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.

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on appeal from the
U.S. District Court for the Southern District of Mississippi
Case No. 3:18-cv-866

APPELLEE'S BRIEF

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CERTIFICATE OF INTERESTED PARTIES

The following listed persons, 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. Plaintiff-Appellee Alysson Mills, in her capacity as Receiver for the estates of Arthur Lamar Adams and Madison Timber Properties, LLC;
2. Lilli Evans Bass, Brent B. Barriere, Kristen D. Amond, and Rebekka C. Veith, Fishman Haygood LLP, as counsel for Appellee;
3. Defendant-Appellant Butler Snow Advisory Services, LLC;
4. Defendant-Appellant Butler Snow LLP;
5. Defendant-Appellant Matt Thornton;
6. Edward Morgan Blackmon, Jr. and Bradford Jerome Blackmon, Blackmon & Blackmon PLLC, as counsel for Defendants-Appellants Butler Snow Advisory Services LLC and Matt Thornton;
7. Alan Walter Perry, W. Wayne Drinkwater, John Alexander Purvis, Simon Turner Bailey, and Michael C. Williams, Bradley Arant Boult Cummings LLP, as counsel for Defendant-Appellant Butler Snow LLP;
8. U.S. District Court Judge Carlton W. Reeves.

Date: January 23, 2020 */s/ Kristen D. Amond*

Kristen D. Amond

STATEMENT REGARDING ORAL ARGUMENT

This appeal is straightforward.

Alysson Mills is the Receiver for the estates of Arthur Lamar Adams and Madison Timber Properties, LLC ("the Receiver").

Adams and Madison Timber had a professional relationship with Butler Snow, LLP and Butler Snow Advisory Services, LLC and its president-CEO Matt Thornton (collectively "Butler Snow"). Adams, Madison Timber, and Butler Snow entered a contract that contains an arbitration clause.

Does the arbitration clause require that the Receiver, standing in the shoes of Adams and Madison Timber, arbitrate her claims against Butler Snow? The Receiver says no: The parties did not form a valid agreement to arbitrate, but even if they did, the Receiver ought to have the power to reject it.

The Receiver believes the briefs and record adequately present the facts and legal arguments. Nevertheless, she does not oppose Butler Snow's request for oral argument if it will aid the Court in its decision-making process.

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STATEMENT OF THE CASE

Introduction

Alysson Mills filed the underlying lawsuit in her capacity as the court-appointed receiver for the estates of Arthur Lamar Adams and Madison Timber Properties, LLC. For more than ten years, Adams, through Madison Timber, operated a Ponzi scheme that defrauded hundreds of investors. During that time, Butler Snow and its agents served as Adams's lawyers and strategic business advisors. The Receiver's complaint alleges that Butler Snow aided and abetted Adams by lending its influence, professional expertise, and even its clients to Madison Timber.

Butler Snow filed a motion to dismiss the Receiver's complaint, not for failure to state a claim, but because Butler Snow's contract with Adams and Madison Timber contains an arbitration clause. Butler Snow argued the Receiver, standing in the shoes of Adams and Madison Timber, must submit any dispute with Butler Snow to private arbitration.

The Receiver opposed Butler Snow's motion, showing that, although the contract contains an arbitration clause, a separate forum selection clause completely contradicts it. The Receiver argued the parties did not form a valid agreement to arbitrate, but even if they did, the Receiver ought to have the power to reject it.

The district court denied Butler Snow's motion, holding only that the parties did not form a valid agreement to arbitrate. Applying Mississippi law, the district court determined that the forum clause and arbitration clause cannot be harmonized and therefore the contract must be construed against Butler Snow, its drafter. Butler Snow filed this appeal.

To the extent the primary issue in this appeal is one of contract interpretation, the Receiver's factual allegations against Butler Snow and the broader proceedings in the district court are unimportant. A summary is nevertheless necessary to understand the Receiver's case and to give context to Butler Snow's arguments.

Madison Timber

For more than ten years, Lamar Adams, through his company Madison Timber, operated a Ponzi scheme that defrauded hundreds of investors. Investors believed that Madison Timber used investors' money to purchase timber from Mississippi landowners; that Madison Timber sold the timber to Mississippi lumber mills at a higher price; and that Madison Timber repaid investors their principal plus interest with the proceeds of those sales. Investors received timber deeds that

purported to secure their investments—but the deeds were fake. There was no timber and no proceeds from sales of timber. The money used to repay existing investors came solely from new investors.

Madison Timber had to continuously grow to repay existing and new investors, and continuously grow it did. In 2011, Madison Timber took in approximately $10 million from investors. By 2018, that number had grown by a factor of 16. In the one-year period prior to April 19, 2018, the date Adams surrendered to federal authorities and confessed to the Ponzi scheme, Madison Timber took in approximately $164.5 million. As of April 19, 2018, Madison Timber had 501 outstanding promissory notes, reflecting debts to investors of more than $85 million.[1]

Adams misused Madison Timber to sustain a singular fraud over many years, and numerous third parties, including Butler Snow, assisted him. Madison Timber would not have grown without these third parties' assistance. They lent their influence, their professional expertise, and even their clients to Adams. They validated Adams and helped him attract new investors.

[1] The evidence at Adams's sentencing established that of the $164.5 million that Madison Timber received in its last year of operation, it paid back approximately $79.5 million, leaving an $85 million difference. The outstanding principal and interest owed to investors is necessarily higher.

The Receiver and her lawsuit

At the request of the Securities and Exchange Commission, the district court appointed a receiver for the estates of Adams and Madison Timber.

The Receiver's primary purpose is to maximize assets available to Adams's victims. "As directed by the court, a receiver may systematically use ancillary litigation against third-party defendants to gather the entity's assets. Once gathered, these assets are distributed through a court-supervised administrative process."[2] The Court's order of appointment directs the Receiver to, among other things:

> investigate and . . . bring such legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging her duties as Receiver.[3]

The Receiver filed the underlying lawsuit in her capacity as a court-appointed receiver and pursuant to the powers vested in her by the district court's orders and applicable law.[4] The complaint names as defendants the law firm Butler Snow LLP; Butler Snow Advisory Services, LLC and its president-CEO Matt Thornton; the law firm Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. and two of its professionals, Brent Alexander and Jon Seawright; and Alexander Seawright, LLC. The complaint alleges the defendants aided and abetted Adams and thereby contributed to the success of the Madison Timber Ponzi scheme and to the debts of

[2] *Zacarias v. Stanford Int'l Bank, Ltd*., 945 F.3d 883, 896 (5th Cir. 2019).
[3] ROA.15.
[4] ROA.12.

the Receivership Estate to investors. The complaint includes counts for civil conspiracy; aiding and abetting; recklessness, gross negligence, and at a minimum negligence; violations of Mississippi's Fraudulent Transfer Act; violations of Mississippi's Racketeer Influenced and Corrupt Organization Act; joint venture liability; negligent retention and supervision; and, against Butler Snow, LLP only, attorney malpractice.

In a footnote in its brief, Butler Snow contends that "the Receiver lacks standing to assert any claim that [Butler Snow] created or contributed to the liabilities of the receivership."[5] Butler Snow did not question the Receiver's standing to sue Butler Snow in its motion to dismiss.[6] It makes the argument for the first time on appeal.[7] In any event, Butler Snow is wrong. The Receiver has standing to pursue,

[5] Butler Snow's brief at p. 7–8, n.6.

[6] Butler Snow parrots an argument its co-defendant Baker Donelson has made. For reasons outside the scope of this appeal, Butler Snow and Baker Donelson are differently situated. The Receiver has separately shown that she has standing to pursue claims against Baker Donelson, but even if she did not, that fact would have no bearing on her standing to pursue claims against Butler Snow. The relationships were similar but different in an important respect: Adams and Madison Timber paid Butler Snow for its professional services pursuant to a written contract. The Receiver, standing in the shoes of Adams and Madison Timber, has standing to pursue claims against Butler Snow, including for professional malpractice, arising from that professional relationship.

[7] An argument not raised in the district court is typically waived. *See Campo v. Bank of America, N.A.*, 678 Fed. App'x 227 (5th Cir. 2017) (mem.) (The Fifth Circuit "do[es] not consider issues raised for the first time on appeal."); *see also Benefit Recovery, Inc. v. Donelon*, 521 F.3d 326, 329 (5th Cir. 2008) ("[W]e require a party to do more than just raise an argument; the contention must be pressed so that the district court has an opportunity to rule on it."). Having also failed to fully brief the argument in its opening brief, it would be improper for Butler Snow to attempt to do so in its reply. *United States v. Tracts 31a, Lots 31 & 32, Lafitte's Landing Phase Two Port Arthur, Jefferson Cty. Texas*, 852 F.3d 385, 390 n.5 (5th Cir. 2017) ("However, Stacy does not raise this argument in the body of her brief; therefore, her argument is waived." (citing *Arbuckle Mountain Ranch of Tex., Inc. v. Chesapeake Energy Corp*., 810 F.3d 335, 339 n.4 (5th Cir. 2016)

inter alia, claims against third parties whose actions contributed to the success of the Madison Timber Ponzi scheme, and therefore to the debts of the Receivership Estate.[8] Adams misused Madison Timber to sustain a singular fraud over many years, and Butler Snow assisted him. The Receiver has standing to pursue claims against Butler Snow as the court-appointed receiver for Madison Timber.

Butler Snow also contends, again for the first time on appeal, that "the Receiver lacks standing to assert claims of the investors-creditors of [Madison Timber]."[9] Again, Butler Snow is wrong. To remove any doubt that the Receiver has standing to sue Butler Snow or any third party whose actions contributed to the success of the Madison Timber Ponzi scheme, investors voluntarily assigned their claims against Butler Snow and others to the Receivership Estate.[10] The result is that the Receiver now has standing to pursue claims against Butler Snow in not one but two ways: because she is the court-appointed receiver for Madison Timber and because investors have executed assignments that entrust their claims to her.

("Arguments subordinated in a footnote are 'insufficiently addressed in the body of the brief,' and thus are waived." (quoting *Bridas S.A.P.I.C. v. Turkm.*, 345 F.3d 347, 356 n.7 (5th Cir. 2003)))); *see also Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016) ("Reply briefs cannot be used to raise new arguments.").

[8] *E.g., Zacarias v. Stanford Int'l Bank, Ltd*., 945 F.3d 883 (5th Cir. 2019).

[9] Butler Snow's brief at p. 7–8, n.6.

[10] Doc. 57 at ¶ 8, *Mills v. Butler Snow LLP, et al.*, No. 3:18-cv-252 (S.D. Miss.).

Butler Snow was made aware of the assignments,[11] therefore it is curious that it did not mention them when it argued the Receiver lacks standing for the first time in its brief in this Court. Butler Snow seeks to inject into this appeal issues that are outside its scope and record. Relevant to this appeal, investors were not parties to the contract that contains the arbitration clause in question, therefore Butler Snow cannot compel arbitration of investors' claims.

Butler Snow and its motion to dismiss

The complaint alleges Adams's relationship with Butler Snow began in 2009 and continued until Adams turned himself in on April 19, 2018.[12]

The complaint's factual allegations against Butler Snow are detailed and numerous.[13] Butler Snow drafted private placement memoranda for Madison Timber; pitched Madison Timber to potential investors, including its clients; consummated sales of Madison Timber to investors; received commissions from Adams for its assistance in growing Madison Timber's business; and generally served as a reference for Adams and Madison Timber in the community. Among other falsities, Butler Snow told potential investors that it could not share the names

[11] The Receiver's amended complaint, which is not part of the record on appeal, alleges that she "has standing to pursue claims against Defendants as the holder of assignments executed by investors." Doc. 57 at ¶ 8, *Mills v. Butler Snow, et al.*, No. 3:18-cv-866 (S.D. Miss).

[12] ROA.19.

[13] ROA.19–30.

of Madison Timber's timber mills due to an "extremely stringent NDA."[14] Of course there was no NDA with any timber mills. There was no timber and there were no timber mills.

Relevant here, when Adams and Madison Timber engaged Butler Snow Advisory Services, LLC in 2012, the parties signed an Engagement Letter that attached and incorporated Standard Terms and Conditions. Together, the two documents form what Butler Snow calls the Engagement Contract.[15]

The Engagement Letter is addressed to Lamar Adams and written on Butler Snow Advisory Services, LLC's letterhead.[16] It describes the specific negotiated terms of the engagement. It is signed by the parties.

The Standard Terms and Conditions is Butler Snow Advisory Services, LLC's boilerplate Standard Terms and Conditions.[17] It was not negotiated and it is not signed.

The Engagement Letter and the Standard Terms and Conditions each contain a forum clause: The Engagement Letter provides that "any" action arising from the engagement is subject to the "exclusive jurisdiction" of Mississippi courts and the parties "irrevocably waive any right they may have to object to any action being

[14] ROA.26–27.
[15] ROA.140–47.
[16] ROA.140–42.
[17] ROA.143–47.

brought in [a Mississippi court]."[18] The Standard Terms and Conditions provides that the parties agree to submit "an unresolved legal dispute" to arbitration.[19]

Butler Snow filed a motion to dismiss the Receiver's complaint that argued the Engagement Contract required the Receiver, standing in the shoes of Adams and Madison Timber, to arbitrate her claims.[20] The Receiver opposed Butler Snow's motion, showing that, while the Standard Terms and Conditions contains an arbitration clause, the forum clause in the Engagement Letter completely contradicts it. The Receiver argued the parties did not form a valid agreement to arbitrate, but even if they did, the Receiver ought to have the power to reject it.

The district court denied Butler Snow's motion, holding only that the parties did not form a valid agreement to arbitrate. Applying Mississippi law, the district court assessed the Engagement Contract as a whole:

> In the forum selection clause, the parties agreed to resolve "any claim, dispute or difference" they might have in "the state and federal courts in Mississippi." The parties agreed that those courts would have "exclusive jurisdiction" over "any" such claims. All objections to that forum or jurisdiction were explicitly waived. The arbitration provision, however, directly contradicts the forum selection clause. It sends disputes "to binding arbitration" instead of "a court of law."[21]

[18] ROA.141.
[19] ROA.145.
[20] ROA.148.
[21] ROA.568.

The district court concluded that "[r]easonable minds cannot, after reading the entire contract, determine which of these clauses the parties intended to control."[22] Because "[i]t is not possible to reconcile" the two clauses,[23] the Engagement Contract is ambiguous[24] and must be construed against its drafter, Butler Snow.[25]

SUMMARY OF THE ARGUMENT

The district court properly denied Butler Snow's motion to dismiss. Because the Engagement Contract's forum clause completely contradicts its arbitration clause, the parties did not form a valid agreement to arbitrate. The two clauses both purport to cover disputes arising from the engagement, but they completely differ as to who will decide a dispute. One says a dispute belongs solely in court—the other would send it to arbitration. If there were any doubt that the two clauses are irreconcilable, the forum clause separately states that the parties "irrevocably waive any right they may have to object to any action being brought in [a Mississippi state or federal court]." Tellingly, Butler Snow not once addresses this language in its brief.

There is no dispute regarding the governing principles of Mississippi law, and there can be no dispute regarding what federal courts have done with different

[22] ROA.568.
[23] ROA.568.
[24] ROA.568.
[25] ROA.570.

contracts in other cases. Although no contract is "identical," case law provides instructive examples, and even the cases on which Butler Snow relies instruct that the forum clause and arbitration clause here cannot be harmonized. The alternative reading that Butler Snow proposes, which would define "jurisdiction" to mean only "power to decide a case or issue a decree," not only does not account for the forum clause's full text, but this Court's precedent actually rejects it.

This Court's analysis ought to end there. But if, instead, it finds that there exists a valid agreement to arbitrate, it may nevertheless hold that the Receiver has the power to reject it because arbitration inherently conflicts with the policies underlying the receivership. Arbitration undermines the purpose of federal equity receiverships generally, which includes the provision of a centralized forum to resolve claims. Here it would also burden and deplete the receivership estate by forcing it to duplicate proceedings in two different forums. These concerns are compelling enough to serve as an independent basis for rejecting arbitration.

ARGUMENT

The Court reviews the grant or denial of a motion to compel arbitration *de novo*. *Bowles v. OneMain Fin. Grp., L.L.C.*, 927 F.3d 878, 882 (5th Cir. 2019).

I. THERE IS NO VALID AGREEMENT TO ARBITRATE.

The federal policy favoring arbitration does not apply to the initial determination of whether there is a valid agreement to arbitrate. *Klein v. Nabors*

Drilling USA L.P., 710 F.3d 234, 236 (5th Cir. 2013). The question is one of state law. *Graves v. BP Am., Inc.*, 568 F.3d 221, 222 (5th Cir. 2009). Under Mississippi law, Butler Snow bears the burden of proof. *Wellness, Inc. v. Pearl River Cty. Hosp.*, 178 So. 3d 1287, 1292 (Miss. 2015).

A. No one disputes the governing principles of Mississippi law.

Butler Snow quotes numerous opinions from Mississippi courts for the same proposition: A contract should be read as a whole and, if possible, to give meaning to all its parts.[26]

No one disputes that a contract should be read as a whole. *See* Butler Snow's brief at 13 (quoting *Goosey v. Goosey*, 48 Miss. 210, 217 (Miss. 1873) ("[t]he whole contract must be considered")) and at 18 (quoting *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752–53 (Miss. 2003) ("we will read the contract as a whole").

No one disputes that the law favors a reading that gives meaning to all of a contract's parts. No one disputes that a court ought "first attempt to harmonize" a contract's contradictory provisions, *see id.* at 16 (quoting *Gaiennie v. McMillen*, 138 So. 3d 131, 136 (Miss. 2014)), or that a reading that renders a provision meaningless

[26] Butler Snow's brief at p. 12–17.

should be avoided "if it can be reasonably avoided," *see id. at* 13 (quoting *Wilson Industries, Inc. v. Newton County Bank*, 245 So. 2d 27, 30 (Miss. 1975)).

That does not mean, however, that the law forces a reading that is not reasonable. Sometimes "there is an irreconcilable conflict." *See id.* at 16 (quoting *Woods v. Sims*, 273 S.W.2d 617, 621 (Tex. 1954)). The law requires a reading that gives meaning to all of a contract's parts only *if it is possible*. *See id.* at 14–17 (quoting *Rubel v. Rubel*, 75 So. 2d 59, 65 (Miss. 1954) ("every word therein must be given effect, *if possible*") (emphasis added); *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352–53 (Miss. 1990) ("the court will, *if possible*, harmonize the provisions") (emphasis added) (quoting *Woods*, 273 S.W.2d at 620–21 (Tex. 1954) ("the court will, *of [sic] possible*, harmonize the parts") (emphasis added)); *West v. West*, 891 So. 2d 203, 210–11 (Miss. 2004) ("we will, *if possible*, 'harmonize the provisions . . . '") (emphasis added)); *Waltman v. Engineering Plus, Inc.*, 264 So. 3d 758, 761 (Miss. 2019) ("No contract provision should be construed as being in conflict with another *unless no other reasonable interpretation or construction is possible*.") (emphasis added)).

Nothing in this appeal threatens to unsettle this "long and unbroken chain of Mississippi precedent."[27] The question is simply whether it is possible to read the

[27] Butler Snow's brief at p. 17.

Engagement Contract to give meaning to both the forum clause and the arbitration clause.

B. It is not possible to read the Engagement Contract to give meaning to both the forum clause and arbitration clause.

It is not possible to read the Engagement Contract to give meaning to both the forum clause and arbitration clause. The two clauses completely contradict. A side-by-side comparison is helpful:

Engagement Letter's Forum Clause	**Standard Terms and Conditions' Arbitration Clause**
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.	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 [Butler Snow Advisory Services] and any of its affiliates, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act.

The two clauses both purport to cover disputes arising from the engagement: The forum clause purports to cover "any claim, dispute or difference concerning this Engagement Contract and any matter arising from it," and the arbitration clause purports to cover to "an unresolved legal dispute" involving "legal rights or remedies arising from this engagement."

The two clauses differ as to who will decide a dispute: The forum clause says "state and federal courts in Mississippi shall have exclusive jurisdiction," while the arbitration clause says "the parties agree to submit their dispute to binding arbitration." There is no way to ascertain from the Engagement Contract itself the parties' true intent. Butler Snow correctly contends that the Engagement Contract should be construed as a whole, but outside the two clauses, it does not point to any language in the Engagement Contract that would suggest the parties intended one clause to give way to the other. The two clauses inherently contradict: One says a dispute belongs solely in court—the other would send it to arbitration. The district court correctly held "[i]t is not possible to reconcile" the two clauses.[28]

If there were any doubt that the two clauses are irreconcilable, the forum clause expressly states that the parties "irrevocably waive any right they may have to object to any action being brought in [a Mississippi state or federal court]." This language is clear:

> 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.

[28] ROA.568.

Butler Snow never addresses the irrevocable waiver in its brief. The language formed a large part of the Receiver's argument in the district court,[29] and the district court highlighted it in its opinion.[30] Butler Snow's failure to address the irrevocable waiver in its brief is inexcusable. Having chosen not to address the irrevocable waiver in its brief, it has waived its right argue in its reply that the irrevocable waiver does not apply.[31]

C. Because the forum clause and arbitration clause completely contradict, there is no valid agreement to arbitrate.

Because the forum clause and arbitration clause completely contradict, there is no valid agreement to arbitrate. Although no contract is "identical," case law provides instructive examples and even the cases on which Butler Snow relies instruct that the forum clause and arbitration clause here cannot be harmonized.

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[29] ROA.172 ("Butler Snow 'irrevocably waive[d]' any right to object to this Court's deciding this case."); ROA.174 ("Here, the text of the Engagement Contract is clear—the parties not only agreed that 'any' action between them would be tried by a Mississippi court, they 'irrevocably waive[d]' any objection to a Mississippi court's trying such action."); ROA.174 ("[The forum clause says] Mississippi courts 'shall have exclusive jurisdiction' over 'any claim, dispute or difference,' and that the parties 'irrevocably waive any right they may have to object.' Properly understood, the Engagement Letter's negotiated and signed forum clause expressly waives the Standard Terms and Conditions' boilerplate arbitration provision."); ROA.175 ("The Engagement Contract is thus unambiguous: Any dispute between the parties shall be decided by a Mississippi court, and the parties 'irrevocably waive' any objection."); ROA.183 ("The plain language of the Engagement Contract evidences that the parties agreed not only that any action between them would be tried by a Mississippi court, but that they 'irrevocably waive[d]' any objection to a Mississippi court's trying such action.").

[30] ROA.568 ("All objections to that forum or jurisdiction were explicitly waived.").

[31] *Hollis*, 827 F.3d at 451 ("Reply briefs cannot be used to raise new arguments.").

The Receiver addresses only the principal cases on which both parties have relied, in chronological order.

1. *Personal Security & Safety Systems Inc. v. Motorola Inc.*, 297 F.3d 388 (5th Cir. 2002)

According to Butler Snow, *Motorola* reflects this Court's "approach to reconciling forum selection and arbitration provisions."[32] It is useful, then, to consider the language of the forum clause and arbitration clause in *Motorola*. A side-by-side comparison:

***Motorola*'s Forum Clause**	***Motorola*'s Arbitration Clause**
Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS. ANY SUIT OR PROCEEDING BROUGHT HEREUNDER SHALL BE SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE COURTS LOCATED IN TEXAS.	[T]he parties hereby agree to resolve by binding arbitration any and all claims, demands, actions, disputes, controversies, damages, losses, liabilities, judgments, payments of interest, penalties, enforcement of settlement agreements, deficiencies, any and all demands not yet matured into the foregoing, and other matters in question arising out of or relating to this Agreement (all of which are referred to as "Claims"), even though some or all of such Claims allegedly are extra-contractual in nature and even though some or all of such Claims sound in contract, tort or otherwise, at law or in equity, in accordance with Commercial Arbitration Rules . . . of the American Arbitration Association . . . .

[32] Butler Snow's brief at p. 24.

This Court held that the two clauses in *Motorola* could be read together to mean "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." *Motorola,* 297 F.3d at 395–96. The Court relied for its holding on 1) the breadth of the arbitration clause and 2) the meaning of "suit or proceeding":

> Rather than covering all "disputes" or all "claims" like the arbitration provision in the Product Development Agreement, the forum selection clause confers "exclusive jurisdiction" on Texas courts only with respect to "*any suit or proceeding*." This limitation suggests that the parties intended the clause to apply only in the event of a non-arbitrable dispute that must be litigated in court.
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> * * *
>
> This reading comports with the plain meaning of the terms "*suit*" and "*proceeding*." *See* Webster's Third New Int'l Dictionary 2286 (1993) (defining "suit" as "an action or process in a court for the recovery of a right or claim"); *id*. at 1807 (defining a "proceeding" as "the course of procedure in a judicial action or in a suit in litigation").

297 F.3d at 396 and n.10 (emphasis added).

This Court's opinion in *Motorola* does not compel the same result here because the two clauses in *Motorola* are the effective reverse of the two clauses in this case.

The *Motorola* forum clause was narrow, covering only "any suit or proceeding brought hereunder"—by contrast, the forum clause here covers "any

claim, dispute or difference concerning this Engagement Contract and any matter arising from it."

The *Motorola* arbitration clause was broad, covering "any and all claims, demands, actions, disputes, controversies, damages, losses, liabilities, judgments, payments of interest, penalties, enforcement of settlement agreements, deficiencies, any and all demands not yet matured into the foregoing, and other matters in question arising out of or relating to this Agreement (all of which are referred to as "Claims"), even though some or all of such Claims allegedly are extra-contractual in nature and even though some or all of such Claims sound in contract, tort or otherwise, at law or in equity"—by contrast, the arbitration clause here covers only "an unresolved legal dispute."

Nothing in the *Motorola* forum clause specifically precluded arbitration. Here, the forum clause states that the parties "irrevocably waive any right they may have to object to any action being brought in [a Mississippi state or federal court]."

These differences are meaningful. *Motorola* is instructive, but it instructs that the forum clause and arbitration clause here cannot be harmonized.

2. *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278 (2d Cir. 2005)

Butler Snow cites *Bank Julius* as a case that "applied the principles and approach outlined in *Motorola*."[33] A side-by-side comparison of the forum clause and arbitration clause in *Bank Julius*:

***Bank Julius*'s Forum Clause**	***Bank Julius*'s Arbitration Clause**
Without limiting the right of the Bank to bring any action or proceeding against [Waxfield] . . . in the courts of other jurisdictions, [Waxfield] hereby irrevocably submits to the jurisdiction of any New York State or Federal court sitting in New York City, and [Waxfield] hereby irrevocably agrees that any Action may be heard and determined in such New York State court or in such Federal court. [Waxfield] hereby irrevocably waives, to the fullest extent it may effectively do so, the defense of an inconvenient forum to the maintenance of any Action in any jurisdiction.	Upon the termination of mediation, any unresolved dispute, controversy or claim arising out of or relating to any business relationship between [Waxfield] and the Bank, including but not limited to any dispute, controversy or claim with regard to any agreement, the breach thereof or any account or transaction [Waxfield has] with the Bank, shall be settled by arbitration . . . and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

The Second Circuit held that the forum clause in *Bank Julius* could be read "as complementary" to the arbitration clause. *Bank Julius*, 424 F.3d at 285. But the *Bank Julius* forum clause was narrower than the forum clause here, covering only "any action or proceeding," and was permissive, providing only that Waxfield "submits to the jurisdiction" of New York courts and that any action "may be heard" there. The *Bank Julius* arbitration clause was also broader than the arbitration clause

[33] Butler Snow's brief at p. 24.

here, covering "any unresolved dispute, controversy or claim arising out of or relating to any relationship between [Waxfield] and the Bank, including but not limited to any dispute, controversy or claim with regard to any agreement," and was mandatory, providing disputes "shall be settled by arbitration."

Unlike here, nothing in the *Bank Julius* forum clause specifically precluded arbitration. In *Bank Julius* only Waxfield waived its right to object to a New York court's jurisdiction. Here, by contrast, both parties "irrevocably waive[d] any right they may have to object to any action being brought in [a Mississippi state or federal court]."

These differences are meaningful. *Bank Julius* is instructive, but it instructs that the forum clause and arbitration clause here cannot be harmonized.

3. *Applied Energetics v. NewOak Capital Markets, LLC,* 645 F.3d 522 (2d Cir. 2011)

Applied Energetics is a case that is similar to this case. A side-by-side comparison of the forum clause and arbitration clause in *Applied Energetics*:

***Applied Energetics*'s Forum Clause**	***Applied Energetics*'s Arbitration Clause**
Any dispute arising out of this Agreement shall be adjudicated in the Supreme Court, New York County or in the federal district court for the Southern District of New York.	Each [party] agrees that any dispute arising out of or relating to this letter, the Indemnity Agreement and/or the transactions contemplated hereby or thereby . . . shall be resolved through binding arbitration before the National Association of Securities Dealers . . . in New York City.

The Second Circuit held the two clauses in *Applied Energetics* could not be harmonized. Applying, but distinguishing, *Bank Julius*, the court observed that the forum clause's use of the mandatory "shall" specifically precluded arbitration such that it displaced the arbitration clause. 645 F.3d at 525–26. In that case and in this case, both clauses purported to cover "any dispute" but completely conflicted as to who would decide it.

This case is like *Allied Energetics* but with the additional and compelling fact that the parties here also "irrevocably waive[d] any right they may have to object to any action being brought in [a Mississippi state or federal court]." *Applied Energetics* instructs that the forum clause and arbitration clause here cannot be harmonized.

4. *ADC LTD NM v. Zeppelinn Energy, LP*, No. 12-ca-1219, 2013 WL 12126246 (W.D. Tex. May 28, 2013)

Butler Snow says the forum clause in *Zeppelinn* is "virtually identical" to the forum clause here.[34] But Butler Snow fails to mention *Zeppelinn*'s arbitration clause. A side-by-side comparison:

***Zeppelinn*'s Forum Clause**	***Zeppelinn*'s Arbitration Clause**
[T]he Courts located in the State of Texas, state or federal, shall have exclusive jurisdiction to hear and determine all claims, disputes, controversies and actions arising from or relating to this Agreement and any	Mandatory Arbitration. Refer to the section of the attached Private Placement Memorandum entitled: SPECIFIC RISKS OF THE OFFERING; Liability, Indemnification of the Joint Venture Manager and Arbitration. It is

[34] Butler Snow's brief at 27.

of its terms or provisions, or to any relationship between the parties hereto, and venue shall be in the courts located in Bexar County, Texas. The undersigned expressly consents and submits to the jurisdiction of said courts and to venue being in Bexar County, Texas. . . .	agreed that any controversies arising out of this Agreement shall be submitted to arbitration conducted before the National Association of Securities Dealer, Inc., as the Joint Manager may elect and in accordance with its rules. . . .
Entire Agreement. This writing, along with the PPM (and any exhibit attached thereto) contains the entire agreement of the parties with respect to the matters contained herein and supersedes all oral agreements and representations.	[A]ny controversies that arise under this [PPM] will be submitted to arbitration conducted before the National Association of Securities Dealers, Inc. (NASD), as the Joint Venture Manager may elect and in accordance with its rules.

The *Zeppelinn* court held that these two clauses could be read together because the arbitration clause only provides for disputes to be arbitrated *if Zeppelinn chooses*. "If, however, [Zeppelinn] chooses not to arbitrate, then the disputes will be resolved in court, and the forum selection clauses designate the court in which the litigation will take place." *Id.* at *4.

Here, there is no option for Butler Snow to elect arbitration. *Zeppelinn* does not stand for the proposition that the forum clause and arbitration clause can be harmonized.

5. *Sharpe v. AmeriPlan Corp.*, 769 F.3d 909 (5th Cir. 2014)

Sharpe is another case that is similar to this case. A side-by-side comparison of the forum clause and arbitration clause in *Sharpe*:

***Sharpe*'s Forum Clause**	***Sharpe*'s Arbitration Clause**
6.07.01. THE PARTIES AGREE TO SUBMIT ANY CLAIM, CONTROVERSY OR DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT (AND ATTACHMENTS) OR THE RELATIONSHIP CREATED BY THIS AGREEMENT TO NON-BINDING MEDIATION PRIOR TO FILING SUCH CLAIM CONTROVERSY OR DISPUTE IN A COURT . . . . 6.07.02. WITH RESPECT TO ANY CLAIMS, CONTROVERSIES OR DISPUTES WHICH ARE NOT FINALLY RESOLVED THROUGH MEDIATION, SALES DIRECTOR HEREBY IRREVOCABLY SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF THE STATE COURTS OF DALLAS COUNTY, TEXAS AND THE FEDERAL DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION. . . . VENUE FOR ANY LEGAL PROCEEDING RELATING TO OR ARISING OUT OF THIS AGREEMENT SHALL BE DALLAS COUNTY, TEXAS. . . . THIS AGREEMENT SHALL BE INTERPRETED AND CONSTRUED UNDER TEXAS LAWS.	Any issue, dispute, claim or controversy (collectively, the "Claim") between AmeriPlan or any officer, director, employee, manager, member, affiliate, legal counsel and/or advisor of AmeriPlan and IBO/Sales Director, arising out of or relating to the Policies and Procedures Manual then in effect, the IBO and/or Sales Director Agreements or any of the other documents, shall be resolved by binding arbitration at the AmeriPlan headquarters in Plano, Texas. The Claim shall be governed by the laws of the State of Texas.

Both clauses in *Sharpe* were broad and mandatory. The *Sharpe* forum clause covered "any claim, controversy or dispute arising out of or relating to [the] agreement" and provided that the parties "irrevocably submit[ed] to the non-exclusive jurisdiction of the state courts of Dallas County, Texas." The *Sharpe* arbitration clause covered "[a]ny issue, dispute, claim or controversy . . . arising out of or relating to [the agreement]" and provided they "shall be resolved by binding arbitration." Applying, but distinguishing, *Motorola*, this Court held that the

"expansive dispute resolution provision[] cannot be harmonized with the similarly expansive arbitration provision without rendering the dispute resolution provisions meaningless." 769 F.3d at 912–13.

This case is like *Sharpe* but with the additional and compelling fact that the parties also "irrevocably waive[d] any right they may have to object to any action being brought in [a Mississippi state or federal court]." *Sharpe* instructs that the forum clause and arbitration clause cannot be harmonized.

Butler Snow contends *Sharpe* has "little if any relevance to this case because it involved different agreements reached at different times,"[35] but it cites no authority for the proposition that different agreements cannot constitute one contract. Indeed, it is typical in business transactions for parties to reach different agreements at different times but provide that the agreements be treated as one—that is what the parties did in *Motorola*. This Court in *Sharpe* observed that, although it had before it three separate contracts, those contracts "represent the entire agreement by and between the [Sharpe] Parties." *Sharpe*, 769 F.3d at 912. Butler Snow does not successfully distinguish *Sharpe* from this case.

[35] Butler Snow's brief at p. 35.

6. *Watkins v. Planters Bank & Tr. Co.*, No. 4:17-cv-00159, 2018 WL 4211736 (N.D. Miss. Sept. 4, 2018)

Butler Snow cites *Watkins*, a recent but unpublished opinion from a Mississippi federal district court, as a case "applying the principle enunciated in *Motorola* to a case very similar to this one."[36] Actually, *Watkins* is a very different case. A side-by-side comparison of the forum clause and arbitration clause in *Watkins*:

***Watkins*'s Forum Clause**	***Watkins*'s Arbitration Clause**
The 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.	You or we may require that any controversy or claim relating to this agreement, or breach of it, be resolved through arbitration administered by the AAA under its commercial rules. Judgment on any award rendered by the arbitrator may be entered in any court having jurisdiction.

The forum clause in *Watkins* was broad, providing that the courts of Mississippi "will have jurisdiction of any dispute," but the arbitration clause purposefully dovetailed with it: "You or we may require that any controversy or claim . . . be resolved through arbitration . . . . [*and] [j]udgment on any award rendered by the arbitrator may be entered in any court having jurisdiction*." That dovetail language, which harmonized the two clauses in *Watkins*, does not exist here.

[36] Butler Snow's brief at p. 27.

Watkins does not stand for the proposition that the forum clause and arbitration clause here can be harmonized.

7. *White v. ACell, Inc.*, 779 F. App'x 359 (6th Cir. 2019)

Finally, Butler Snow cites the Sixth Circuit's recent but unpublished opinion *White*.[37] *White* is also a very different case. A side-by-side comparison of the forum clause and arbitration clause in *White*:

***White*'s Forum Clause**	***White*'s Arbitration Clause**
You agree that your employment by ACell is governed by the laws of the State of Maryland, without regard for its conflict of laws rules. You agree that any lawsuit relating to your employment with ACell may be filed only in the state court located within Howard County, Maryland, or the federal courts located in the United States District of Maryland, and you agree to submit to venue and personal jurisdiction in those courts.	12.1 Governing Law; Consent to Personal Jurisdiction. This Agreement will be governed by and construed according to the laws of the State of Maryland, as such laws are applied to agreements entered into and to be performed entirely within Maryland between Maryland residents. The Company [i.e., ACell] and I [i.e., White] agree that any dispute between us, regardless of whether such dispute relates to this Agreement, including but not limited to claims of employment discrimination pursuant to federal, state or local statutes or common law, shall be resolved by mandatory binding arbitration . . . Notwithstanding the foregoing, at the Company's [i.e., ACell's] sole option, the Company may forego arbitration of disputes relating to violations of the Sections 1, 2, 4, 5, 6 and 8 of this Agreement and seek judicial enforcement . . . .

The *White* forum clause was narrow, covering only "any lawsuit." By contrast, the *White* arbitration clause was broad, covering "any dispute"; was

[37] Butler Snow's brief at p. 25.

mandatory, providing disputes "shall be resolved by mandatory binding arbitration"; and purposefully dovetailed with the *White* forum clause: "the Company may forego arbitration . . . and seek judicial enforcement," *i.e.* by filing a lawsuit. No dovetail language exists in this case. *White* does not stand for the proposition that the forum clause and arbitration here can be harmonized.

Of course other cases might offer additional instructive examples, but the foregoing is sufficient to show that precedent counsels that the forum clause and arbitration clause here cannot be harmonized. Both clauses are broad, but the forum clause is mandatory and uniquely provides that the parties "irrevocably waive any right they may have to object to any action being brought in [a Mississippi state or federal court]." Because the forum clause completely contradicts the arbitration clause, there is no valid agreement to arbitrate.

D. Butler Snow's alternative reading fails.

Butler Snow does not dispute that the forum clause and arbitration clause conflict. It argues instead that the two clauses can be harmonized by defining "jurisdiction" to mean only "power to decide a case or issue a decree."[38] Instead of "state and federal courts in Mississippi shall have exclusive jurisdiction," Butler

[38] Butler Snow's brief at p. 21.

Snow would read the forum clause to say "state and federal courts in Mississippi are the only courts that can exercise power in this case."[39] Butler Snow's alternative reading would limit the forum clause "to issues that cannot be arbitrated."[40]

Butler Snow's alternative reading fails for three principal reasons.

1. Butler Snow's alternative reading does not account for the forum clause's full text.

The forum clause does not say simply "state and federal courts in Mississippi shall have exclusive jurisdiction." It says "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" *and* the parties "irrevocably waive any right they may have to object to any action being brought in [a Mississippi state or federal court]."

Butler Snow would substitute the words "are the only courts that can exercise power in this case" for the words "shall have exclusive jurisdiction"—but in context that substitution does not accomplish Butler Snow's purpose. It remains that the parties "irrevocably waive any right they may have to object to any action being brought in [a Mississippi state or federal court]." That waiver is not limited to objections to a court's jurisdiction, because the forum clause separately accounts for that:

[39] Butler Snow's brief at p. 22.

[40] Butler Snow's brief at p. 22.

> state and federal courts in Mississippi are [the only courts that can exercise power in this case] 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.*

(Emphasis added.) It follows that, even accepting Butler Snow's proposed reading, the forum clause still specifically precludes arbitration.

2. *Motorola* does not support Butler Snow's alternative reading.

Butler Snow's brief leaves the false impression that this Court in *Motorola* adopted the meaning of "jurisdiction" that Butler Snow urges here. It did not.

The forum clause in *Motorola* similarly said "any suit or proceeding brought hereunder shall be subject to the exclusive jurisdiction of the courts located in Texas"—but this Court's analysis in *Motorola* did not turn on the meaning of "exclusive jurisdiction." This Court's analysis turned instead on 1) the breadth of the arbitration clause in that case and 2) the meaning of "suit or proceeding." 297 F.3d at 396 and n.10. Nothing in *Motorola* suggests that here the language "state and federal courts in Mississippi shall have exclusive jurisdiction" should be read instead to say "state and federal courts in Mississippi are the only courts that can exercise power in this case."

3. *Sharpe* rejected Butler Snow's alternative reading.

This Court in *Sharpe* rejected an alternative reading of the forum clause in that case that would have limited it to claims "not governed by arbitration," concluding that the limitation was "at odds" with the forum clause's "broad" language. *Sharpe*, 769 F.3d at 917. The Court separately observed that a contract's use of language reflecting an intent to submit to the jurisdiction of a court "demonstrates an intent for a court to adjudicate the merits" of a claim. *Id.* (citing *Union Elec. Co. v. AEGIS Energy Syndicate 1225*, 713 F.3d 366, 369 (8th Cir. 2013) ("[B]y agreeing in the endorsement 'to submit to the jurisdiction of the Courts of the state of Missouri,' [the insurer] has agreed to have, in words near the endorsement's beginning, 'any dispute relating to this Insurance or to a CLAIM' resolved in those courts. The endorsement thus entirely supplants the condition's mandatory arbitration provision.")).

Butler Snow necessarily acknowledges that *Sharpe* already rejected its alternative reading by attempting to distinguish the Eighth Circuit case on which *Sharpe* relied. *See* Butler Snow's brief at p. 35–36 (distinguishing *Union Electric*). But whether Butler Snow can factually distinguish that Eighth Circuit case, Butler Snow cannot distinguish *Sharpe*. Of all the cases on which the parties rely here, *Sharpe* is the closest and this Court decided it.

E. The district court's "process" was not flawed.

Butler Snow suggests the district court did not follow the "three-tier process" for contract interpretation under Mississippi law.[41] There is no basis for the suggestion.

Butler Snow is correct that contract interpretation under Mississippi law has three steps: First, a court reads the contract as a whole, applying the "four corners" test and attempting to harmonize its provisions. If a court cannot harmonize a contract's provisions, second, it applies canons of contract interpretation—for example, an ambiguous contract must be construed against its drafter. If canons of contract interpretation do not resolve an ambiguity, third, the court considers extrinsic or parol evidence. *See* Butler Snow's brief at 17–18 (quoting *Pursue*, 558 So. 2d at 351–53; *Royer Homes*, 857 So. 2d at 752–53).

Butler Snow is wrong to suggest that the district court erroneously skipped the first step. Butler Snow contends the district court did not address its argument that the forum clause and arbitration clause could be harmonized.[42] That is not true. The district court expressly addressed Butler Snow's argument and rejected it:

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[41] Butler Snow's brief at p. 17–19, 28–31.

[42] *See e.g.*, Butler Snow's brief at p. 31 ("The District Court did not discuss the proposed harmonization offered by the Butler Snow Parties, nor did it explain why that reading of the forum selection provision was unreasonable."). Butler Snow also contends that "[t]he Receiver's brief [in the district court] did not even discuss [Butler Snow's] proposed reading, much less contend that such a reading could not be harmonized with the arbitration provision." Butler Snow's brief at p. 28. In fact, the Receiver directly addressed Butler Snow's "proposed reading," and argued (as

> The Butler Snow parties endeavor mightily to harmonize the provisions. A close reading, they say, "leads to the inescapable result that the forum selection clause is fully consistent with the arbitration provision." Their strongest argument is that the parties intended to arbitrate their dispute and, subsequently, have any arbitration award confirmed (or vacated) in court.
>
> The parties certainly *could* have written that in their contract. . . . But these parties did not. The plain language of the contract contains no such two-step process.
>
> The Butler Snow parties then assert that "this very case" proves the contract needed both provisions, because "the arbitration provision's validity must be decided by some court." But that brings us back to the central problem. This Court cannot adjudicate the validity of the arbitration provision, because it cannot determine which provision the parties intended to be dispositive.

Butler Snow is also wrong to contend that the district court "prematurely reached the second tier of the process" when it "applied the canon of construing a contract against the drafter."[43] The district court determined the Engagement Contract is ambiguous[44] (first step) before it construed the Engagement Contract against Butler Snow[45] (second step). The district court's "process" was not flawed.

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the district court held) that the Engagement Letter's forum clause is expansive, all-inclusive, mandatory, and cannot be reconciled with the arbitration clause. *See* ROA.177–79.

[43] Butler Snow's brief at p. 29.

[44] ROA.569.

[45] ROA.570 ("Because the forum selection clause and the arbitration provision conflict, this part of the contract must be read favorably to the non-drafting party.").

F. Canons of interpretation support that there is no valid agreement to arbitrate.

The canon holding that an ambiguous contract must be construed against its drafter is well established under Mississippi law. *Rosenfelt v. Mississippi Dev. Auth.*, No. 2017-CA-01120-SCT, 2018 WL 6381173, at *5 (Miss. Dec. 6, 2018); *Swartzfager v. Saul*, 213 So. 3d 55, 64 (Miss. 2017) ("A consistent rule of contract construction is that when the terms of a contract are vague or ambiguous, they are always construed more strongly against the party preparing it.") (internal quotation marks omitted); *Woodruff v. Thames*, 143 So. 3d 546, 554 (Miss. 2014) ("[I]f vagueness or ambiguity exist, the terms must be 'strongly construed' against the drafting party."); *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077, 1085 (Miss. 2000) ("[I]t is a well-known canon of contract construction that ambiguities in a contract are to be construed against the party who drafted the contract."). The district court properly construed the Engagement Contract against its drafter, Butler Snow.

The canon holding that "special provisions inserted in a contract govern over boilerplate provisions" is also well established and equally applicable here. *Miss. Transp. Comm'n*, 753 So. 2d at 1085; *Ronald Adams Contractor, Inc. v. Miss. Transp. Comm'n*, 777 So. 2d 649, 656–57 (Miss. 2000) ("special provisions drafted specifically for this contract supercede [sic] any conflicting standard specifications"). The arbitration clause in the Standard Terms and Conditions "runs

head long" into the forum clause in the Engagement Letter. *See Miss. Transp. Comm'n*, 753 So. 2d at 1085. The Engagement Letter is specifically addressed to Madison Timber Company, Inc. and Lamar Adams, was specifically negotiated by the parties, and was signed. The Engagement Letter is special; the Standard Terms and Conditions is boilerplate. Applying the canon that special provisions control boilerplate provisions, the Engagement Letter's forum clause "supplants" the Standard Terms and Condition's arbitration clause. *Id.*

II. ARBITRATION INHERENTLY CONFLICTS WITH THE POLICIES UNDERLYING THE RECEIVERSHIP.

If this Court agrees that there is no valid agreement to arbitrate, it need not decide whether the Receiver has the power to reject any agreement to arbitrate. *See Manning v. Upjohn Co.*, 862 F.2d 545, 547 (5th Cir. 1989) ("if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented"). If this Court finds there is a valid agreement to arbitrate, it may nevertheless hold that the Receiver has the power to reject it because arbitration inherently conflicts with the policies underlying the receivership.

Butler Snow argues if there is a valid agreement to arbitrate, the Receiver is bound by it because the Engagement Contract is nonexecutory.[46] But whether a contract is executory is only part of the question.[47] Judge Higginbotham offered compelling reasons for rejecting arbitration agreements in Ponzi scheme cases in his concurrence in *Janvey v. Alguire*, 847 F.3d 231 (5th Cir. 2017). *Janvey* involved the Stanford Ponzi scheme, and Judge Higginbotham observed that the arbitration agreements in question were "instruments of Stanford's fraud":

> I am persuaded that the Receiver—standing in the shoes of the Stanford entities—is not bound by the arbitration agreements because those agreements were instruments of Stanford's fraud. Stanford and his co-conspirators exercised complete control over the receivership entities before the scheme collapsed, and that control included the agreements to arbitrate, which were part of the contracts that had to be signed by the entities. The arbitration agreements were central to the Stanford Ponzi scheme with its inherent need for privacy. As part of their employment contracts, the brokers fed the enterprise by the ongoing sale of CDs, for which they were handsomely compensated. Perversely, some employee-defendants claim they were deceived by the Ponzi scheme, yet the privacy of arbitration helped keep it hidden.

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[46] *See* Butler Snow's brief at p. 41–42 (citing *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989) *and Javitch v. First Union Sec., Inc.*, 315 F.3d 619 (6th Cir. 2003)).

[47] Butler Snow cites *Hays* for the proposition that receivers, like bankruptcy trustees, are bound to arbitrate nonexecutory contracts. The district court in *Janvey* read *Hays*, too, but concluded it was not helpful to determine "whether the Employee Defendants' arbitration agreements are contracts that the Receiver can reject, an ability that has deep historical roots for both federal equity receivers and bankruptcy trustees and that continues to be an important tool for both." *Janvey v. Alguire*, No. 09-cv-0724, 2014 WL 12654910, at *7 (N.D. Tex. July 30, 2014); *see also In re RDM Sports Grp., Inc.*, 260 B.R. 905, 914 (Bankr. N.D. Ga. 2001) ("This Court does not read *Hays* to strip a court of all of its discretion. It is the responsibility of the bankruptcy court to determine the effect that arbitration will have on the underlying bankruptcy case. If the bankruptcy court concludes that enforcing an arbitration agreement will threaten the objectives or purposes of the Bankruptcy Code, the court has discretion to maintain jurisdiction over the case.").

Janvey, 847 F.3d at 250 (Higginbotham, J., concurring). "There are outer boundaries to the enforcement of arbitration agreements, and they surely hit shoal water as they encounter the criminal enterprise . . . ." *Id.* at 251.

Janvey is a lot like this case. There, as here, the receiver sued persons who worked in different capacities for the receivership entities and who received salaries, commissions, and bonuses. There, as here, the defendants moved to compel arbitration. There, as here, the receiver argued "there is 'an inherent conflict between arbitration and the [federal receiver] statute's underlying purpose' such that federal law does not permit the court to compel arbitration." *Janvey,* 847 F.3d at 240.

This Court concluded the defendants in *Janvey* could not compel the receiver to arbitrate because the specific receivership entity on whose behalf the receiver sued was not a signatory to the arbitration agreements in question. The majority expressly declined to reach the receiver's argument that "the underlying purpose of the federal equity receivership statutes is at odds with the FAA's mandate in favor of arbitration." *Id.* at 245. The majority nevertheless agreed that there existed "important concerns about undermining Congress's goal of consolidating receivership claims before a single court." *Id.*

Those important concerns exist here and, if this Court finds there is a valid agreement to arbitrate, it may choose to address them in this appeal.

Federal statutes[48] and common law recognize that the purpose of a receivership is "to promote orderly and efficient administration of the estate by the district court for the benefit of creditors." *S.E.C. v. Stanford Int'l Bank, Ltd.*, No. 309-CV-298-N, 2009 WL 8707814, at *3 (N.D. Tex. Oct. 9, 2009) (quoting *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986)); *see also Zacarias*, 945 F.3d at 895 n.27 (citing *Janvey v. Alguire*, No. 09-cv-0724, 2014 WL 12654910, at *17 (N.D. Tex. July 30, 2014) ("The purpose of federal equity receiverships is . . . to marshal assets, preserve value, equitably distribute to creditors, and, either reorganize, of possible, or orderly liquidate.")). The receivership consolidates all claims related to receivership property, providing a centralized forum for their resolution. Arbitration undermines that consolidation and interferes with efficient administration of the receivership estate.

This Court has held that arbitration impermissibly conflicts with federal statutes that serve similar purposes. For example, arbitration can impermissibly conflict with the Bankruptcy Code's "goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from

[48] *See* 28 U.S.C. § 754 ("A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof."); 28 U.S.C. § 1692 ("In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district . . . .").

piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." *See In re Gandy*, 299 F.3d 489, 500 (5th Cir. 2002) (quoting *In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1068 (5th Cir. 1997)).[49] Arbitration can also impermissibly conflict with the Federal Credit Union Act, which was "designed to protect the interests of creditors of defunct federal credit unions." *Nat'l Credit Union Admin. Bd. v. Lormet Cmty. Fed. Credit Union*, No. 1:10-cv-1964, 2010 WL 4806794, at *2–4 (N.D. Ohio Nov. 18, 2010) ("[R]equiring plaintiff to defend creditor claims in arbitration would defeat a primary purpose of the statute, i.e., centralizing the claims process and preserving the limited assets of the defunct credit union.").

The policy justifications that permit a bankruptcy trustee or a liquidating agent to reject an agreement to arbitrate apply with equal force to a federal equity receiver. As the district court observed in *Janvey*, arbitration agreements greatly burden and deplete receivership estates:

> Arbitration decentralizes, deconsolidates, strips the court and the receiver of exclusive jurisdiction over the receivership assets, interferes with the broad powers of both the court and the receiver to adjudicate all issues affecting receivership assets, and opens the door to the possibility of a distribution process that becomes, in part, "first-come, first-served."

[49] Butler Snow argues that these cases do not apply because they involve only "core" bankruptcy issues. The Receiver asserts a claim against Butler Snow for avoidance of fraudulent transfers under the Mississippi Fraudulent Transfer Act. *See* ROA.47–48. Fraudulent transfer claims in this case are like those brought in bankruptcy proceedings. *See Gandy*, 299 F.3d at 494 (debtor "raised actual core bankruptcy issues including, *inter alia*, issues of avoidance of fraudulent transfers").

See Janvey v. Alguire, 2014 WL 12654910, at *21.

These important concerns are not hypothetical in this case. The Receiver's claims against Butler Snow and its co-defendants overlap factually and legally. Trying all the claims in a single action is efficient and in the receivership estate's interests. If the Receiver was required to arbitrate her claims against Butler Snow, she would be forced to prove claims currently pending in a single action in the district court in two distinct forums—the district court and AAA. Not only costly and time-intensive, such duplication of proceedings risks inconsistent findings of fact and law.

This also 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. *See Janvey*, 847 F.3d at 248 (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.").

This Court should not have to address these concerns because it should agree there is no valid agreement to arbitrate. If, however, it reaches the issue, these concerns are compelling enough to serve as an independent basis for rejecting arbitration.

CONCLUSION

This Court should affirm the District Court's order and return this case to the district court so that discovery can commence, and the Receiver can present her case to a jury.

January 23, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of filing to all counsel of record.

Date: January 23, 2020 */s/ Kristen D. Amond*

Kristen D. Amond

CERTIFICATE OF COMPLIANCE

1. This brief contains less than 13,000 words, exclusive of parts exempted by Fed. R. App. P. 32(a)(7)(b). The exact word count is 10,060, exclusive of parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point, Times New Roman font in text and 12-point Times New Roman font in footnotes.

Date: January 23, 2020 */s/ Kristen D. Amond*

Kristen D. Amond