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 REPLY BRIEF OF ALL APPELLANTS

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SUMMARY OF THE ARGUMENT

Mississippi law controls the interpretation of this agreement and provides clear guidance on the relevant issue:

> **No contract provision should be construed as being in conflict with another unless no other reasonable interpretation or construction is possible.**[1]

The trial court Opinion provides no basis for a conclusion that the contract's forum selection and arbitration provisions cannot both be given effect. Mississippi law requires that, if reasonably possible, apparently conflicting contractual provisions must be interpreted in light of the parties' intent so as not to render any portion of the agreement meaningless. If a narrower reasonable interpretation of a provision will give effect to all parts of the contract, the court must adopt that interpretation. Here, such a reasonable narrower interpretation of the forum selection provision is clearly possible. The trial court erred in failing to adopt it.

The Butler Snow Parties' proffered reading of the forum selection clause is based on the *Black's Law Dictionary* meaning of "jurisdiction" and provides an interpretation of "jurisdiction" consistent with the meaning utilized by this Court in

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[1] *Waltman v. Engineering Plus, Inc.,* 264 So. 3d 758, 761 (Miss. 2019) (quoting 17A Am. Jur. 2d Contracts § 374) (emphasis added).

Motorola.[2] Using *Motorola's* language, the forum selection provision means that "the parties must litigate in [Mississippi] courts only those disputes that are not subject to arbitration." This interpretation permits the entire forum selection clause to be harmonized with the arbitration clause, allowing both to be given effect. The trial court did not address the plausibility of this proffered interpretation.

On appeal, the Receiver advances a different version of her argument to the trial court. The Receiver's argument below was based on the forum selection clause as a whole—not on any argument that the third sentence of that clause, which "irrevocably waives" certain objections, by itself conflicts with the contract's arbitration provision. The Receiver now contends that "even accepting Butler Snow's proposed reading [of the second sentence], the forum clause still specifically precludes arbitration." Br. at 30. The revised argument is based solely on the waiver language of the third sentence of the forum selection clause.

The Receiver's newly-discovered argument has no merit: once the Butler Snow Parties' interpretation of the forum selection clause's second sentence is accepted, nothing in the third sentence conflicts with the arbitration clause; the proffered interpretation of the second sentence resolves fully any claimed conflict.

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[2] *Personal Sec. & Safety Sys. Inc. v. Motorola,* 297 F.3d 388, 395 (5th Cir. 2002).

Moreover, the "waivers" of the forum selection clause's third sentence simply have no application to this case. The Butler Snow Parties **do not object** to the Receiver bringing the case in the District Court—since that was an appropriate court to exercise judicial power and resolve arbitrability. Similarly, the Butler Snow Parties **do not object** on the basis that the District Court is an inconvenient forum or lacks jurisdiction to decide the issue of arbitrability. Because the Butler Snow Parties raise none of the objections described in the third sentence, waivers of those objections cannot apply.

Finally, Mississippi law does not require that the Butler Snow Parties' proposed harmonization of these allegedly conflicting provisions negate all possible alternative interpretations. So long as our interpretation is plausible and allows harmonization of all provisions of the contract, it is to be given effect.

ARGUMENT

I. THE TWO PROVISIONS CAN BE RECONCILED. BOTH MUST BE GIVEN EFFECT.

A. The applicable law and key question are not in dispute.

The Receiver concedes (Br. at 12) that Mississippi law controls, and acknowledges that the key issue is as follows:

> The question is simply whether it is possible to read the Engagement Contract to give meaning to both the forum clause and the arbitration clause. (Br. at 13-14.)

Mississippi law requires that, if there are two reasonable interpretations of a contractual provision, the court should give effect to that interpretation which renders effective all provisions of the agreement:

> 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.[3]

This principle has often been restated, most recently by the Mississippi Supreme Court in 2019, which provided the following additional guidance:

> No contract provision should be construed as being in conflict with another unless no other reasonable interpretation or construction is possible.[4]

B. After correctly identifying the relevant question, the Receiver hardly discusses it.

Despite identifying the relevant question on pages 13-14 of her Brief—whether it is possible to harmonize the two allegedly conflicting provisions—the Receiver fails even to mention the proposed interpretation until page 28, and even

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[3] *Goosey v. Goosey*, 48 Miss. 210, 217 (Miss. 1873).

[4] *Waltman,* 264 So. 3d at 761 (quoting 17A Am. Jur. 2d Contracts § 374).

then does not discuss the plausibility of interpreting "jurisdiction" in accord with the meaning supplied by *Black's Law Dictionary*.

For convenience, we quote the forum selection clause, separating its three sentences:

> 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. (ROA.141.)

As discussed at length throughout our Primary Brief, the "exclusive jurisdiction" language of the second sentence can be harmonized with the arbitration provision by interpreting the word "jurisdiction" in accord with *Black's Law Dictionary*, a reading which is also in accord with the clear intent of the parties as shown by the entire agreement. *Black's* teaches that 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* (10th ed. 2014). Placing this definition into the forum selection clause produces the following restatement:

> 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.

As so construed, the second sentence means that the named Mississippi courts **are the only courts that can exercise a court's adjudicatory capacity with respect to disputes or claims.** The sentence does not foreclose a role for arbitrators, since arbitrators do not exercise "jurisdiction."

The agreement itself contemplates that the arbitration provision and forum selection provision are compatible and complementary; the arbitration provision specifically provides that certain disputes as to the award of the arbitrators will be resolved by "a court of law." ROA.145. The forum selection provision provides that state and federal courts in Mississippi are the only courts with power to exercise adjudicatory power as to such issues.

Thus, this case calls for an interpretation of the word "jurisdiction" in accord with that adopted in *Motorola*. *Motorola* concluded that the "exclusive jurisdiction" language in the forum selection provision before it did not preclude arbitration:

> 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.[5]

The Receiver now claims (Br. at 29) that our proffered interpretation does not account for **the full text** of the forum selection provision. The Receiver now bases that argument primarily on the "irrevocably waive" language of the third sentence of the forum selection clause—an argument discussed more completely below.

Moreover, the Receiver's failure to contest the plausibility of our proffered interpretation **of the second sentence** is a tacit concession that the proffered interpretation is plausible and reasonable. The trial court gave no explanation why the Butler Snow Parties' proposed reading of the second sentence of the forum selection provision is not reasonable and plausible. The trial court's Opinion concludes that it is "not possible to reconcile" the provisions. ROA.568. However, that conclusion is not supported by any discussion of the plausibility of the proffered interpretation suggested by the Butler Snow Parties. Nothing in the

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

Opinion indicates that the trial court considered whether the proffered interpretation was plausible and reasonable.

And unless the proffered interpretation was not reasonable and plausible, Mississippi law required that the trial court harmonize the provisions based on that interpretation. *Waltman,* 264 So. 3d at 761.

C. In light of the interpretation of the second sentence, the third sentence has no application in this case.

The Receiver now claims that "even accepting Butler Snow's proposed reading [of the second sentence], the forum clause still specifically precludes arbitration." Br. at 30. This argument differs significantly from the Receiver's argument in the trial court. The Receiver's argument there was that the forum selection provision as a whole conflicted with the arbitration provision. ROA.172, 174-75, 179. In turn, the trial court's Opinion dealt with the provision 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. (ROA.568, emphasis added).

Thus, neither the Receiver nor the trial court suggested that the arbitration provision conflicted with the "waiver" language of the third sentence—if the second sentence was interpreted as suggested by the Butler Snow Parties.

In any event, the argument has no merit because our proffered construction of the second sentence resolves any argument based on the third sentence. The third sentence—read in the context of the proffered interpretation of the second sentence—simply provides that there can be no objection to the named courts **exercising the adjudicatory power of a court with respect to disputes or claims.** That language does not foreclose a role for arbitrators, as arbitrators do not exercise "jurisdiction" in the sense of the definition provided by *Black's Law Dictionary.* Moreover, the third sentence has no application in this case. The Butler Snow Parties **do not object** to the Receiver having filed the case in the District Court or to that court exercising jurisdiction to determine if the case is required to be arbitrated, as contemplated by the second sentence. Similarly, the Butler Snow Parties **do not object** on grounds that the District Court is an inconvenient forum or lacks jurisdiction to make that determination. Accordingly, **there are simply no relevant objections to waive**, irrevocably or otherwise, and the third sentence has no application.

Thus, harmonizing the second sentence with the arbitration provision resolves any possible conflict with the third sentence. Even if there were other possible constructions of the third sentence, Mississippi law requires use of this

plausible construction of that language to harmonize all provisions of the agreement so as not to render any of its provisions meaningless.[6]

II. *MOTOROLA* AND *SHARPE* BOTH SUPPORT HARMONIZING THE PROVISIONS BY CONSIDERING THE INTENT OF THE PARTIES AS SHOWN BY THE LANGUAGE OF THE ENTIRE AGREEMENT.

A. The Receiver's proposed "broad language" rule ignores the process outlined in *Motorola*.

The Receiver argues throughout that an arbitration agreement is always invalidated by a forum selection provision that can be initially characterized as "broad." *E.g.*, Br. at 18, 24, 27. **But that suggestion ignores the fact that forum selection provisions are often subject to more than one interpretation.** Before a forum selection provision can be labeled as either "narrow" or "broad," Mississippi law requires a court to consider the entire document and determine whether the provision is subject to a narrower interpretation which can be harmonized with the other provisions of the contract. Mississippi law requires that "[p]articular words should not control; rather, the entire instrument should be examined."[7] The purpose of the examination, of course, is to give effect to "every word" of the document; that is, to accomplish the parties' intent.[8]

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[6] *Wilson Industries, Inc. v. Newton County Bank*, 245 So. 2d 27, 30 (Miss. 1971).

[7] *Smith v. Maggie Mae, L.P.*, 225 So. 3d 1243, 1250 (Miss. Ct. App. 2016).

[8] *Rubel v. Rubel*, 75 So. 2d 59, 65 (Miss. 1954); *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352-53 (Miss. 1990).

Thus, the Receiver's "broad language" argument ignores the crucial step required by Mississippi law: a determination whether there is a plausible narrow construction of the forum selection provision which can be harmonized with the arbitration provision.

B. *Motorola* demonstrates the analysis required.

The Receiver attempts to downplay the comparison between this case and *Motorola* by claiming that the "*Motorola* forum clause was narrow." Br. at 18. But that argument simply ignores the process *Motorola* used to reach that narrow interpretation. Indeed, *Motorola* specifically noted that the forum clause in that case **could have been read broadly**:

> 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.[9]

Thus, the Receiver's claim that "*Motorola* forum clause was narrow" ignores the fact that the clause became "narrow" only after (and because) the Court **chose** a plausible narrow construction of the provision that was consistent with the entire agreement, including the arbitration provision. As the *Motorola* Court explained:

> [W]e 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.** . . . Given our conclusion

[9] 297 F.3d at 395.

> that the arbitration provision . . . applies to all claims . . . **we must therefore interpret the forum selection provision . . . in a manner that is consistent with the arbitration provision.**[10]

C. *Sharpe* is fully consistent with *Motorola.*

1. The legal principles enunciated in *Sharpe*.

Sharpe[11] recognized with approval many of the cases we have cited, including *Motorola* and *Bank Julius Baer*. The *Sharpe* Court's favorable citation of *In re Winter Park Construction, Inc.*, 30 S.W.3d 576, 578 (Tex. App. 2000), is particularly significant:

> **Taking the provisions in context,** they simply provide that venue of any suit over the contract will be in Harrison County and that Texas law will govern in any such litigation. **Thus, the provisions specifically apply to lawsuits, not to arbitration. A contractual choice of law provision will not supersede or obviate an arbitration provision unless the choice of law provision specifically excludes arbitration.** *See In re L & L Kempwood Assocs., L.P.,* 9 S.W.3d 125, 128 (Tex.1999). **The choice of law and venue provisions here do not contain any language explicitly excluding arbitration.** (Emphasis added.)

Simply put, the legal principles in *Sharpe* accord with *Motorola, Bank Julius Baer,* and the position we have advanced in this case.

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[10] *Id*. (emphasis added).

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

2. *Sharpe*'s analysis of the different versions of the language in that case.

Because the operative language of the contract varied from plaintiff to plaintiff, *Sharpe* made two different decisions on whether provisions could be harmonized. *Sharpe* noted that the original agreement of three plaintiffs contained elaborate dispute resolution provisions, "which take up close to a full page and are emphasized through the use of all caps, establish[ing] a two-tiered approach to resolving claims."[12] As the Court noted:

> The dispute resolution provisions in the Sharpe/Moen/Downard Sales Director 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).[13]

Because those lengthy dispute resolution provisions were "far more extensive than a forum selection clause," the *Sharpe* Court concluded that the "full dispute resolution process must be given effect as creating something beyond that."[14] The Court held that such lengthy and elaborate dispute resolution provisions could not be harmonized with the arbitration provision.

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[12] *Id*. at 916.

[13] *Id.* at 918 (emphasis added).

[14] *Id*. at 916-17 (emphasis added). The "side-by-side" comparison set out in the Receiver's Brief (at page 24) includes only a small portion of the lengthy provision held to be inconsistent with the arbitration clause.

The agreements of the fourth plaintiff in *Sharpe* contained language somewhat like this case: an arbitration clause and a simple forum selection clause. The Court concluded that "Guarisco's limited forum selection clause can be reconciled with the arbitration provision" and required arbitration.[15]

Thus, *Sharpe*'s conclusions as to the varying provisions at issue in that case provide little guidance, if any, as to whether the particular language in this case can be harmonized—other than that the case enforced the arbitration agreement as to the plaintiff with the less complex forum selection provision.

3. The District Court's reading of *Sharpe*.

The trial court Opinion stated that *Sharpe* had distinguished *Motorola* as being inapplicable in cases involving forum selection provisions "with more expansive language." **Importantly, nothing in *Sharpe* suggests that the harmonization process required by Mississippi law[16] and applied in *Motorola* can be omitted in cases involving language that might initially be viewed as "expansive."** *Sharpe* simply concluded, after examining the lengthy dispute

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[15] *Id*. at 918.

[16] *Sharpe*, which was governed by Texas law, dealt with arbitration agreements **unilaterally imposed on the plaintiffs many years after the first agreement**. 769 F.3d at 913. Thus, there was no reason to apply any rule, such as the one embodied in Mississippi law, requiring harmonization of allegedly conflicting provisions included by parties **in the same contract**—who "must be supposed to have the same general purpose and object in view in all its parts." *Goosey,* 48 Miss. at 217.

resolution provision in contracts of three plaintiffs, that the provision was "more than a forum selection provision" and was "expansive." *Sharpe* provides no basis for omitting the harmonization analysis required by Mississippi law**—since such analysis may lead to a reasonable and less expansive reading.**

4. *Sharpe's* citation of *Union Electric.*

Two points should be made with respect to *Sharpe's* reference to *Union Electric Co. v. AEGIS Energy Syndicate 1225*, 713 F. 3d 366 (8th Cir. 2013) and that court's interpretation of the word "jurisdiction" in the insurance agreement at issue.

First, *Sharpe* cannot be read to mean that use of the word "jurisdiction" in a forum selection provision always "demonstrates an intent for a court to adjudicate the merits of the claims." *Sharpe*, 713 F. 3d at 917. After all, any such rule establishing a universal meaning of "jurisdiction" applicable to all forum selection provisions would be completely inconsistent with *Motorola*—which interpreted "exclusive jurisdiction" to have a more limited meaning. Moreover, any rule interpreting a forum selection provision based on one "particular word"—rather than basing the interpretation of the provision in light of the parties' intent as shown by the entire agreement—would be inconsistent with Mississippi law.[17]

[17] *E.g., Epperson v SOUTHBank*, 93 So. 3d 10, 18 (Miss. 2012); *Pursue*, 558 So. 2d at 352; *Smith*, 225 So. 3d at 1250.

Second, *Union Electric* did not follow the Mississippi law requiring that plausibly consistent provisions be harmonized; instead, it applied Missouri insurance law construing policy provisions in favor of the insured. 713 F.3d at 368. Moreover, *Union Electric* noted that interpreting "jurisdiction" in a forum selection provision in a more limited fashion "may not be entirely implausible in the abstract," *id*. at 369—thus providing further support to the plausibility of such an interpretation.

III. THE DISTRICT COURT SIMPLY DID NOT ADDRESS WHETHER THE TWO PROVISIONS CAN BE HARMONIZED.

The trial court stated that "it is not possible to **reconcile**" the two provisions.[18] But such a conclusion is not at all the same thing as attempting to **harmonize** the provisions. "Harmonize" (as used in the many Mississippi cases cited above) requires that a court consider the entire agreement and determine—in light of the parties' intent as reflected in that agreement—whether one of the clauses can be interpreted more narrowly as to make all clauses effective. A court must attempt to harmonize provisions before drawing any conclusion as to whether they can be "reconciled."

The trial court did not engage in that harmonization process. Thus, the decision of the trial court did not follow the basic principle of Mississippi law:

[18] ROA.568.

> No contract provision should be construed as being in conflict with another unless no other reasonable interpretation or construction is possible.[19]

The trial court Opinion simply does not discuss the plausibility of the proffered interpretation **at all**—much less explain why it not plausible or possible. Similarly, the Receiver has offered **no explanation** as to why the proffered interpretation is not plausible.

The Opinion does offer a different rationale for the decision. It states that the Butler Snow Parties—one of which is a "sophisticated law firm"—"*could* have written" the agreement to make the provisions consistent. ROA.569 (emphasis in original).[20] The Opinion then concludes that the "plain language" of the agreement does not contain what it refers to as the "two-step process" construed by *Motorola*.

Assuming *arguendo* that the contract could have been drafted more clearly, that does not provide a basis for bypassing the fundamental requirement of Mississippi law that allegedly conflicting provisions in a contract must be harmonized if possible. Indeed, the need to apply that principle of harmonization

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[19] *Waltman,* 264 So. 3d at 761 (quoting 17A Am. Jur. 2d Contracts § 374).

[20] The Opinion attributed significance to the fact that the two provisions are found in "distant and in fact distinct parts" of the contract. ROA.569. However, the entire contract is only eight pages long. It constitutes one contract in the eyes of the law. *See Gilchrist Tractor Co. v. Stribling*, 192 So. 2d 409, 417 (Miss. 1966) and our Primary Brief at page 12.

typically finds application in precisely those situations where imperfect drafting has created a lack of clarity. Any rule that language that could have been drafted more clearly will be construed against the drafter is completely in conflict with Mississippi law. Few, if any, of the contracts discussed in the cited Mississippi cases presented ideally crafted language. **Less-than-perfect drafting simply does not mean that the provisions cannot be harmonized; instead, it creates a need for harmonization, if possible—**as shown by *Motorola*, in which the Court engaged in "reconciling apparently conflicting provisions and attempting to give effect to all of them, if possible."[21]

Moreover, any rule construing imperfectly drafted agreements against the drafter is also inconsistent with the Federal Arbitration Act. As the Supreme Court recently noted in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019):

> The [*contra proferentem*] rule applies "only as a last resort" when the meaning of a provision remains ambiguous after exhausting the ordinary methods of interpretation.

Thus, *contra proferentem* could be applied in this case only as a last resort—**after it had been determined that the provisions could not be harmonized** as required by Mississippi law.

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[21] 297 F.3d at 395 (quoting *Richland Plantation Co. v. Justiss–Mears Oil Co., Inc.,* 671 F.2d 154, 156 (5th Cir. 1982)).

Here, the proffered narrower interpretation based on the definition of jurisdiction in *Black's Law Dictionary* is plausible, reasonable, and consistent with the apparent intent of those who included both a forum selection and an arbitration provision in the same agreement: "the parties intended the clause to apply only in the event of a non-arbitrable dispute that must be litigated in court."[22] Thus, as in *Motorola,* the provisions must be harmonized based on the clearly expressed intention that disputes should be arbitrated.

IV. INTENT, AS SHOWN BY THE ENTIRE AGREEMENT, MATTERS.

Like any party opposing arbitration, the Receiver approaches the interpretation of the Engagement Contract looking for inconsistencies to invalidate the arbitration clause. In contrast, the Butler Snow Parties seek to harmonize the provisions. **These positions are not legal equivalents.** That is because Mississippi law requires harmonizing the provisions if possible, to effectuate the intent of the parties:

> The parties make the entire contract and must be supposed to have the same general purpose and object in view in all its parts.[23]

Here, the overall intent of the parties is clear. Mississippi law does not favor hyper-technical arguments based on "particular words" advanced for the purpose

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[22] *Motorola,* 297 F.3d at 396.

[23] *Goosey*, 48 Miss. at 217.

of rendering provisions meaningless surplusage.[24] Instead, Mississippi law requires that reference be made to the entire agreement in an effort to determine the intent of the parties and, if possible, render all provisions of their agreement meaningful.

Consistent with this basic principle of Mississippi law, many courts across the country[25] have recognized that purported conflicts between forum selection and arbitration provisions in the same agreement are unlikely to reflect an intention to vitiate arbitration provisions and, accordingly, have adopted the principle noted in *Motorola* and clearly stated in *Bank Julius Baer*:

> **Under our cases, if there is a reading of the various agreements that permits the Arbitration Clause to remain in effect, we must choose it**. . . . **Moreover, we "cannot nullify an arbitration clause unless the forum selection clause specifically precludes arbitration."** (Quoting *Motorola)* (emphasis added)).[26]

The principle that a forum selection clause will not be interpreted to vitiate an arbitration clause unless an intent not to arbitrate is clearly expressed is consistent with a basic principle of Mississippi law:

> **[A] contract must be considered as a whole, and from such examination the intent of the parties must be gathered. Such**

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[24] *E.g., Epperson*, 93 So. 3d at 18; *Pursue*, 558 So. 2d at 352; *Smith*, 225 So. 3d at 1250.

[25] See Primary Brief at footnotes 14 and 15.

[26] *Bank Julius Baer & Co., Ltd. v. Waxfield, Ltd.,* 424 F.3d 278, 284 (2d Cir. 2005).

> **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**.[27]

Judge Mills applied this very principle in *Watkins v. Planters Bank & Tr. Co.,* 2018 WL 4211736, at *1 (N.D. Miss. Sept. 4, 2018), noting that it represented the rule in this Circuit:

> 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." **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.** (quoting *Motorola*, 297 F.3d at 396 n. 11 (emphasis added)).

The rule makes sense. Parties who execute contracts containing both arbitration and forum selection provisions can be assumed, in the absence of a clear indication to the contrary, to have intended both provisions to apply. It is highly improbable, and should not be assumed, that the parties intended a forum selection clause to invalidate an arbitration clause in the same contract.

V. THE RECEIVER'S ANALYSIS OF CASES DOES NOT SUPPORT HER POSITION.

The Receiver's attempt to distinguish some of the cases which have been cited provides no support for the Receiver's position.

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[27] *Roberts v. Roberts*, 381 So. 2d 1333, 1335 (Miss. 1980).

A. The Receiver's analysis of other cases.

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

The Receiver (at page 20) argues that the pro-arbitration outcome in *Bank Julius Baer* was attributable to a "narrower" forum clause. The Receiver ignores the critical point: the court consciously **chose a narrow construction of a forum selection provision that could have been read more broadly** to harmonize it with the arbitration provision:

> It may be read, consistent with the Arbitration Agreement, in such a way that the Bank and Waxfield are required to arbitrate their disputes, but that to the extent the Bank files a suit in court in New York—for example, to enforce an arbitral award, or to challenge the validity or application of the arbitration agreement—Waxfield will not challenge either jurisdiction or venue.[28]

The Receiver (Br. at 21) argues: "Unlike here, nothing in the *Bank Julius* forum clause specifically precluded arbitration." Suffice it to say that the forum selection provision here, including the third sentence, does not preclude—or even mention—arbitration.

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

Applied Energetics deals with **a subsequent agreement revoking or displacing an earlier agreement**. The *Applied Energetics* court plainly said that

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[28] *Bank Julius Baer*, 424 F.3d at 285.

the case constituted an "alternative scenario" to that contemplated by *Bank Julius Baer* in which parties "revoke an earlier agreement to arbitrate by executing a subsequent agreement." 645 F.3d at 524-25. That situation—the effect of a later agreement on an arbitration clause in an earlier agreement—involved issues and legal principles very different from the interpretation of two provisions contained in the same agreement.

3. *ADC Ltd NM v. Zeppelinn Energy, LP*, 2013 WL 12126246 (W.D. Tex. May 28, 2013).

The Receiver's observation that the arbitration clause in *Zeppelinn* was elective for the defendant is irrelevant. The court provided its own explanation for its decision. The forum clause provided that the courts of Texas had "exclusive jurisdiction to hear and determine all claims, disputes, controversies and actions" and the parties "consent[ed]" and "submit[ted]" to the "jurisdiction of said courts." *Id*. at *1-2. The court explained:

> 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. . . . Their purpose 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.)

4. *Watkins v. Planters Bank & Trust Co.*, 2018 WL 4211736 (N.D. Miss. Sept. 4, 2018).

Watkins—decided by a judge familiar with Mississippi law—explained its decision by stating that "'a forum selection [clause] cannot nullify an arbitration clause unless the forum selection clause specifically precludes arbitration.'" 2018 WL 4211736 at *1 (quoting *Motorola*). The Receiver ignores that language and attempts to distinguish *Watkins* by suggesting that the court compelled arbitration only because the arbitration clause "dovetailed" with the forum clause. This is not only irrelevant but it also completely ignores the fact that language in the arbitration clause in this case also "dovetails" with the forum selection language. ROA.145-46.

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

The Receiver attempts to explain the pro-arbitration result in the case by arguing that the forum clause was "narrow"—even though the court **chose** a permissible narrow reading of the provision to allow harmonization with the arbitration provision. The case relies on the cases that "generally have interpreted the contractual provisions to complement, rather than contradict, each other"—including *Bank Julius Baer* and *Motorola*. The *White* court noted that Maryland "attempt[s] to construe contracts as a whole, to interpret their separate provisions harmoniously, so that, if possible, all of them may be given effect, rather than rendering them void." *Id*. at 365 (internal marks omitted). The court concluded

that that "[the forum selection clause] is best interpreted in accordance with the approach taken by the Second and Third Circuits interpreting analogous provisions," citing *Bank Julius Baer* and *Patten*.[29]

B. The numerous cases not discussed by the Receiver.

The Receiver does not even attempt to distinguish most of the cases cited in our Primary Brief (at pages 24-28) which enunciate the same harmonization process followed in *Motorola.*

VI. THE CANONS OF CONSTRUCTION DO NOT APPLY.

The Receiver's Brief (at page 32) concedes that, under Mississippi law, the canons of construction—such as canons relating to "boilerplate" and construing ambiguous documents against the drafter—are not applied if the contract provisions can be harmonized. The two provisions can be harmonized, and any further discussion of the canons is unnecessary.

VII. THERE IS NO BASIS TO CREATE ANY POLICY EXCEPTION TO THE FAA.

As noted in our Primary Brief, the Supreme Court, in refusing to create a policy exception to the FAA, recently restated 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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[29] *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc*., 819 F.2d 400, 407 (3d Cir. 1987) (cited in *Motorola*), referenced in our Primary Brief at footnote 14.

A. The policy arguments that this court should create a new policy exception to free Receivers from arbitration agreements.

Our Primary Brief anticipated and addressed these policy arguments.

B. The "used by a swindler to conceal" policy argument.

The Receiver invokes Judge Higginbotham's concurrence in *Janvey v. Alguire*, 847 F.3d 231, 250 (5th Cir. 2017), which suggested that a court might not enforce arbitration agreements used by the perpetrator of the Ponzi scheme and which "were central to the Stanford Ponzi scheme with its inherent need for privacy." But even if this Court were to adopt such a policy exception to the FAA, and it should not for the reasons noted in our Primary Brief (at page 49), the facts here would not fit such an exception. Here, there is no basis to suggest that this arbitration agreement was used by any perpetrator of a Ponzi scheme or was intended to serve any such purposes.

C. The newly-advanced "duplicate litigation" policy argument.

1. The purported assignments.

The Receiver, after the appeal of this case and while these proceedings were stayed in the District Court, filed an Amended Complaint against the other defendants. That Amended Complaint should have no bearing on this appeal. [30] The Amended Complaint recites that unnamed investors "have assigned claims

[30] The Amended Complaint, referenced by the Receiver's Brief at footnote 10, is not in the record in this appeal.

against Defendants to the Receivership Estate." However, no assignments are attached, no assignors are identified, and there is no indication as to the basis for claims of any assignor against the Butler Snow Parties.

2. The purported assignments do not justify creating a policy exception to the FAA.

The Receiver now claims in this appeal that she can sue the Butler Snow Parties twice for the same damages: first, as receiver for the entities in receivership, and second, as the assignee of unidentified investors. The Receiver contends that that she has the right to litigate the claims of the unidentified investors in the District Court. She argues that arbitration of the receivership's claims should be denied in order to avoid duplicate litigation. Br. at 40.

Whether any assigned claims should be arbitrated or litigated is not before this Court and is to be determined by the arbitration panel. *See Edwards v. Doordash, Inc.*, 888 F.3d 738, 743–44 (5th Cir. 2018). Here the arbitration clause incorporates AAA rules, and delegates questions regarding the clause's scope to the arbitrators. *Id.*; ROA.145-46, 160.

In any event, an arbitration agreement should still be enforced even it is assumed that additional proceedings may be required. "[T]he Arbitration Act requires district courts to compel arbitration of . . . arbitrable claims when one of the parties files a motion to compel, even when the result would be the possibly

inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985).

3. Numerous legal questions arise from the Receiver's claim to sue for the same loss suffered by the investors.

While the Receiver can assert claims for damages suffered by the entities in receivership, such as fees and expenses, it is a far different thing for the Receiver to assert the claims based **on the Receivership Estate's own liabilities** as asserted throughout the Complaint. ROA.44, 46-47, 49, 52-53. As noted in *Latitude Solutions, Inc. v. DeJoria,* 922 F.3d 690, 696 (5th Cir. 2019):

> Citing *In re American Tissue*, the *Reneker* Court held the receiver lacked Article III standing because "**the only harm alleged is the Receivership Estate's inability to satisfy its liabilities."** *Id*. at *6. The court held the receiver did not have Article III standing to sue for damages his clients did not suffer, stating "[t]he Receivership Estate's financial inability to satisfy liabilities owed to investors as a result of securities-laws violations harm[ed] the investors," not the receiver. *Id*. (Emphasis added.)

See also SEC v. Stanford International Bank, Ltd., 927 F.3d 830, 841 (5th Cir. 2019). *But cf. Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 899 (5th Cir. 2019) (dicta).

The legal questions that arise from the Receiver's "duplicate loss" argument are obvious. Are recoveries of a receiver from a particular defendant to be paid to the investors injured by that particular defendant or divided among all investors? Can an investor who did not assign a claim sue for his own losses? Can a

defendant be required to pay for the same loss twice—once to the receiver and again to an injured investor?

This appeal is not the place to resolve these issues. What is clear, however, is that, given these uncertainties, this is not the case in which to consider the unusual step of creating a policy exception to the FAA.

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 24th day of February, 2020, an 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 6,402 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).

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