possible, harmonize the provisions in accord with the parties' apparent intent. A cursory examination of the provisions may lead one to conclude that the instrument is irreconcilably repugnant; however, this may not be a valid conclusion.** (Emphasis added.)

To explain that proposition, the *Pursue Energy* court cited *Woods v. Sims,* 273 S.W.2d 617, 620-21 (Tex. 1954), which stated:

> Generally the parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement, and this purpose should not be thwarted except in the plainest case of necessary repugnance. **Even where different parts of the instrument appear to be contradictory and inconsistent with each other, the court will, of [sic] possible, harmonize the parts and construe the instrument in such way that all parts may stand and will not strike down any portion unless**

> **there is an irreconcilable conflict wherein one part of the instrument destroys in effect another part.** (Emphasis added.)

This principle—that an ambiguity will be resolved by harmonizing the parts to as to enforce the entire agreement and not strike down any portion thereof — was reiterated in *West v. West*, 891 So. 2d 203, 210-11 (Miss. 2004):

> When the language of the contract is clear or unambiguous, we must effectuate the parties' intent. *Id.* **However, if the language of the contract is not so clear, we will, if possible, "harmonize the provisions in accord with the parties' apparent intent."** (Emphasis added, citing *Pursue Energy*.)

This principle was restated and applied in *Gaiennie v. McMillin*, 138 So. 3d. 131, 136 (Miss. 2014), in which the Court stated:

> Notwithstanding that the plain language of the agreement requires no private-school tuition, **if we accepted Gaiennie's argument that absence of the word "tuition" creates an ambiguity, the result would be no different, for we would first attempt to harmonize the provisions in accord with the parties' apparent intent.** (Emphasis added.)

This principle of Mississippi law was applied in *Smith v. Maggie Mae, L.P.*, 225 So. 3d 1243, 1250 (Miss. Ct. App. 2016). The *Maggie Mae* court concluded that, as to one provision, the provision was ambiguous because the court found that, before looking to the rest of the contract, each party's "interpretation is reasonable." Citing the rule set out in *Pursue Energy*, the court described its next step as follows:

> Without a clear indication of when Maggie ceased to act as managing general partner, this **Court "will attempt to ascertain**

> **intent by examining the language contained within the 'four corners' of the instrument in dispute . . . [as] [p]articular words should not control; rather, the entire instrument should be examined.**" (Emphasis added.)

Finally, the rule was recently applied in *Waltman v. Engineering Plus, Inc.,* 264 So. 3d 758, 761 (Miss. 2019), which applied the rule to a disputed provision and provided the following guidance by quoting a standard treatise:

> American Jurisprudence, Second Edition, sets out the following general rules of contract interpretation when two or more provisions are arguably in conflict:
>
>> Where there is an apparent repugnancy or conflict between two clauses or provisions of a contract, it is the province and duty of the court to find harmony between them and to reconcile them if possible. . . . **No contract provision should be construed as being in conflict with another unless no other reasonable interpretation or construction is possible.** (Emphasis added.)

As this long and unbroken chain of Mississippi precedent makes clear, the Court, if possible, should apply an interpretation of the forum selection provision which harmonizes with the arbitration provision, and thus give effect to the entire agreement—rather than striking down any portion of the agreement.

D. The various canons of construction, such as construing a document against the drafter, are not applied unless the court has determined that the provisions cannot be harmonized.

Mississippi has adopted a three-tier process for the interpretation of agreements. *Pursue Energy*, 558 So. 2d at 351-353, describes that process which can be summarized as follows:

First Tier: the court looks at the four corners of the agreement. Critically, at this first tier, the court uses the following process: "In cases in which an instrument is not so clear (*e.g.,* different provisions of the instrument seem inconsistent or contradictory), the court will, if possible, harmonize the provisions in accord with the parties' apparent intent." *Id*. at 352.

Second Tier: if the four corners review does not resolve the issue, the next tier involves the discretionary use of various "canons" of contract interpretation, some of which the Receiver relies upon.

Third Tier: if the parties' intent remains unascertainable, the court considers extrinsic or parol evidence.

Here, because the arbitration and forum selection provisions can be readily harmonized as described below, there is no reason to reach the Second Tier or to apply any of the canons of construction.

As noted in *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752-53 (Miss. 2003):

> This Court has set out a three-tiered approach to contract interpretation. [Citing *Pursue Energy*]. Legal purpose or intent should first be sought in an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence. **First, the four corners test is applied, wherein the reviewing court looks to the language that the parties used in expressing their agreement.** We must look to the four corners of the contract whenever possible to determine how to interpret it. **When construing a contract, we will read the contract as a whole, so as to give effect to all of its clauses.** Our concern is not nearly so much with what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy. Thus, the courts are not at liberty to infer intent contrary to that emanating from the text at issue. **On the other hand, if the contract is unclear or ambiguous, the court should attempt to harmonize the provisions in accord with**

> **the parties' apparent intent.** Only if the contract is unclear or ambiguous can a court go beyond the text to determine the parties' true intent. The mere fact that the parties disagree about the meaning of a contract does not make the contract ambiguous as a matter of law.
>
> Secondly, **if the court is unable to translate a clear understanding of the parties' intent, the court should apply the discretionary canons of contract construction.** (Emphasis added; internal marks, alterations, and citations omitted.)

In sum, the "First Tier" analysis as described by *Pursue Energy* requires that the court first harmonize the provisions, if possible, to give effect to the entire agreement. The various canons of construction—such as construing an ambiguous provision against the drafter—are applied only if the court has determined that the two provisions cannot be harmonized.

II. THE FORUM SELECTION AND ARBITRATION PROVISIONS CAN BE AND SHOULD BE HARMONIZED.

A. The two provisions can be readily harmonized.

Here, the forum selection provision can be harmonized with the arbitration provision. The process required by Mississippi law for determining if the two provisions can be harmonized is demonstrated by *Personal Security & Safety Systems Inc. v. Motorola,* 297 F.3d 388 (5th Cir. 2002). *Motorola* applied Texas law which is consistent with Mississippi law on this issue.[9] The forum selection

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[9] *Taylor v. Detroit Diesel Realty, Inc.,* 2014 WL 1794582 at *10 and n. 4 (S.D. Miss. 2014).

provision in *Motorola* provided that any suit or proceeding arising from the agreement "shall be subject to the **exclusive jurisdiction** of the courts located in Texas." *Id*. at 395 (emphasis added).

The *Motorola* Court explained the process by which it found that the "exclusive jurisdiction" language was consistent with the arbitration agreement as follows:

> **Standing alone, one could plausibly read the forum selection clause to mean that Texas courts have the exclusive power to resolve all disputes arising under the Stock Purchase Agreement. But the forum selection clause does not stand alone. To the contrary, we must interpret the forum selection clause in the context of the entire contractual arrangement and we must give effect to all of the terms of that arrangement.**
>
> . . .
>
> Reading the two provisions together, it becomes clear that the forum selection clause does not require the parties to litigate all claims in Texas courts, nor does it expressly forbid arbitration of claims arising under the Stock Purchase Agreement. Instead, we interpret the forum selection clause to mean that the parties must litigate in Texas courts only those disputes that are not subject to arbitration—for example, a suit to challenge the validity or application of the arbitration clause or an action to enforce an arbitration award.[10]

Here, as in *Motorola*, one could plausibly read the "exclusive jurisdiction" language in the forum selection provision in this case— "standing alone"—to provide that the named courts have the exclusive power to resolve all disputes.

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[10] 297 F.3d 388, 395-96 (5th Cir. 2002) (emphasis added).

But *Motorola* makes clear that looking to that plausible reading is not the end of the process because the forum selection provision does not stand alone. The forum selection provision must be viewed in light of the arbitration provision that the parties placed in the same Engagement Contract. As the *Motorola* court held, "we must therefore interpret the forum selection provision . . . in a manner that is consistent with the arbitration provision." *Id.* at 395.

Here, the "exclusive jurisdiction" language of the forum selection provision can be harmonized with the arbitration agreement by interpreting the word "jurisdiction" in accord with its well-established legal meaning. In the context of adjudicating disputes, "jurisdiction" refers to a "**court's** power to decide a case or issue a decree." *Black's Law Dictionary* (11th ed. 2019) (emphasis added).[11]

Substituting the meaning of the word "jurisdiction" as defined in *Black's Law Dictionary* into the forum selection provision produces the following restatement:

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[11] The first definition provided by *The New Oxford English Dictionary* (2d ed. 2005) leads to the same conclusion by defining jurisdiction as "the **official** power to make legal decisions and judgments"—a description that includes courts but not arbitrators.

Both the Fifth Circuit and the Mississippi Supreme Court commonly use the dictionary meaning of words to determine the meaning of contract provisions in the context of deciding claims of ambiguity. *See, e.g., Motorola,* 297 F.3d 388, 396 n.10; *Harrison Cnty. Commercial Lot, LLC v. H. Gordon Myrick, Inc.*, 107 So. 3d 943, 959-60 (Miss. 2013).

> The state and federal courts in Mississippi [are the only courts that can exercise judicial power to decide a case or issue a decree] in relation to any claim, dispute or difference concerning this Engagement Contract and any matter arising from it.

Thus, using the word "jurisdiction" in accord with the *Black's Law Dictionary* definition, the forum selection provision provides that the courts in Mississippi are **the only courts that can exercise a court's power in this case.**

Moreover, using "jurisdiction" in this sense[12] is consistent with the interpretation that common sense demands: the parties included both a forum selection provision and an arbitration provision and both must be given an interpretation that renders both effective. As *Motorola* explains, parties often choose to include both types of provision in a single agreement: the forum selection provision is included to deal with non-arbitrable issues "that must be litigated in court." 297 F.3d at 396. Thus, the court recognized that the parties intended both provisions to be effective and that the forum selection provision applied to issues that cannot be arbitrated.

That common sense result is clearly required by Mississippi law. Indeed, that reasoning is exactly why many courts have held that "a forum selection clause

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[12] In addition to the noted dictionary definitions, additional support for that reading is provided by Supreme Court precedent recognizing that the word "jurisdiction" is often misused; the Supreme Court has cautioned federal courts to only apply the jurisdictional label to "a court's adjudicatory capacity." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

cannot nullify an arbitration clause unless the forum selection clause specifically precludes arbitration," *Motorola,* 297 F.3d at 396, n.11, restating a principle that many more courts have since restated.

In sum, the interpretation of the provision offered by the Butler Snow Parties is consistent with not only *Black's Law Dictionary* but also with common sense and the almost-certain intention of parties that both provisions be effective. This interpretation is clearly a plausible reading—since the ultimate result of *Motorola* was to interpret "exclusive jurisdiction" in that forum selection provision to have just such a meaning: "we interpret the forum selection clause to mean that the parties must litigate in Texas courts only those disputes that are not subject to arbitration." *Id.* at 396.

In light of the clear Mississippi policy of interpreting contracts to give effect to all contractual provisions, if possible, and the availability of a harmonizing reading of the forum selection provision, both provisions in this contract should be enforced. Otherwise, the lengthy and detailed arbitration provision would be rendered meaningless, a result clearly disfavored by Mississippi law. As noted in *Motorola:*

> Given our conclusion that the arbitration provision in the Product Development Agreement applies to all claims related to the overall transaction, **we must therefore interpret the forum**

> **selection provision in the Stock Purchase Agreement in a manner that is consistent with the arbitration provision.**[13]

Applying the process required by Mississippi law and utilized by the Fifth Circuit in *Motorola* leads to the inescapable conclusion that, because the forum selection and arbitration provisions are capable of being harmonized, both provisions should be given effect.

B. Numerous courts have adopted the Fifth Circuit's approach to reconciling forum selection and arbitration provisions.

Numerous cases outside of this Circuit have applied the principles and approach outlined in *Motorola*. That approach makes sense, as it is common sense that parties who include both a forum selection provision and an arbitration provision in the same agreement generally intend for both provisions to be effective. After all, why would parties put both provisions in an agreement if they did not intend that both provisions be effective?

In recognition of that fact, the overwhelming majority of courts do not allow a forum selection provision to make an arbitration provision meaningless if the two can be harmonized using any reasonable construction.

Perhaps the most often cited of those decisions outside this Circuit is *Bank Julius Baer & Co., Ltd. v. Waxfield Ltd.*, 424 F.3d 278, 283 (2d Cir. 2005):

> **Under our cases, if there is a reading of the various agreements that permits the Arbitration Clause to remain in**

[13] *Motorola*, 297 F.3d at 395 (emphasis added).

> **effect, we must choose it: "[T]he existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."** *WorldCrisa Corp. v. Armstrong,* 129 F.3d 71, 74 (2d Cir.1997) (internal quotation marks omitted). Moreover, we "cannot nullify an arbitration clause unless the forum selection clause specifically precludes arbitration." *Personal Sec. & Safety Systems v. Motorola,* 297 F.3d 388, 396 n. 11 (5th Cir.2002). In the circumstances presented to us in this appeal, we cannot say that the Forum Selection Clause, which does not even mention arbitration, either "specifically precludes" arbitration or contains a "positive assurance" that this dispute is not governed by the Arbitration Agreement. (Emphasis added.)

Other federal circuits have reached similar holdings, including the recent decision of the Sixth Circuit in *White v. ACell, Inc.*, 779 F. App'x 359, 365-66 (6th Cir. 2019):

> The forum-selection clause . . . does not contradict this conclusion. That clause is simply a choice-of-law and forum-selection provision. It does not negate the arbitration provision. It simply states that any lawsuits that are filed must be filed in Howard County. It provides that "any lawsuit relating to" White's employment "*may* be filed only in the state court located within Howard County" or in Maryland federal courts—and **it contains no language specifically precluding arbitration for resolution of disputes. . . . The absence of such language is significant, as the Second Circuit recognized. *See Bank Julius Baer & Co.*, 424 F.3d at 284; *see also Goldman, Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 764 F.3d 210, 216 (2d Cir. 2014) (stating that, in the absence of a specific reference to arbitration, a forum-selection clause must be all-inclusive and mandatory to preclude arbitration).** (Emphasis added.)[14]

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[14] *See also UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319, 328-29 (4th Cir. 2013); *Century Indem. Co. v. Certain Underwriters at Lloyd's, London,* 584 F.3d

In addition to federal appellate courts, a number of state appellate courts have also enunciated the same principle.[15]

Of course, the views of these other courts are not binding precedent. However, the large number of cases from different jurisdictions that have adopted the same principle are persuasive authority that reason, fairness, and common sense underlie that principle.

C. District courts in this Circuit have followed the Fifth Circuit's approach in *Motorola.*

We will not burden this brief with a string cite of the dozens of district court cases which have utilized the process demonstrated by *Motorola, Julius Baer*, and the other appellate cases cited. However, we do note that such a process has, in fact, been utilized by district courts in this Circuit.

513, 554 (3d Cir. 2009); and *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc*., 819 F.2d 400, 407 (3d Cir. 1987) (cited in *Motorola*).

[15] *See Regions Bank v. Baldwin Cnty. Sewer Serv., LLC*, 106 So. 3d 383, 391-92 (Ala. 2012) (applying N.Y. law); *Advance Tank & Const. Co. v. Gulf Coast Asphalt Co*., 968 So. 2d 520, 525-26 (Ala. 2006) (applying Alabama law); *In re Marriage of Dorsey*, 342 P.3d 491, 495-96 (Colo. App. 2014); *Pound for Pound Promotions, Inc. v. Golden Boy Promotions, Inc.*, 2018 WL 6721363, at *2 (Nev. Dec. 17 2018); *Gaffer Ins. Co. v. Discover Reinsurance Co.,* 936 A.2d 1109, 1115-16 (Pa. Super. Ct. 2007); *Coody Custom Homes, LLC v. Howe,* 2007 WL 1374136, at *1-2 (Tex. App. May 9, 2007*); Kirby Highland Lakes Surgery Ctr., L.L.P. v. Kirby*, 183 S.W.3d 891, 899-901 (Tex. App. 2006); *New Concept Const. Co. v. Kirbyville Consol. Indep. Sch. Dist*., 119 S.W.3d 468, 470 (Tex. App. 2003).

Recently, and very close to home, is the recent decision of Judge Mills of the Northern District of Mississippi, *Watkins v. Planters Bank & Tr. Co.,* 2018 WL 4211736, at *1 (N.D. Miss. Sept. 4, 2018), applying the principle enunciated in *Motorola* to a case very similar to this one:

> In opposing the instant motion to compel arbitration, plaintiff raises two legal arguments, each of which is squarely refuted by Fifth Circuit precedent.
>
> First, plaintiff argues that the forum selection clause in the Agreement nullifies the arbitration clause at issue in this case. In particular, plaintiff points to the Agreement's language stating that:
>
>> [t]he laws of Mississippi govern this agreement. **The courts of that state will have jurisdiction of any dispute in connection with this agreement.** You agree that venue will be proper in the courts in the county and city of our office where your representatives signed or delivered this agreement.
>> . . .
>
> This argument is defeated, however, by the fact that "a forum selection cannot nullify an arbitration clause unless the forum selection clause specifically precludes arbitration." [Citation to *Motorola.*]. **It is undisputed that the forum selection clause in this case does not, in fact, preclude arbitration, and it is thus apparent that plaintiff's first argument is contrary to the law of this circuit.** (Emphasis added.)

ADC LTD NM v. Zeppelin Energy, LP, 2013 WL 12126246 (W.D. Tex. May 28, 2013) dealt with a forum selection provision that was virtually identical to the forum selection provision in this case. The *Zeppelin* agreement provided, as in this case, that

> [the named courts] shall have exclusive jurisdiction to hear and determine all claims, disputes, controversies and actions arising from or relating to this Agreement and any of its terms or provisions, or to any relationship between the parties hereto. (*Id.* at *2.)

Zeppelin explained its decision as follows:

> **If the entirety of the agreement can be harmonized, and therefore given a certain or definite meaning, an agreement is not ambiguous. . . . That is the case here. The arbitration clauses and the forum selection clauses go hand in hand. . . . [The purpose of the forum selection provision] is to prevent litigation in far-flung forums and/or forum shopping by the parties. The clauses are not inconsistent when viewed in this common sense way.** (*Id.* at *4 (emphasis added).)

See also Sanchez v. Gen. Elec. Co., 196 F. Supp. 3d 726, 731 (S.D. Tex. 2016) (applying New York law).

III. THE DISTRICT COURT ERRED BY REJECTING THE BUTLER SNOW PARTIES' REASONABLE INTERPRETATION.

A. The District Court failed to harmonize the provisions.

The Butler Snow Parties offered the foregoing harmonization of the provisions in their initial and reply briefs in the District Court. ROA.155-160, 186-195. The Receiver's brief did not even discuss that proposed reading, much less contend that such a reading could not be harmonized with the arbitration provision. ROA.170-183.

The District Court did not specifically address the proposed interpretation offered by the Butler Snow Parties. Instead, the District Court read the "exclusive

jurisdiction" language of the forum selection provision as requiring that all disputes and claims be decided in their entirety by a court. That reading of the forum selection provision led to the District Court's conclusion that the provisions were "irreconcilable" because both the forum selection provision and the arbitration provision were "all-inclusive." ROA.568. Thus, the District Court, prematurely reached the second tier of the process set out in *Pursue* and applied the canon of construing a contract against the drafter.[16] That led to the ruling which rendered meaningless the detailed arbitration provision included in the parties' agreement —a result strongly disfavored by Mississippi law.

The District Court supported its decision by observing that the Butler Snow Parties "had not pointed to a single case where an identical conflict was ordered to arbitration." ROA.569. But, with respect, the requirement to show an "identical" case is simply not a proper test under Mississippi for interpretation of contracts.

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[16] In a recent FAA case, *Lamps Plus, Inc. v. Varela,* 139 S. Ct. 1407, 1417 (2019) the Supreme Court noted a similar limitation on the application of California's analogous canon, referred to as *contra proferentum:*

> Unlike contract rules that help to interpret the meaning of a term, and thereby uncover the intent of the parties, *contra proferentem* is by definition triggered only after a court determines that it *cannot* discern the intent of the parties.

See also DirectTV, Inc. v. Imburgia, 136 S. Ct. 463, 470 (2015) ("Moreover, the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was.").

Agreements usually have different language—and the search for an "identical" case is not part of the process of interpreting contracts outlined in the Mississippi cases. Instead, the Mississippi law principles outlined above require that the language in a particular provision must be harmonized with the remainder of the agreement, if possible.

Perhaps to demonstrate that *Motorola* was not "identical," the District Court noted that the language of the forum selection provision in this case and in *Motorola* were somewhat different. While that is correct—the language is slightly different—that is not the test. No two cases are ever identical; each contract requires its own separate analysis.

The important point of *Motorola* is that it demonstrated the **process** to be used in analyzing whether the language found in any forum selection provision can be harmonized with an arbitration provision contained in the same agreement—"all must be construed together in an attempt to discern the intent of the parties, reconciling apparently conflicting provisions and attempting to give effect to all of them, if possible." 297 F.3d at 393. *Motorola* began that analysis by noting that simply giving effect to a plausible reading offered by the party opposing arbitration was not appropriate because the forum selection provision did not "stand alone." The *Motorola* court held that the provision should be read in the context of the fact that the parties had clearly intended to arbitrate disputes.

Here the language here can reasonably be read to provide that "state and federal courts in Mississippi [are the only courts that can exercise judicial power to decide a case or issue a decree] in relation to any claim, dispute or difference concerning this Engagement Contract and any matter arising from it." That reading—consistent with the *Black's Law Dictionary* meaning of the words and is in accord with common sense—is clearly capable of being harmonized with the arbitration agreement. Thus, Mississippi law requires application of that interpretation to give effect to the entire agreement and to avoid rendering the arbitration provision meaningless.

Finally, the District Court erred by applying the canon of construction that contracts be interpreted against the drafter

The District Court did not discuss that proposed harmonization offered by the Butler Snow Parties, nor did it explain why that reading of the forum selection provision was unreasonable. By failing to harmonize the two provisions using that reasonable interpretation, the District Court rendered the lengthy arbitration provision meaningless—a disfavored result which Mississippi law seeks to avoid. Thus, the District Court erred by failing to follow clear Mississippi law.

B. Cases cited in support of a different result involved very different factual situations that required application of different rules.

The cases cited by the Receiver and in the District Court's Opinion involved very different facts than this case and did not present situations in which a court would be required to harmonize provisions contained within one agreement

1. The three cases cited by the Receiver in the District Court.

The three cases cited by the Receiver are simply not like this case. If forum selection and arbitration provisions are found in different documents, that fact requires application of different standards—depending upon the relationship of the documents, the time of their execution, and the surrounding circumstances.

SLSJ, LLC v. Kleban, 2015 WL 1973307, at *22 (D. Conn. Apr. 30, 2015) referred to the rule enunciated in *Julius Baer* as described above but noted that an arbitration provision could be superseded by a later agreement. The *Kleban* court reasoned that a "subsequent agreement" containing a forum selection provision "displaced" the earlier agreement through a merger clause that replaced "all previous agreements and understandings." Thus, there was no requirement to seek to harmonize provisions contained in the same agreement.

Applied Energetics v. NewOak Capital Markets, LLC, 645 F.3d 522, 525-26 (2d Cir. 2011) is much the same. Again, the decision was grounded on a determination that a subsequent agreement "displaces" the earlier agreement.

Again, there was no requirement to seek to harmonize provisions contained in the same agreement.

Goldman, Sachs & Co, v City of Reno, 747 F. 3d 733 (9th Cir. 2014), falls within the same general category. That case was one of a series of cases that have reached different results on whether a forum selection provision in a customer agreement superseded a FINRA rule requiring arbitration.[17] Thus, *City of Reno* did not require harmonization of two provisions in a single agreement.

Thus, none of the three cases cited by the Receiver in the District Court—*Kleba*n, *Applied Energetics,* and *City of Reno*—dealt with the situation here: the validity of two provisions intentionally included by the parties in a single contract.

2. The case cited by the District Court.

Sharpe v. AmeriPlan Corp, 769 F. 3d 909 (5th Cir. 2014), cited in the District Court's Opinion, is much like the three cases cited by the Receiver. *Sharpe* involved different agreements that became effective of over a period of many years. Thus, the *Sharpe* case did not deal with provisions contained in one contract and therefore did not require application of the Mississippi law discussed above.

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[17] A discussion of the various decisions dealing with this issue that has divided the circuits issue is set out in *Reading Health System v. Bear Sterns & Co.*, 900 F. 3d 87, 102-03 (3d Cir. 2018).

Indeed, the arbitration provision in *Sharpe* was imposed by one party through unilateral amendment to a policy manual many years after the execution of the other agreements. The earlier agreement contained an elaborate dispute resolution provision (not just a forum selection provision) which did not require arbitration. The general rule that a later amendment supersedes earlier conflicting provisions did not apply in *Sharpe* because (a) the earlier agreement required specific procedures for amendment of the earlier agreement; and (b) the party relying on the later arbitration provision was estopped from denying the continued validity of the dispute resolution provisions in the earlier agreement. The *Sharpe* Court held that the arbitration provision in *Sharpe* could not be applied if it rendered the earlier agreement a "nullity."

Applying that standard, the Court refused to apply the later-imposed arbitration provisions, holding that to do so would supersede the very detailed dispute resolution provisions in the earlier agreements. As the Court explained:

> The dispute resolution provisions in the [agreements] therefore are not simply forum selection clauses like the one we addressed in *Personal Security & Safety Systems Inc. v. Motorola Inc.,* 297 F.3d 388 (5th Cir. 2002), and they do not merely impose a prearbitration mediation requirement like the one at issue in *Klein[, v. Nabors Drilling USA L.P.*, 710 F.3d 234 (5th Cir. 2013)]. Instead, the Sales Director Agreements provide a two-step dispute resolution process in which "any claims, controversies or disputes which are not finally resolved through mediation [are] submit[ted] to the non-exclusive jurisdiction of" particular state and federal courts. **Those expansive dispute resolution provisions cannot be harmonized with the**

similarly expansive arbitration provision without rendering the dispute resolution provisions meaningless.[18]

Notably, this "no-arbitration outcome" (based on the foregoing reasoning) applied only to three of the four plaintiffs in the *Sharpe* case. This Court applied the arbitration provision to a fourth plaintiff because that plaintiff's earlier contract did not contain the detailed dispute resolution provision and instead contained a simple forum selection provision. The Court noted that the reference to legal action in the forum selection clause was "not incompatible" with the arbitration requirement, noting that lawsuits often precede arbitration (when a court may be asked to decide the validity, scope, and enforceability of an arbitration clause) or follow arbitration (when a court may be asked to enforce or set aside an arbitration award).[19]

Thus, *Sharpe* has little if any relevance to this case because it involved different agreements reached at different times. But, to the extent *Sharpe* is relevant at all, it supports applying both provisions, as that court did with respect to the fourth plaintiff.

Finally, we address *Union Electric Co. v. AEGIS Energy Syndicate 1225*, 713 F. 3d 366 (8th Cir. 2013)—not cited by either the Receiver or the District Court—because it was cited in *Sharpe* as suggesting that, at least in some contexts,

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[18] 769 F.3d at 918 (emphasis added).
[19] *Id*. at 916.

the word "jurisdiction" connoted an intent for a court to "adjudicate the merits of the claims." 769 F.3d at 917. Of course, any such "general rule" as to the meaning of "jurisdiction" that would be applicable to every case would be inconsistent with the decision in *Motorola*, which makes it clear that the word "jurisdiction"—or even "exclusive jurisdiction"—cannot be read to convey such an intent in all agreements. It is also worth noting that, under Mississippi law, agreements must be interpreted as a whole, not on the basis of one word. *As noted in Epperson*, 93 So. 3d at 18 (emphasis added):

> This case does not turn on any one of these phrases in the contract; the entire contract must be interpreted as a whole. **"Particular words should not control; rather, the entire instrument should be examined."**

Moreover, *Union Electric* applied its interpretation of "jurisdiction" in that case for reasons that do not apply here. *Union Electric* held that a forum selection provision (in an insurance endorsement) superseded an arbitration provision in the policy. In doing so, the court specifically noted that reconciliation of the two provisions as suggested by the carrier—"that the endorsement was meant to give Missouri courts personal jurisdiction over both parties, and then only to enforce the arbitration provision"—"may not be entirely implausible in the abstract." *Union Elec.*, 713 F.3d at 368-69. However, the court refused to enforce both provisions based in part on Missouri law requiring ambiguities to be interpreted in favor of an insurance policyholder. Had the *Union Electric* court been obligated to interpret

the provisions in harmony if possible, as is required by Mississippi law, its decision that the argument advanced to reconcile the provisions were not implausible would necessarily have led to a different result.

In sum, the five cases discussed above—*Kleban*, *City of Reno, Applied Energetics, Sharpe,* and *Union Electric*—involved factual circumstances that are not similar to this case.

IV. THE RECEIVER CANNOT INVALIDATE THE ARBITRATION PROVISION BY LABELING IT "BOILERPLATE."

As noted in its Opinion at pages 14-15, the District Court did not reach or address the Receiver's contention that the arbitration provision was a "boilerplate" provision and was therefore displaced by the forum selection provision.

This Court should rule on this related textual issue as part of this appeal, so that there will not be a second appeal concerning arbitrability.

What has been said above resolves this issue. This contention fails because the arbitration provision can be harmonized with the forum selection provision. Under Mississippi law, as described in I-D above, the various canons of construction—including the various rules construing ambiguous provisions against the drafter and relating to "boilerplate" provisions—simply do not apply if the provisions can be harmonized as they can be here.[20]

[20] Since Mississippi law makes it clear that the boilerplate canon is not applicable because the provisions can be harmonized, we need not address the absolute lack

V. THERE IS NO BASIS FOR DISREGARDING AN ARBITRATION PROVISION JUST BECAUSE THIS CASE ARISES OUT OF A RECEIVERSHIP.

A receiver is "bound to the arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver." *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003); *see also Wiand v. Schneiderman*, 778 F.3d 917, 923 (11th Cir. 2015); *Moran v. Svete*, 366 F. App'x 624, 629-32 (6th Cir. 2010). Put simply, the receiver "stands in the shoes" of the persons or entities subject to the receivership. Thus, their agreements to arbitrate become the receiver's agreements. 1 Thomas H. Oehmke & Joan Brovins, *Commercial Arbitration* § 8:13 (Dec. 2018 Update).

At one time the Fifth Circuit traveled under the assumption that receivers act "on behalf of creditors," and were therefore not subject to arbitration agreements that creditors had not signed. *Janvey v. Alguire ("Alguire I")*, 628 F.3d 164, 182 (5th Cir. 2010), *opinion withdrawn and superseded*, 647 F.3d 585 (5th Cir. 2011). However, the Fifth Circuit has since held that "a federal equity receiver has standing to assert only the claims of the entities in receivership, and not the claims

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of any basis for the Receiver's suggestion that the arbitration provision should be labelled as "boilerplate" while the forum selection provision should be treated as "special." In any event, as this Court noted in *WBCMT 2007 C33 Office 9720, L.L.C., v. NNN Realty Advisors, Inc.,* 844 F.3d 473, 482 (5th Cir. 2016), "courts are not entitled to disregard boilerplate language as such. Our task is to give effect 'to *all* provisions,' boilerplate or not." (quoting *Weeks Marine, Inc. v. Standard Concrete Prods., Inc.*, 737 F.3d 365, 369 (5th Cir. 2013)).

of the entities' investor-creditors." *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir. 2013). This rule—that receivers lack the power to assert the claims of investor-creditors—was recently restated in *Latitude Solutions*, 922 F.3d at 695-97, and in *Stanford Int'l Bank, Ltd.*, 927 F.3d at 841.

Finally, in *Janvey v. Alguire*, 847 F.3d 231 (5th Cir. 2017), the Fifth Circuit analyzed the arbitration issue and rejected a broader ruling by the trial court, instead ruling that arbitration was not required because (a) the receiver was not a party to some of the arbitration agreements and (b) as to the remaining agreement, that the party person seeking arbitration had waived it—results which are consistent with the rule that arbitration agreements are effective as to receivers asserting claims on behalf of the entities in receivership.

Therefore, the Fifth Circuit is now in accord with the general rule that receivers can sue only for claims of the entities themselves and that receivers are bound by the arbitration agreements of the persons or entities for whom they act.

In the District Court the Receiver advanced three inter-related contentions to avoid arbitration with respect to the claims it advances on behalf of the entities in receivership. As stated in the Opinion, at page 15-16 (ROA.570-571), the District Court did not reach those legal arguments. As explained above, it makes sense to confront those issues in this appeal. Doing so will be more efficient than multiple appeals with respect to a single arbitration agreement and will advance the purpose

of the Federal Arbitration Act to remove obstructions to arbitration. *Prima Paint Corp.,* 388 U.S. at 404.

The interlinked issues raised in the District Court with respect to the right to avoid arbitration in a receivership include the following three separate prongs:

First, the Receiver's claim that the arbitration agreement can be rejected as "executory" and that, in any event, a receiver *qua* receiver has the inherent power to avoid arbitration agreements;

Second, the closely related argument that, if the Receiver cannot reject the arbitration agreement, then the District Court itself has discretion to reject arbitration agreements; and

Third, the argument that arbitration is not appropriate in receiverships involving Ponzi schemes because defendants are or may ultimately be determined to have been "swindlers."

Each argument is discussed below.

A. The Receiver cannot reject the arbitration agreement.

The Receiver argued in the District Court that she is entitled to reject the arbitration agreement because she is a receiver. ROA.179-181. This argument has no merit. The Federal Arbitration Act mandates enforcement of a valid arbitration provision, and the Receiver has provided no authority to override that mandate.

1. The Receiver cannot reject the arbitration agreement as an "executory" agreement.

The Receiver argued in the District Court that she is entitled to reject the arbitration agreement as an "executory" agreement:

> Receivers, like bankruptcy trustees, generally can assume or reject executory contracts, including arbitration agreements, especially if they are unprofitable to the estate.[21]

At the outset, it should be noted that the Receivers' frequent analogies to bankruptcy law are indulged here only for the sake of argument. As the Eleventh Circuit reasoned in *Wiand*, the bankruptcy code provides a specific **method** to adjudicate particular claims—whereas the receivership statutes merely provide a specific **person** (a receiver) to prosecute claims, not a **method** to resolve disputes. 778 F.3d at 922-24. The claims asserted by the Receiver are creatures of Mississippi statutory and common law which are routinely arbitrated. While there might, theoretically, be an irreconcilable conflict between the **bankruptcy code** and arbitration for some subset of claims in bankruptcy, that conflict does not exist when it comes to the receivership statutes. *Id*.

That said, even assuming *arguendo* that bankruptcy law is somehow applicable to this non-bankruptcy case, the 2012 Engagement Contract which contains the arbitration provision is not an executory contract that could be rejected

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[21] ROA.179.

by a trustee in bankruptcy. The term "executory contract" refers, in the bankruptcy context, to a contract for which "performance remains due to some extent on both sides" and "the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party." *In re Murexco Petroleum, Inc.*, 15 F.3d 60, 62-63 (5th Cir. 1994). No performance remains due under the Engagement Contract. The Contract was fully performed not later than December 2013 and the engagement was terminated. Thus, the Engagement Contract is a non-executory contract and the Receiver has no legal basis for avoiding the Engagement Contract's arbitration provision.[22]

Nor would there be merit to any suggestion that the arbitration provision can be isolated from the rest of the Engagement Contract and treated as a standalone executory contract. Arbitration provisions within non-executory contracts are included in the general rule binding trustees—and by analogy receivers, if bankruptcy law applies—to a debtor's "non-executory contracts." As the Third Circuit has noted:

> We see no reason to make an exception for arbitration agreements to the general rule binding trustees to pre-petition non-executory contracts, especially in face of the strong federal policy favoring arbitration . . . .[23]

[22] Of course, the Receiver does not seek to reject the entire Engagement Contract. Instead, the Receiver's case is based on that agreement, as shown by its reference to the obligations of BSAS throughout the Complaint. *E.g.*, ROA.23-24, 28.

[23] *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1153 (3d Cir. 1989) (footnote omitted); s*ee also Sec. & Exch. Comm'n v. Colonial*

This is one of the factors that has led the circuits considering the issue to hold that a federal equity receiver is bound to the underlying entity's arbitration agreements. *Wiand*, 778 F.3d at 923; *Javitch*, 315 F.3d at 627.

2. The Receiver has no general power to reject an arbitration provision.

In the District Court, the Receiver advanced an even broader version of this argument: that a receiver has the inherent power to reject **all** arbitration provisions. ROA.179-181. For that remarkable proposition, the Receiver cited two cases: the 2014 district court opinion in *Janvey v. Alguire*[24] and *Jones v. Wells Fargo Bank, N.A.*.[25] Neither case supports her position.

Principally, the Receiver's argument in the District Court relied on the unpublished 2014 *Janvey* district court opinion—a case that is referenced in the District Court's Opinion at page 15. However, that citation to the 2014 *Janvey* district court opinion ignores the majority opinion of the Fifth Circuit in the appeal of that case. *Janvey v. Alguire*, 847 F.3d 231, 245 (5th Cir. 2017). Instead of

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Tidewater Realty Income Partners, LLC, 2015 WL 9460121, at *16 (D. Md. Dec. 22, 2015) (reasoning that a "Receiver cannot alter the terms of a non-executory contract"); *Nw. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 321 B.R. 120, 123 (Bankr. D. Del. 2005); *In re Farmland Indus., Inc.*, 309 B.R. 14, 18 (Bankr. W.D. Mo. 2004).

[24] 2014 WL 12654910 (N.D. Tex. July 30, 2014).

[25] 666 F.3d 955 (5th Cir. 2012).

adopting the broad rule upon which the Receiver now attempts to rely, the Fifth Circuit decided that case on appeal on much different grounds than the district court—denying arbitration because (a) the plaintiff was not a party to some of the arbitration agreements and (b) arbitration had been waived as to another agreement. In refusing to adopt theory upon which the Receiver here relies, the Fifth Circuit stated:

> [W]e are wary of endorsing these broad policy arguments in the absence of specific direction from the Supreme Court. *Cf., e.g.*, *DIRECTV, Inc. v. Imburgia*, —— U.S. ——, 136 S.Ct. 463, 471, 193 L.Ed.2d 365 (2015) (rejecting interpretation of law that "does not give 'due regard ... to the federal policy favoring arbitration'") (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 476, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)).[26]

There is no basis this Court to change its position by adopting those broad policy arguments now. Indeed, the Supreme Court, in refusing to find an exception to application of the Federal Arbitration Act in another situation, has recently restated the rule that even that Court "is not free to substitute its preferred economic policies for those chosen by the people's representatives." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

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[26] *Janvey*, 847 F.3d at 245. As suggested by the Fifth Circuit's reference to *Imburgia*, allowing such a "pick and choose" approach to the contract would not only violate basic fairness, but also violate the federal mandate to place arbitration provisions on "equal footing with all other contracts." *21st Fin. Servs., L.L.C. v. Manchester Fin. Bank*, 747 F.3d 331, 335 (5th Cir. 2014) (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 581 (2008)).

Nor have those broad policy arguments suggested by the district court in *Janvey* been adopted by other courts in the years since that 2014 district court opinion. In fact, the reasoning enunciated in the *Janvey* district court opinion has not been followed by even one other court. Indeed, one commentator has suggested that the view expressed by the 2014 *Janvey* district court will never gain any currency.[27]

Thus, the Receiver sought to avoid arbitration based on a theory clearly not contemplated in the Federal Arbitration Act which has only been advanced in a single district court opinion, which the Fifth Circuit declined to adopt on appeal, and which has been the subject of scholarly skepticism.

Although the District Court here did not reach that policy issue, the issue should be finally resolved now lest it delay proceeding after remand or lead to yet

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[27] The *Janvey* district court had adopted its theory that the arbitration contract was "executory" in reliance on the view of a bankruptcy scholar, Jay Westbrook. However, Westbrook's suggestion has since been the subject of strong criticism in a recent article, which cited the 2014 *Janvey* district court opinion and stated as follows:

> For now, it is safe to say that given the strong policy towards enforcing arbitration agreements in the United States, this approach is unlikely to find suitors in the near term unless Congress elects to amend the Code, which, again, is something that is unlikely.

Julian Ellis, *A Comparative Law Approach: Enforceability of Arbitration Agreements in American Insolvency Proceedings*, 92 Am. Bankr. L.J. 141, 189-92 (2018).

another appeal. This argument should be rejected now by this Court, for the same reasons discussed in this Court's opinion in the 2017 *Janvey* appeal. Rejecting the argument is consistent with the other circuits who hold that receivers are bound by arbitration provisions. *Wiand*, 778 F.3d at 923; *Javitch*, 315 F.3d at 627.

Jones, supra, the only other case the Receiver cited in the District Court (ROA.179) to support her claimed power to unilaterally reject arbitration, simply does not support her position at all. The Receiver quotes from that case that a receiver can "maintain and defend actions" where "the corporation would not be permitted to do so." *Jones v. Wells Fargo*, 666 F.3d at 966. But that quote refers to the Court's analysis of the *in pari delicto* defense under Texas law. In short, the *Jones* case involved a much different issue and simply does not speak to any power of a receiver to reject arbitration agreements.

B. The District Court has no power to "reject" an otherwise valid arbitration agreement.

Making the same argument that arbitration agreements should not bind receivers in a slightly different manner, the Receiver further argued in the District Court (ROA.181-183) that—even if the Receiver *qua* receiver lacks the power to unilaterally reject the arbitration provision—the District Court itself has "discretion" to reject the arbitration provision. Again, the District Court did not reach this issue.

The Receiver did not cite any authority dealing with receivers for this proposition, but instead attempted to rely by analogy on bankruptcy law. However, the bankruptcy law authorities cited by the Receiver—assuming *arguendo* that bankruptcy law were relevant—show the weakness of that argument. Even if bankruptcy law applied, the Receiver would have no right to avoid this arbitration agreement with respect to the claims asserted.

In bankruptcy, the right to avoid arbitration agreements depends on the types of claims asserted. In this case the Receiver has asserted numerous "non-core" common law and statutory claims, such as conspiracy, aiding and abetting, negligence, RICO, and malpractice. These are claims created by state law. They are not analogous to claims created by federal bankruptcy law and therefore **would have to be arbitrated even in bankruptcy court.** *In re National Gypsum Co*., 118 F.3d 1056, 1068 (5th Cir. 1997)—a bankruptcy case cited by the Receiver—makes that point clearly. The case distinguishes between "actions derived from the debtor," on one hand, and "federal bankruptcy rights wholly divorced" from the debtor's inherited claims—*i.e*. claims "created by the Bankruptcy Code"—on the other hand. *Id*. The former claims are arbitrable under bankruptcy law, while the latter, standing alone, are not. *Id*. at 1067-1070.[28]

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[28] Even in the bankruptcy context, the Receiver's claims would be arbitrable. *E.g.*, *In re RDM Sports Grp., Inc*., 260 B.R. 905, 912 (Bankr. N.D. Ga. 2001) (conspiracy); *In re TEU Holdings, Inc*., 287 B.R. 26, 41 (Bankr. D. Del. 2002)

The Receiver's various damage claims are "derived from" Adams and Madison Timber; they are not "core" claims created by federal bankruptcy law (or receivership law, if the bankruptcy law could be deemed analogous). Hence, they would be required to be arbitrated in bankruptcy and, of course, must be arbitrated in this case.

In the District Court (ROA.182) the Receiver cited *In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002), which makes our argument quite clearly:

> A bankruptcy court does possess discretion, however, to refuse to enforce an otherwise applicable arbitration agreement when the underlying nature of a proceeding **derives exclusively** from the provisions of the Bankruptcy Code and the arbitration of the proceeding conflicts with the purpose of the Code. (Emphasis added.)

In *Gandy*, the debtor-in-possession asserted "three causes of action that derive entirely from the federal rights conferred by the Bankruptcy Code." 299 F. 3d at 495-96. Although the debtor had some state law causes of action, the Court found that the "bankruptcy causes of action predominate" and implicate the state law issues "only in the most peripheral manner." *Id*. at 497-500. Based on this finding—that the case primarily involved core claims created by bankruptcy law—the Court found the "derives exclusively" requirement to be sufficiently satisfied and declined to compel arbitration. *Id*.

(negligence arising out of contractual undertaking); *Hays & Co*., 885 F.2d at 1162 (RICO).

Here, by contrast to the facts in *Gandy*, the Receiver's numerous state law causes of action for damages involving many millions of dollars completely dwarf any claims derived from the debtors from state law. As noted above at pages 5 and 6, the total amounts of fees of any kind received by all of the Butler Snow Parties is only a tiny portion of the amount which the Receiver seeks to recover; moreover, the Receiver's claim for disgorgement would not even include the entire amount of those fees, since that amount includes amounts representing fees for services as to which clearly there would be no claims based on "fraudulent transfer" theories. Thus, even if bankruptcy law principles applied in this case—and they do not—there would still be no authority to refuse to enforce a valid arbitration provision, for the reasons made clear by *Gandy*.

Therefore, the Receiver has presented no basis for the Court to reject a valid arbitration provision for which the Federal Arbitration Act mandates enforcement.

C. There is no merit to the suggestion to create a policy exception allowing receivers to avoid arbitration because some adverse parties may be "swindlers."

In addition, the Receiver advanced (ROA.181) the following related policy argument in the District Court:

> It furthermore bears mention that the Engagement Contract and any alleged agreement to arbitrate were borne out of Butler Snow's assistance to the criminal enterprise now known as the Madison Timber Ponzi scheme. This is not an ordinary situation in which two private parties agree to resolve a private dispute out of court, through arbitration. The public, and certainly victims, have an interest in this action. The veil of arbitration is in no one's

> interest, except Butler Snow's. *Janvey v. Alguire*, 847 F.3d 231, 248 (5th Cir. 2017) (Higginbotham, J., concurring) ("Swindlers can use arbitration to mitigate discovery and cabin attending risk of exposing fraudulent activity while presenting arbitration, not as a tool of fraud, but as business as usual.").

There are several clear problems with that argument.

First, to the extent that the Receiver argues that no arbitration should ever be permitted in in a dispute with a receiver—even for parties who dealt the perpetrator of the Ponzi scheme innocently and in good faith—that suggestion is totally unsupported by any authority and inconsistent with the Federal Arbitration Act.

Second, if the Receiver argues that arbitration should be denied only to parties who were somehow knowing participants in wrongdoing, such a rule would "put the cart before the horse"—since it would require a factual determination that the party had engaged in wrongful conduct at the outset and before any hearing. This case provides a clear example of that problem, since the facts here are vigorously disputed.

Third, if the Receiver's contention is that arbitration should be denied in all disputes with a receiver related to any Ponzi scheme—based on the argument that arbitration "can be used to mitigate discovery and cabin attending risk of exposing fraudulent activity"—such a rule is inconsistent with the Federal Arbitration Act. Moreover, such a rule would be completely ineffective in exposing fraudulent activity. After all, if the issue of arbitrability arises prior to discovery of the

existence of a Ponzi scheme, there would be no basis to apply the rule; thus arbitration would proceed in spite of such a rule. On the other hand, if the issue of arbitrability arises after the discovery of the existence of a Ponzi scheme, the fraudulent activity will have already been exposed to public scrutiny.

Fourth, if the Receiver's concern is that the "veil of arbitration" allows the Butler Snow Parties to avoid disclosure of the "wrongdoing" which the Receiver claims to have occurred, that policy argument too is unsupported by authority, is inconsistent with the Federal Arbitration Act, and again "puts the cart before the horse" by assuming—without any finding by any court—that these parties did something wrong.

The discussion above demonstrates that the Receiver's suggested policy would offer be ineffective and offer no advantages. But that is not even the primary issue.

The more fundamental reason to reject the Receiver's proposed and self-serving policy exception is that such a rule would be inconsistent with the Federal Arbitration Act. It is a firmly-established rule that the FAA requires enforcement of arbitration clauses as written, notwithstanding differences of view as to the merits of policy arguments advanced in efforts to justify judicially-created exceptions to the Act. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

CONCLUSION

The Court should reverse the District Court's order and remand this case with instructions that the District Court stay or dismiss the claims against these Defendants pending arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2019, and electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/Alan W. Perry

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,649 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/Alan W. Perry