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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re Stephanie Banks Debtor.	Case No. 14−35264−rld13 **DEBTOR'S RESPONSE IN OPPOSITION TO AD ASTRA AND RAPID CASH'S MOTION TO COMPEL THE COURT'S ORDER TO SHOW CAUSE TO ARBITRATION**

FACTUAL BACKGROUND

I. Arbitration agreement

Prior to filing bankruptcy, debtor took out a payday loan. Doc. #29, Ex. A, pg. 1. She agreed to a $30 prepaid finance charge and a 153.73% annual interest rate. *Id.* She also agreed to an arbitration provision. *Id.* at pg. 3-5. In the event of a lawsuit, the provision allows a defending party to "elect to demand arbitration–". *Id.* The provision requires both parties to pay their own upfront arbitration fees and costs, with the caveat that the defending party "will consider any good faith request" to pay debtor's portion of any non-waivable fees or costs. *Id.* at 4.

II. Notice of automatic stay

On September 16, 2014, debtor filed for chapter 13 bankruptcy protection. Doc. #1. Ad Astra Recovery Services, Inc. ("Ad Astra") and Rapid Cash Payday Loans ("Rapid Cash") both received notices of the automatic stay, chapter 13 plan, and order confirming plan. Doc. #10, #12, #23.

III. Demand for payment

Ad Astra, acting as agent for its client Rapid Cash, sent debtor a collection letter dated August 17, 2015. Doc. #24, Ex. C. The letter threatened to damage debtor's credit if she didn't pay. *Id.* Debtor initially considered paying Ad Astra and Rapid Cash to stop future harassment and avoid harm to her credit. Banks decl. ¶ 2. However, making a payment to Ad Astra and Rapid Cash would have jeopardized her ability to make her monthly plan payments to the chapter 13 trustee. *Id.*

IV. Order to show cause

Debtor ultimately referred the matter to her bankruptcy attorney, who filed a motion for order to show cause for contempt of the automatic stay. Doc. #24. On September 18, 2015, the Court issued an order to show cause why Ad Astra and Rapid Cash should not be held in contempt for violation of the automatic stay. Doc. #25.

V. Response to order to show cause

On October 23, 2015, Ad Astra and Rapid Cash filed a response to the order to show cause. Doc. #27. The response argued that Ad Astra and Rapid Cash's violation of the automatic stay was caused by human error and asked the Court to "exercise its discretion in a just and

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equitable manner in this dispute." *Id.* at pg. 4-5. Ad Astra and Rapid Cash's October 23 response did not reserve any rights to later elect arbitration.

VI. Motion to compel arbitration

On December 10, 2015, Ad Astra and Rapid Cash sought to compel the order to show cause to arbitration. Doc. #29. Debtor's disposable income is committed to her chapter 13 plan payment and she cannot afford to pay any upfront arbitration fees or costs. Banks decl. ¶ 3. Neither debtor nor debtor's bankruptcy attorney has the time, resources, or experience necessary to enforce the order to show cause in arbitration. *Id.*; Schumacher decl. ¶ 2. Debtor cannot find any attorneys willing to represent her in arbitration now that this matter is mid-litigation in bankruptcy court. Banks decl. ¶ 3.

LEGAL POINTS AND AUTHORITIES

I. Waiver of the right to arbitrate

"A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Fisher v. A.G. Becker Paribas Incorporation*, 791 F.2d 691, 694 (9th Cir. 1986).

II. FAA and the Bankruptcy Code

An order to show cause for contempt of the automatic stay is a core proceeding. *Johnston Envtl Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 617 (9th Cir. 1993) (recognizing that an automatic stay violation was a "core proceeding", and, "entirely inappropriate for resolution in any court other than a bankruptcy court.")

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A court's denial of a motion to compel arbitration of a core bankruptcy proceeding is reviewed on an abuse of discretion standard. *Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1020 (9th Cir. 2012).

A. Legal standard on a motion to compel

Courts may compel core bankruptcy proceedings to arbitration so long as the parties can effectively vindicate their rights in an arbitral forum, and so long as arbitration would not inherently conflict with the purposes of the Bankruptcy Code. *Shearson/American Express v. McMahon*, 482 U.S. 220, 242 (1987); *Thorpe*, 671 F.3d at 1020.

The Ninth Circuit uses a case-by-case analysis to determine whether compelling arbitration would conflict with the Bankruptcy Code under the totality of the circumstances at issue. *Thorpe* at 1022-1027.

The two most recent Ninth Circuit opinions concerning arbitration of bankruptcy-related actions upheld orders denying motions to compel. *Thorpe*, 671 F.3d at 1020 (affirming denial of motion to compel arbitration); *Ackerman v. Eber (In re Eber)*, 687 F.3d 1123 (9th Cir. 2012) (same).

B. Arbitration of alleged automatic stay violations

Courts regularly exercise their discretion to deny motions to compel arbitration of automatic stay enforcement actions. *Merrill v. MBNA America Bank, N.A. (In re Merrill*), 343 B.R. 1, 9 (Bankr. D. Me. 2006) ("ordering arbitration of Merrill's stay violation claim would

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conflict with this court's duty to safeguard the automatic stay's fundamental protection for debtors.").[1]

See also Knepp v. Credit Acceptance Corp. (In re Knepp), 229 B.R. 821, 845 (Bankr. N.D. Ala. 1999) (denying motion to compel arbitration of debtor's claim against creditor) (reasoning that a conflict existed between the FAA and the Bankruptcy Code because arbitration was not economically practical for the debtor).

1. The Second Circuit's *Hill* opinion

The Second Circuit's 2006 holding in *MBNA Am. Bank v. Hill*, 436 F.3d 104 (2d Cir. 2006) is consistent with the Ninth Circuit's 2012 holding in *Thorpe*. The *Hill* holding states:

> "Arbitration of Hill's automatic stay claim would not necessarily jeopardize or inherently conflict with the Bankruptcy Code. We hold that the bankruptcy court did not have discretion to deny the motion to stay or dismiss the proceeding in favor of arbitration."

Hill, 436 F.3d at 110.

The *Hill* opinion recognized that the claim at issue presented a "close case" but ultimately granted the motion to compel arbitration based on three potential conflict factors. *Hill*, 436 F.3d at 109-110. The *Hill* case involved a creditor that continued auto-billing customers despite the

[1] *See also Zimmerli v. Ocwen Loan Servicing, LLC*, 432 B.R. 238 (Bankr. N.D. Tex. 2010) (denying creditor's motion to compel automatic stay violation claim to arbitration); *In re Cavanaugh v. Conseco Fin. Serv. Corp.*, 271 B.R. 414 (Bankr. D. Mass. 2001) (same); *Moses v. CashCall, Inc.*, 781 F.3d 63 (4th Cir. 2015) (denying payday lender's motion to compel chapter 13 debtor's declaratory relief claim to arbitration); *Hooks v. Acceptance Loan Co.*, 2011 U.S. Dist. LEXIS 76544, at *15 (M.D. Ala. July 14, 2011) (denying collector's motion to compel because "–arbitration of § 105(a) contempt proceedings would inherently conflict with the Bankruptcy Code, undermining the bankruptcy court's authority to enforce its orders."); *Grant v. Cole (In re Grant)*, 281 B.R. 721 (Bankr. S.D. Ala. 2000) (denying motion to compel arbitration of contempt claim arising under section 362).

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fact that they had sought bankruptcy protection. *Hill*, 436 F.3d at 106. No published opinion in the Ninth Circuit has adopted *Hill's* three factors as exclusive. Of the five in-circuit opinions to have cited *Hill*, none involved automatic stay violations and none relied on *Hill's* analysis.[2]

C. The purposes of the automatic stay

In 1978, Congress enacted the Bankruptcy Reform Act, which created the Bankruptcy Code pursuant to the constitutional imperative "to establish … uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8. The purpose of the Bankruptcy Code was, in part, to provide debtors a "fresh start" by protecting them from subsequent collection efforts. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 509 (9th Cir. 2002).

1. The automatic stay's remedial scheme

The Federal Rules of Bankruptcy Procedure allow debtors to enforce the automatic stay without incurring filing fees or personal service costs. FRBP 7004, 9014, 9020. The Ninth Circuit (sitting en banc) recently explained that Congress sought to encourage private enforcement lawsuits under the automatic stay:

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[2] The five in-circuit opinions plaintiff's counsel was able to access on Lexis Advance that cite *Hill* are: *Ackerman v. Eber (In re Eber)*, 687 F.3d 1123 (9th Cir. 2012) (affirming denial of motion to compel § 523 claim); *Ace Ins. Co. v. Smith (In re BCE West, L.P.)*, 2006 U.S. Dist. LEXIS 67761 (D. Ariz. Sept. 20, 2006) (involving non-core insurance coverage dispute); *New Cingular Servs. v. Burkart (In re Wire Comm Wireless, Inc.)*, 2008 U.S. Dist. LEXIS 79273, 2008 WL 4279407 (E.D. Cal. Sept. 15, 2008) (involving state law contract claim headed to commercial arbitration before bankruptcy was commenced); *In re 72 Townsend, LLC*, 2010 Bankr. LEXIS 1366, 2010 WL 1689564 (Bankr. N.D. Cal. Apr. 22, 2010) (same); *Rico Corp. v. Arundotech, LLC (In re Arundotech, LLC)*, 2009 Bankr. LEXIS 1705, 51 Bankr. Ct. Dec. 192, 2009 WL 7809008 (B.A.P. 9th Cir. May 4, 2009) (same).

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> "We do not have legislative history that speaks directly to Congress' purpose in enacting § 362(k). It seems evident, however, that **Congress sought to encourage injured debtors to bring suit to vindicate their statutory right to the automatic stay's protection**, one of the most important rights afforded to debtors by the Bankruptcy Code."
>
> "By providing robust remedies for debtors who prevail, the statute acts to deter creditors from violating the automatic stay in the first instance. **That legislative plan can be carried out, of course, only if injured debtors are actually able to sue to recover the damages that § 362(k) authorizes.**"

America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard), 803 F.3d 1095, 1100 (9th Cir. 2015) (emphases added).

The purpose of the automatic stay is to give debtors a breathing spell from the collection efforts of creditors. *MacDonald v. MacDonald (In re MacDonald)*, 755 F.2d 715, 717 (9th Cir. 1985).

The automatic stay is fundamental to the Bankruptcy Code because it constitutes "an injunction issuing from the authority of the bankruptcy court" to immediately halt all collection efforts against debtors. *Boucher v. Shaw*, 572 F.3d 1087, 1092 (9th Cir. 2009); *Gruntz*, 202 F.3d at 1082; § 362(a)(6); *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1214 (9th Cir. 2002) (§ 362 is "one of the most important protections in bankruptcy law.")

In 1984, Congress expressly conferred a private right of action under § 362, in response to widespread criticism of the need to make it easier for debtors to remedy stay violations. *Walls*, 276 F.3d at 509.

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ARGUMENT

I. Ad Astra and Rapid Cash's motion to compel should be denied because they waived their right to arbitrate

The existence of Ad Astra and Rapid Cash's right to compel arbitration is evident on the face of the payday loan agreement. Doc. #29, Ex. A, pg. 3-5. About half of the entire agreement is dedicated solely to arbitration. *Id.* Ad Astra and Rapid Cash's October 23 response was thoroughly researched, indicating they knew or should have known of their right to elect arbitration when they filed it.[3]

The October 23 response was completely inconsistent with a defending party's election to demand arbitration under the payday loan agreement. The response repeatedly contemplated adjudication of the order to show cause by the Court at evidentiary hearing (*i.e.*, "Respondents will show that…", The record will be clear."). Doc. #27, pg. 3-4. The response concludes with an express request for the Court to exercise its discretion in resolving the order to show cause. *Id.* at pg. 5.

Debtor is now prejudiced by Ad Astra and Rapid Cash's inconsistent acts, as evidenced by her inability to find any attorneys willing to represent her in arbitration, should this matter be transferred out of bankruptcy court mid-litigation. Banks decl. ¶ 3.

Based on the three *Fisher* factors, this Court should deny Ad Astra and Rapid Cash's motion because they waived their right to compel arbitration.

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[3] Rapid Cash regularly attempts to exercise the arbitration provisions in its payday loan agreements. *See, e.g., Principal Invs., Inc. v. Eighth Judicial Dist. Court of Nev.*, Nos. 57371, 57625, 59837, 2012 Nev. Unpub. LEXIS 1310 (Sep. 19, 2012) (denying Rapid Cash's second motion to compel arbitration).

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II. Ad Astra and Rapid Cash's motion to compel should be denied because debtor cannot effectively vindicate her fundamental automatic stay protections in arbitration

Pursuant to *Thorpe,* this Court has discretion to deny Ad Astra and Rapid Cash's motion because the order to show cause is a core proceeding invoking a substantive right under the automatic stay. For the reasons below, this Court should exercise its discretion by refusing to compel arbitration of the order to show cause in the instant case.

As an individual in chapter 13 bankruptcy, debtor can't afford to pay (or risk paying) the filing fees and costs associated with arbitration. Banks decl. ¶ 2. In bankruptcy court, debtor was able to use her existing attorney to file a short motion (without a filing fee) and was able to effectuate service on Ad Astra and Rapid Cash for the cost of two stamps. FRBP 7004, 9020. The straightforward claim at issue in this case should be resolved through an early settlement (or short hearing) without the need for drawn out litigation or arbitration. Although debtor's payday loan agreement requires Ad Astra and Rapid Cash to "consider any good faith request" to reimburse her for non-waivable arbitration expenses moving forward, nothing in the agreement guarantees her expenses will be covered. Doc. #29, Ex. A, pg. 4. And it's unclear on what basis a request for reimbursement would be considered or allowed. *Id.* Debtor's potential AAA filing fee alone would use up almost all of her monthly disposable income. Doc. #23; Banks decl. ¶ 3.

Just as the court in *Knepp* recognized that a debtor's inability to afford arbitration created a compelling conflict with his statutory rights, so too should this Court recognize that compelling debtor's claim to arbitration in the instant case would conflict with her ability to enforce her most fundamental bankruptcy protection.

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Congress sought to encourage debtors to bring suit to vindicate their statutory rights under the automatic stay. *Schwartz-Tallard,* 803 F.3d at 1100. As the *Walls* opinion recounts, Congress specifically amended the automatic stay's remedial scheme in 1984 to encourage enforcement actions through private litigation. *Walls*, 276 F.3d at 509.

Compelling this court's order to show cause to arbitration would conflict with Congressional intent based on debtor's inability to find an attorney to represent her outside of bankruptcy court. Banks decl. ¶ 3; Schumacher decl. ¶ 2. The automatic stay's remedial scheme was designed in part to "deter creditors from violating the automatic stay in the first instance." *Schwartz-Tallard* at 1100. Compelling the order to show cause to arbitration in the instant case would risk pitting debtor pro se against institutional adversaries represented by an experienced commercial litigation firm. Banks decl. ¶ 3. Arbitration under these circumstances would hardly deter Ad Astra or Rapid Cash from future stay violations in this District. This Court should deny the motion to compel so debtor may effectively vindicate her fundamental protections under the automatic stay as Congress intended.

Finally, the instant case is distinguishable from *Hill* because the collection efforts at issue stand to directly interfere with debtor's ability to fund her chapter 13 plan. Banks decl. ¶ 2. Pursuant to this Court's order confirming plan, debtor has committed all her disposable income to paying her creditors. Doc. #23. Complying with Ad Astra and Rapid Cash's demand for payment stood to jeopardize debtor's ability to make her monthly plan payments to the chapter 13 trustee. Banks decl. ¶ 2. These facts are easily distinguishable from *Hill*, where a debtor commenced an adversary proceeding complaint after her chapter 7 trustee filed a no-asset report.

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MBNA Am. Bank v. Hill, 436 F.3d at 106. Unlike the class action private right of action at issue in *Hill*, the order to show cause in the instant case arises from this Court's Congressional directive to issue orders "necessary or appropriate to carry out the provisions" of the Bankruptcy Code. § 105(a). Under the facts specific to this case, the order to show cause "would be entirely inappropriate for resolution in any court other than a bankruptcy court." *Goodman*, 991 F.2d at 617.

III. Conclusion

For all the reasons above, the motion to compel the order to show cause to arbitration should be denied.

DATED: January 12, 2016

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CERTIFICATE OF SERVICE

I certify that on the date below I caused this document and all attachments to be served on the following persons by ECF:

Ad Astra and Rapid Cash
c/o attorney Michael Farrell
mfarrell@martinbischoff.com

DATED: January 12, 2016

/s/ Michael Fuller
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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re Stephanie Banks Debtor.	Case No. 14−35264−rld13 **DECLARATION OF KYLE SCHUMACHER** **IN SUPPORT OF DEBTOR'S RESPONSE IN OPPOSITION TO AD ASTRA AND RAPID CASH'S MOTION TO COMPEL THE COURT'S ORDER TO SHOW CAUSE TO ARBITRATION**

DECLARATION

I, Kyle Schumacher, declare the following under penalty of perjury to be used as evidence in court:

1. I know the facts I am testifying about based on my personal knowledge. I am debtor's bankruptcy attorney in this case.
2. I filed debtor's motion for order to show cause for contempt of the automatic stay on September 17, 2015. Debtor understands that I would not have the time, resources, or experience necessary to represent her in private arbitration, should be this matter be transferred out of bankruptcy court.
3. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED: January 12, 2016

/s/ Kyle Schumacher
Kyle Schumacher

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re Stephanie Banks Debtor.	Case No. 14–35264–rld13 **DECLARATION OF STEPHANIE BANKS** **IN SUPPORT OF DEBTOR'S RESPONSE IN OPPOSITION TO AD ASTRA AND RAPID CASH'S MOTION TO COMPEL THE COURT'S ORDER TO SHOW CAUSE TO ARBITRATION**

DECLARATION

I, Stephanie Banks, declare the following under penalty of perjury to be used as evidence in court:

1. I know the facts I am testifying about based on my personal knowledge.
2. After reading Ad Astra and Rapid Cash's collection letter, I initially considered paying them to make them go away and so my credit wouldn't be harmed. But I could not afford to pay the collection demand and continue my bankruptcy plan payments.

3. I have no extra money to pay upfront costs or fees for arbitration, even if the costs or fees were later reimbursed. I live paycheck to paycheck and all my extra money goes to pay my $281 bankruptcy plan payment. I am not great with paperwork and would not be able to represent myself at arbitration. I don't have any legal experience and don't really understand how the bankruptcy rules work. I've called around and can't find any attorneys that will agree to represent me if I'm sent to arbitration now that I've already filed in bankruptcy. I could not even begin to afford a $200 arbitration filing fee because I'm in bankruptcy.
4. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED: January 12, 2016

Stephanie Banks